Case Number: 3347071/2016

EMPLOYMENT TRIBUNALS

Claimant
Respondent

Ms M Rakova **v** **London North West Healthcare NHS Trust**

Heard at: Watford **On**: 2-13 and 24-26 October; 14-16 November, 4-5 December 2017, 3-5 & ,29-30 January 2018; 26-28 February 2018 (in Chambers)

Before: Employment Judge Bedeau
Members: Mr A Scott,
Mrs A Brosnan

Appearances

For the Claimant: Ms R Crasnow, Queen's Counsel
For the Respondent: Ms H Stout, Counsel

JUDGMENT

1. The claimant's claims of failure to make reasonable adjustments are not well-founded and are dismissed.

2. The claimant's claims of harassment related to disability are not well-founded and are dismissed.

3. The claimant's claims of victimisation are not well-founded and are dismissed.

4. The claimant's claims of discrimination arising in consequence of disability are not well-founded and are dismissed.

5. The claimant's claims of direct disability discrimination are not well-founded and are dismissed.

6. The acts complained of were presented in time.

7. The provisional remedy hearing listed on 2 and 3 May 2018 is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 25 October 2016, the claimant made claims of disability discrimination arising out of her employment as MacMillan Colorectal Cancer Clinical Nurse Specialist. In particular, she claims failure to make reasonable adjustments; harassment related to disability; direct disability discrimination; discrimination arising from disability; and victimisation.

2. In the response presented to the tribunal on 25 November 2016, the respondent asserts that it had carried out all reasonable adjustments and had not harassed, victimised, directly discriminated against the claimant nor had it discriminated against her because of something arising in consequence of her disability or disabilities. It avers that there were concerns about the claimant's capability. She had long periods of sickness absence over 8 years during which it had managed and supported her. In addition, some of the complaints are out of time.

The Issues

3. At a preliminary hearing held on 11 January 2017, Employment Judge Southam ordered that the claimant should serve further information, in tabular form, of her complaints. These were served on 30 March 2017. In it the claimant relies on 40 acts constituting, variously, failure to make reasonable adjustments, 1-19; harassment related to disability, 20-28; victimisation, 29-35; discrimination arising from disability, 36-38; and direct disability discrimination, 39-40.

4. On 4 July 2017, the parties wrote to the tribunal stating that the list of issues had been agreed and on the first day of the hearing, Ms Crasnow QC, on behalf of the claimant, invited the tribunal to have regard to the claimant's annotated list of issues which is a condensed version of the further information. We have taken that document into account in our deliberations and conclusions.

5. The following are the claims and issues as set out in the annotated list of issues which refers to the tables in the further information.

6. Failure to make reasonable adjustments (s.21 Equality Act 2010)

6.1 Was there a provision, criterion or practice (pcp) of the respondent which puts the claimant at a substantial disadvantage in comparison with others who are not disabled? The claimant relies upon the followings pcps:

- Being required to use the conventional software provided by the respondent (list of claims: table 1/1);
    - Reasonable adjustments would have been: the respondent should have provided electronic sensitive paper and printer to allow her to use her electronic pen effectively.
    - Processes should have been in place for software to be efficiently purchased, downloaded and updated.
    - Processes should have been in place for out of order supportive aids to be replaced quickly.
    - The claimant should have been given a reduced clinical work load until all adjustments were in place.
    - The claimant should have been given full access to the hospital Wi-Fi when she was forced to work from her personal phone.
    - The claimant should have been given direct access to the guest Wi-Fi.

- Being required to make handwritten notes in one to one meetings and consultations with patients and their follow up (table 1/2);
    - Reasonable adjustments - The claimant should have been permitted to use audio equipment during all meetings.
    - The respondent should have provided electronic sensitive paper (as recommended by Access to Work (ATW)) to allow her to use her electronic pen effectively.
    - The claimant's workload should have been reduced.
    - The claimant should have been permitted to remain at work out of hours to catch up on tasks.

- Being required to make handwritten notes with a conventional pen and paper in one to one meetings, Multi-disciplinary Meetings (MDT), team meetings, patient assessment and when taking phone messages (table 1/3):
    - Reasonable adjustments - The claimant should have been permitted to use audio equipment during all meetings.
    - The respondent should have provided electronic sensitive paper to allow her to use her electronic pen effectively.
    - The claimant's workload should have been reduced.
    - The claimant should have been permitted to remain at work out of hours to catch up on tasks or come in over the weekend as other members of the team did (such as Yvonne Tapper) when the office was quiet.

- Being required to work at a desk positioned in the respondent's offices which could not face from any direction/door and being

required to work at a desk positioned against the wall, with a desk neighbouring on the side and another desk behind her (table 1/4);

  - Reasonable adjustments - The respondent should have given the claimant her own office, or at least ensured that her desk was positioned (in the way described above) or given her a noise-cancelling booth.

- Being required to share an office (table 1/5);

  - The claimant should have been provided with her own office.

- Being required to work in an environment with every day work place conversational, and telephone noise, along with noisy handovers amongst other teams who were sharing the same office space (table 1/6);

  - The claimant should have been provided with her own office.

- Being required to use a table with moving parts (an electric sit to stand desk) without a protective screen (table 1/7);

  - The claimant therefore required a 'sit to stand' desk with moving parts. The respondent should have ensured that the desk had a barrier screen to prevent injury and help improve the use of voice recognition software by eliminating noise pollution.

- Being required to work without assistance of a support worker (table 1/8);

  - The respondent should have ensured that the correct grade of support worker was fully available to the claimant.

- Being required to attend disciplinary meetings with management/HR and her team without being allowed to record the meetings (table 1/9);

  - The claimant should have been permitted to use audio equipment during all meetings.

- On return to work, being expected to work full duties rather than waiting until adjustments have been put in place as required by Occupational Health (table 1/10);

  - The claimant should have been allowed to have a reduced clinical caseload and should have been entitled to her full pay during the periods of time she was medically advised to reduce her working hours.

- Only being permitted to remain at the workplace during one's contracted hours (table 1/11);

  - The respondent should have either reduced the claimant's clinical caseload until such time as all the necessary software and support adjustments were in place, or allowed her to remain in the office out of hours to catch up. This had a profound effect developing into depression.

- Putting the onus on individual employees to apply for promotions/redeployment (table 1/12);

  - The respondent should have actively explored what steps could be taken to support the claimant in seeking promotion.

- Misapplication of the Sickness Absence Policy, in that disability related sickness absences are not discounted (table 1/13);

  - The respondent should have made reasonable adjustments to their sickness absence procedure by discounting the periods of time that she was on disability related sickness absences.

- Being paid at the contracted rate at times when disability restricts ability to undertake all duties (table 1/14);

  - The respondent should have paid the claimant full pay during any periods that she was medically advised not to work due to her disability and until the respondent had completed all reasonable adjustments.

- If dictation equipment is needed in the course of one's duties, adequate equipment will be provided, i.e. dictation device (table 1/15);

  - The respondent should have ensured that the claimant had access to fully functional dictation devices at all times.

- During IT updates, being given substitute equipment, i.e. PCs, laptops (table 1/16);

  - The respondent should have made reasonable adjustments to ensure that the claimant had suitable software equipment available to her at all times and was given additional time to complete tasks.

- Not having access to hospital guest Wi-Fi (table 1/17);

  - The respondent should have made reasonable adjustments to ensure that the claimant had access to hospital Wi-Fi at all times, had reduced clinical duties and was given more time to complete tasks.

- Not being given appropriate and safe processes to prevent cross contamination of her finger and hand braces (table 1/18);

- The respondent should have made reasonable adjustments correctly and not allow the claimant or patients to be exposed to unnecessary and increased risk of infection. The respondent failed to acknowledge its failure or offer an apology to the claimant.

- Not permitting outside agencies to support by carrying out reasonable adjustments and assist in training the claimant's colleagues (table 1/19);

    - The respondent should have taken advice from outside agencies on training and reasonable adjustments in order to support the team and the claimant.

6.2 Was the respondent under a duty to make reasonable adjustments in light of the pcps?

6.3 Has the respondent failed to comply with the duty to make reasonable adjustments? In respect of each of the pcps set out above, the claimant relies upon the suggested reasonable adjustments set out in the Table of Claims for Discrimination 1.

7 Harassment (s.26 Equality Act 2010)

7.1 Was the claimant subjected to the treatment referred to in the Table of claims for Discrimination 2/section 20-28 inclusive of the List of Claims?

Being subjected to belittling and dismissive behaviour by her line manager Dr Claire Taylor during her weekly 1:1 meetings. See C sm para 168-170	Sep-Nov 2015
The Capability Procedure being instigated against the claimant due to some minor grammatical and spelling errors without any previous discussion/warning. See C sm paras 64-5, 177-8, 222 and pp2184-6	2009 Onwards 3/3/2016
Being sent threatening and bullying emails from line manager to resume full time working hours. See C sm paras 179-183, and pp2163-2169, 2172-9	Jan-Apr 2016 onwards
Repeatedly sent emails by line manager over weekends to private email address regarding whereabouts during proceeding working hours w/o any attempt to contact her in working hours via bleep. C sm para 168.	From April 2015 onwards
Receiving messages written on post-it notes and pieces of paper left on the floor in front of the locked office door and other private correspondence left in unsealed envelopes on desk. Claimant sm para 184-5, pp 1907-1910, 2525.	Since 2013 onwards, & 1/2016
Claimant's manager Mrs Manju Khanna contacted patients' family members apologising for claimant, implying she had done something wrong. Took place in office in front of claimant's colleagues.	17,20 and 23/5/2016
On-going failure to ensure confidentiality of claimant's health and medical conditions. Repeatedly asked questions about health and nature of medical appointments, relating to condition, in front of colleagues. p2413-4, and ET1 para 40 p19.	14/5/15, 3-4/9/15 & Nov 2015
Claimant's pre-agreed study leave be cancelled at short notice pp2549.	May 2016, June 2016

7.2 Was that treatment related to the claimant's disability?

7.3 Did that conduct have the purpose or effect of violating claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.4 In deciding whether the conduct had that effect, the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect should also be taken into account.

8. Victimisation (s.27 Equality Act 2010)

8.1 Were the verbal complaints to Andrea Nelson, Fiona Vaz and Sheila Small in 2006, 2007, 2008, 2009 and 2010 Protected Acts?

8.2 Was the complaint of disability discrimination set out in letter of 26 July 2010 to Sheila Small a Protected Act?

8.4 Was the informal grievance of November 2015 a Protected Act?

8.5 Was the formal grievance of 10 December 2015 a Protected Act?

8.6 Did the respondent subject the claimant to a detriment because the claimant had done a protected act? The claimant relies upon the alleged detriments in the Table of Claims for Discrimination 3/sections 29-35 inclusive of the List of Claims).

Less favourable treatment by her managers, e.g. weekly 1:1 meetings with line manager Dr Claire Taylor (CT) where claimant's concerns re. lack of reasonable adjustments were dismissed, generally unsupported, or not followed up. She was belittled and given unreasonable deadlines. In 1-1 meetings the claimant's line manager would criticise her by stating that supportive software requested was very complicated and unnecessary. Pp1785. See claimant's witness statement (c sm) para 168-170	Sept/Oct 2015 onwards	**Protected Act C** Complained to team leader Andrea Nelson and her unit manager Fiona Vaz and (when Fiona Vaz left) complained to unit manager Sheila Small about need/lack of ergonomic adjustments to workstation in 2006, 2007, 2008, 2009 and 2010. Complaint of disability discrimination set out in letter of 26 July 2010 to Sheila Small. Page 939.
Instigation of Capability Procedure against claimant at time when reasonable adjustments still not in place. From March 2016 – ongoing.	3 March 2016	**Protected Act** Informal grievance in November 2015. Page 2028
Receiving threatening and bullying emails from her line manager CT to resume full working hours. *See refs in harassment table above*.	From January 2016 onwards	**Protected Act** Informal grievance in November 2015. Page 2028
Repeatedly sent emails by line manager over weekend to private email and receiving work emails after working hours or on days off asking about her whereabouts on day before. *See refs in harassment table*	January 2016 onwards	**Protected Act** Informal grievance in November 2015. Page 2028

above.		
Receiving messages written on post-it notes and pieces of paper left on the floor in front of locked office door and other private correspondence left in unsealed envelopes on her desk. *See refs in harassment table above.*	January 2016 Onwards	**Protected Act** Informal grievance in November 2015. Page 2028
On-going failure to ensure confidentiality of claimant's health and medical conditions. Claimant repeatedly asked questions about health and nature of medical appointments in front of colleagues. *See refs in harassment table above.*	Nov 2015 (after informal grievance)	**Protected Act** Informal grievance in November 2015. Page 2028
Incorrect and discriminatory application of respondent's absence procedures. Through out period.	2010 onwards	**Protected Act** Letter to Sheila Small 26 July 2010. Page 939

9. Discrimination arising from Disability (s.15 Equality Act 2010)

9.1 Was claimant treated unfavourably by respondent? The claimant relies upon the treatment set out in the Table of Claims for Discrimination 4/sections 36-38 of the List of Claims.

Description of Complaint	**Date**	**What disability engaged by treatment?**
Respondent's practice of leaving it to employee's discretion whether to apply for a promoted role, put claimant at disadvantage because of her disability. See c's sm para 119	2012, 2014 and 2 Occasions in 2015	EDS, POTS, Mast Cell Activation, Disorder, dyspraxia, dyslexia, ADHD, depression
Respondent's failure to discount claimant's disability related to S/As. *At every stage 2 meeting disability ignored.*	2009 onwards	EDS, POTS, Mast Cell Activation, Disorder, dyspraxia, dyslexia, ADHD, depression
Respondent instigated capability procedure against claimant due to minor grammatical and spelling errors in inpatient records after she raised informal grievance against respondent. NB errors arose from disability – see c sm paras 64-5, 177-8, 222 and pp2184-6.	3 March 2016	EDS, POTS, Mast Cell Activation, Disorder, dyspraxia, dyslexia, ADHD, depression

9.2 At the time of the treatment, was the respondent aware (or ought respondent to have been aware) that claimant was a disabled person?

9.3 Was this treatment because of something arising as a consequence of claimant's disability?

10. Direct Disability Discrimination (s.13 Equality Act 2010)

10.1 Was claimant treated less favourably than respondent treats (or would treat) others because of her disability?

10.2 Claimant replies upon the treatment set out in the Table of Claims for Discrimination 5/sections 39-40 of the List of Claims.

Claimant was discriminated against by being only member of team to have 2 and then 3 managers to report to. Caused increased stress to claimant as often information was misinterpreted or misunderstood so claimant needed to update 3 different people. Claimant asked HR on several occasions to change structure as was very difficult to follow. See para 220-1 of c sm.	2 Managers from November 2014 and then 3 Managers from 9/2015
Claimant was discriminated against when capability process was commenced against her. Patient database GCIS had very simple word processing application – does not highlight spelling errors. Input of information is required in a complex form and text input is in a small window. Commencement of capability process was first time this issue was discussed with claimant – no previous warnings. See c sm paras 64-5, 177-8, 222 and pp2184-6.	March 2016

11. Has claimant brought her claims within 3 months of the relevant act of event? If not, have the claims been brought within such other period as the Employment Tribunal thinks just and equitable?

The evidence

12. The tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondent evidence was given by: Ms Sheila Small, MacMillan Lead Nurse – Cancer and Palliative Care; Ms Joan Klein, MacMillan Lead Nurse – Cancer and Palliative Care; Dr Claire Taylor, Nurse Consultant - Colorectal Cancer; and Ms Manju Khanna, Band 8A Colorectal Service Senior Clinical Nurse Specialist.

13. In addition to the oral evidence the parties adduced agreed bundles of documents comprising in excess 2936 pages. References will be made to the documents as numbered in the bundles.

Findings of fact

14. The central issue in this case is whether the respondent breached the relevant provisions in the Equality Act 2010 in its treatment of the claimant as a disabled person? The period in question covers 6 years during which the respondent claims that a large number of adjustments were made to the claimant's work. The claimant disputes this and is currently on sick leave. As the documentary evidence is voluminous and the issues both factual and legal complicated, we spent a considerable amount of time in discussion in making our findings of fact and in coming to our conclusion. This, by its very nature, necessitated having to give a lengthy judgment, the bulk of which are our findings of fact. In our findings, we have set out below, chronologically, the facts as found.

15. The respondent is an NHS Trust delivering hospital and community services across Brent, Ealing and Harrow. It employs over 9000 staff and serves a diverse population of approximately 850,000 people.

Managing sickness absence

15. In its 2008 issue of its Sickness Absence Policy, (SAP) which is a guide to managers, in relation to disability, paragraph 4.2 provides;

> "4.2 Disability Discrimination Act
>
> 4.2.1 Employees who have an illness or condition classified under the disability discrimination act 1995 and 2005 requires special attention and support in that the Trust is required to make reasonable adjustments to ensure the employee is supported in the work place. Different types of absence can be classified as disability, and employees who have a disability may have absence from work due to their condition. HR and Occupational Health should be immediately contacted if you are dealing with a disability (or even potential disability) matter." (pages 264-292 of the joint bundle)

17. In relation to the 2010 SAP, the above paragraph 4.2.1 is repeated but a further two paragraphs have been added 4.2.2 and 4.2.3. We also refer to paragraph 3.2.6. These state the following:

> "3.2.6 If the employee's sickness absence during the review period improves sufficiently, the manager will meet the employee to advise them of the matter and to agree what further formal monitoring will be required. If the employee's sickness during the review period exceeds the target level, the manager will meet with the employee under Stage 3 of the procedure.
>
> 4.2.2 Occupational Health can advise whether an employee is likely to be covered under the DDA and may be able to advise on reasonable adjustments. Further information on Occupational Health's role is included in section 5.
>
> 4.2.3 If all reasonable adjustments have been made and the employee's sickness absence persists, the manager may refer the case to a stage 3 final formal review." (311-344)

18. Again the policy is a guide for managers.

19. In the respondent's 2015 SAP, which again is guidance for managers, under "Disability in the Equality Act 2010" it states:

> "Employees who have an illness or condition classified under the Equality Act 2010 require special attention and support in that the Trust is required to make reasonable adjustments to ensure the employee is supported in the work place. Different types of absence can be classified as a disability, and employees who have a disability may have absence from work due to their condition. The line managers should

contact HR and Occupational Health is dealing with disability (or even potential disability) matter.

7.1 Occupational Health can advise whether an employee is likely to be covered under the disability provisions of the Equality Act 2010 and may be able to advise on reasonable adjustments. Further information on Occupational Health's role is included in section 5.

7.2 If all reasonable adjustments have been made and the employee's sickness absence persists, the manager may refer the case to a stage 3 final formal review.

7.3 Reasonable adjustments, may in certain circumstances, include amending the triggers for action set out in this Policy for a particular employee bearing in mind advice from Occupational Health about that employee's disability and how best to support them to continue to work for the Trust." (481-529)

20. The respondent's procedure for managing sickness absence involves three stages, namely stages 1,2, and 3. In the 2008 policy, employees reaching the trigger point of ten working days in a rolling year or an equivalent amount of absence on pro-rata basis over a fixed time period, would be required to attend a stage 1 informal review meeting with their line manager. Where, however, the employee continues be absent for a protracted period they may be referred to stage 2 of the procedure by their manager without going through the stage 1 process. At the stage 1 meeting the manager will discuss their concerns about the level of sickness absence; would give the employee a copy of their sickness absence record over the previous 12 months; ask the employee if there were any underlying reasons for their absence; ask what action they believe the respondent could take to improve their sickness absence; and warn the employee of the employment consequence of continued high levels of sickness absence. The line manager may refer the employee to Occupational Health to gain further information. Following the meeting, the line manager will advise the employee of the outcome in writing as soon as practicable. The employee does not have a right of appeal against the outcome at stage 1, informal review. If their sickness absence during the review period improve, the manager would meet with him or her, informally, to advise them. If the sickness absence during the review period exceed the target level, the manager would arrange to meet with the employee under stage 2 of the procedure.

21. Stage 2 is the formal review process. The manager would write to the employee giving a minimum of five days' notice of the meeting. The employee has the right to be accompanied by a fellow employee or a representative from a recognised trade union. A human resources representative would normally be present. During the meeting the line manager would go through the employee's sickness absence record over the previous 12 months and the impact it had on the service; ask the employee if there were underlying reasons for their absence and what action they believe the respondent could take to improve their

sickness absence; explain to the employee the employment consequences of continued high levels of sickness absence; warn the employee that the level of attendance is unacceptable and is giving cause for concern; consider what reasonable work adjustments could be made to support improved sustained attendance including redeployment; and state that the consequence of exceeding the target will be a stage 3 final review meeting, the outcome of which could be dismissal on the grounds of incapability. The manager could refer the employee to Occupational Health for further information. There is a requirement to inform the employee in writing of the outcome at stage 2. If the employee's sickness absence during the review period improves sufficiently, the manager would meet with the employee to advise him or her of the matter and agree what further monitoring would be required. However, if the employee's sickness absence during the review period exceeds the target level, the manager would meet with the employee under stage 3 of the procedure.

22. Stage 3 is the final formal review. The 2008 Policy states:

> "3.3.1 Where a Stage 3 formal review meeting becomes necessary, the manager will write to the employee accordingly, giving a minimum of five days notice of the meeting… . A senior manager with the authority to dismiss and not directly involved in the case previously would be appointed to chair the panel, supported by a representative from the HR Directorate. The manager who considered the matter at stage 2 would present the management case at the hearing and the employee would have the right to be accompanied by a fellow employee or representative from a recognised trade union.
>
> 3.3.2 Exceptionally where the employee continues to be absent for a protracted period, they may be referred to Stage 3 of this procedure by the manager without being initially seen informally under stage 2.
>
> 3.3.3 At this meeting the panel will review the following:
>
> - level and reasons for the absences including the medical evidence;
> - requirement of the Trust for the employee's work;
> - impact of the employee's absence on the service and colleagues;
> - consider what reasonable work adjustments could be made to support improved sustained attendance including redeployment
> - nature of the illness and likely frequency and length of future absence;
> - likelihood of reoccurrence of sickness absence;
> - the employee's length of service

> 3.3.4 Following the meeting, the panel chair should confirm to the employee the outcome in writing as soon as practicable… . The outcome of the final review could be dismissal (normally with notice) on the grounds of incapability. However, the panel does have the discretion to substitute another sanction, set a further period of review or recommend another course of action to address the situation i.e further reasonable adjustments or redeployment."

23. The employee may appeal against the decision to dismiss at the final review stage.

24. The 2010 policy adopts a similar procedure as in the 2008 policy in respect of the management of sickness absence under the 3 stages. In relation to the final formal review meeting, another consideration would involve the panel reviewing Occupational Health reports.

25. In the 2015 SAP, the 3 stages are similar to the 2010 policy provisions. In relation to long term sickness absence, section 6 states the following:

> "Long term absence, defined as continuous periods of three weeks or more continued absence from work, can occur in a number of situations due for example to a chronic underlying medical condition, the sudden occurrence of an acute medical condition or where short term intermittent absence develops into continuous periods away from work. Longer term absence is problematic because there is a negative direct correlation between the length of sickness absence and the likelihood of an early, successful return to work.
>
> Managers, with the support of the Occupational Health department and cooperation from the employee, should seek to minimise periods of longer term absence. It is particularly important that both manager and employee maintain regular (at least monthly) contact during these periods and that every opportunity is explored for employees to return to work as early as practicable, including initially on a phased basis with reduced hours and reduced duties and responsibilities.
>
> The phased return must be time limited and normally last no longer than four to six weeks, building up to 100% of working hours on the fourth, fifth or sixth week. Longer term adjustments to hours and duties and responsibilities can only be considered where a suitable role is available or where this is reasonable and does not have an unacceptable effect on the service.
>
> Line managers are responsible for ensuring;
>
> They maintain regular contact (at least monthly) with the employee. The manager and employee may agree how this is to be put into effect (meetings at work, phone calls or in exceptional circumstances, home visits, etc).
>
> Regular assessment of the options to enable the employee to return to work, with support from Occupational Health where this is likely to be helpful."

26. The policy gives suggested timeframes for managers in managing the employee's long-term sickness absence. At the end of the third week,

the employee's line manager, it is suggested, should arrange an informal meeting at stage 1 with the employee. By the eleventh week, confirm the outcome of the review meeting. By the twelfth week, the manager would arrange the first formal meeting, stage 2. By the nineteenth week, confirm the outcome of the meeting. By the twentieth week, hold a final formal review meeting and by the twenty first, confirm the outcome of the meeting.

27. As already referred to, the 2015 policy states that reasonable adjustments in certain circumstances may include amending the triggers for the actions set out in the policy. The claimant was, however, managed under the 2010 SAP at all material times because the respondent's approach is that if an employee's absence invokes the provisions of the SAP at the time that policy will apply to them irrespective of any later revisions of it.

28. On 25 June 2001, the claimant commenced employment with the respondent as a Nurse. Since October 2005 she has been working as a MacMillan Colorectal Clinical Nurse Specialist at St Marks Hospital, Northwick Park Hospital, Harrow, Middlesex.

The claimant's medical conditions

29. Following a road traffic accident in 2003, she developed neck and back pain. On 29 September 2008, she came under stage 1, informal review, based on her sickness absence. On 16 September 2009, there was a stage 2 absence review meeting as she had 97 days absence in the previous twelve months. Various adjustments were made by the respondent during 2008 to 2009. These were to her visual display unit; the provision of a new chair, desk lamp; monitor stand; wrist rest; headset and foot rest. She had a phased return to work as well as work place assessments.

Ehlers-Danlos Syndrome

30. On 24 December 2009, Professor Rodney Grahame, Consultant Rheumatologist and Honorary Professor at UCL Department of Medicine, informed the claimant and her general practitioner that he had diagnosed her as suffering from Ehlers-Danlos Syndrome. He wrote,

> "This is to confirm that Maria Rakova is suffering from an inherited disorder of connective tissue which is termed the joint hypermobility syndrome. It is a genetic disorder also known as Ehlers-Danlos syndrome hypermobility type formerly EDS III. It manifests as marked laxity and hypomobility of joints with increased skin stretchiness, a tendency to bruising and gives rise to widespread pain, restricted exercise tolerance and lack of stamina. She had been referred for specialist physiotherapy and pain management within this Trust. It is also the cause of gastrointestinal and urogynaecological symptoms for which she has been referred to appropriate specialists elsewhere for further investigation.

> I would be grateful if her Trust authorities would take into account the very real pain she experiences and ensure that every assistance is given to her in her quest to achieve recovery. This should include an urgent ergonomic assessment of her work station and expeditious implementation of any recommended modifications. She should also be allowed adequate time off from work for hospital appointments and treatments." (869)

2010

31. The claimant informed her line manager, Ms Sheila Small, MacMillan Lead Nurse – Cancer and Palliative Care, on 12 January 2010, of the EDS diagnosis. Ms Small then made a referral to Occupational Health on 12 January 2010, to consider whether the claimant would be able to carry out all of the components of her role. She informed occupational health that the claimant had joined the respondent's MacMillan Colorectal Cancer Unit as a MacMillan Colorectal Cancer Clinical Nurse Specialist, Band 7, in October 2005.

32. The Occupational Health doctor, Dr Shriti Pattani, Consultant Occupational Health Physician, replied on 9 February 2010, confirming the diagnosis of Ehlers-Danlos Syndrome. She stated that one of the significant aspects of it is the hypermobile joints which are more prone to injury and that any damage can be more profound due to the hypermobility. She also wrote:

> "The nature of the condition with which Maria has been diagnosed does not make her unfit to undertake her current sedentary work. She has received various treatments over the last few years however as a specific diagnosis was not available the treatment was not targeted to her diagnosis. I have advised her to focus and streamline all of her treatment through Professor Grahame so that all her treatment has been provided via a specialist with an interest in her condition. There is no cure for her condition however I would hope that the targeted and focus treatment would have a positive impact on Maria's symptoms and therefore functional capacity. In due time, this should be reflected in all aspects of her life including her work.
>
> In my opinion Maria's condition would be covered under the disability discrimination act and therefore all reasonable adjustments need to be considered. The adjustments that Maria currently requires are flexibility in attending her hospital appointments, considering an allowance of extra sickness absence and expediting the recommendations of the VDU assessment that has been undertaken.
>
> It is a management decision as to what level of sickness absence or time off for hospital appointments would be considered reasonable. I would recommend you contact Human Resources to advise you on this." (871-872)

33. The respondent does not dispute that by virtue of the claimant's EDS, the claimant is covered under the under the Equality Act 2010 as from 12 January 2010, as Dr Pattani had informed Ms Small that the claimant may be covered under the Disability Discrimination Act in respect of her sickness absence and/or time off for medical appointments. It was,

however, a management decision as to what would be considered reasonable sickness absence because of the condition. (868)

34. In relation to the claimant's EDS diagnosis and her work, Dr Pattani stated:

> "However, from the perspective of her condition, there is no reason why she cannot undertake all aspects of her work perhaps with some adjustment as outlined above. Her condition should be considered covered under the Disability Discrimination Act 1995 which requires consideration of reasonable adjustments. The reasonableness of any adjustments is a management decision however above average sickness absence related to the condition may well be considered reasonable. Human Resources will be able to advise you further……" (930-932)

35. We are of the view that by virtue of her EDS, the claimant is a disabled person under section 6, schedule 1, Equality Act 2010 because she is predisposed to the dislocation of her joints; carrying anything in her hands can be challenging; she cannot sit or stand for long periods; she has difficulty having a bath and uses a special chair.

Dyspraxia

36. In relation to the claimant's dyspraxia, she was examined by Dr Tim Harper on 16 February 2010. In his summary, he wrote:

> "Maria has excellent learning strengths in verbal skills in terms of understanding, reasoning and taking in information but has specific difficulties in tasks which involve carrying out any mental planning while carrying out a series of fine movements like writing.
>
> This is a pattern of scores that is typical of dyspraxia and Maria shows some mild difficulties. She also has symptoms of visual stress from reading which slows down her intake of information. The effect of her writing is that the process of transferring complex thinking into a fluent and easily readable handwritten text is harder for her than it is for most people. The interference that she finds in fluency and accuracy also affects the ordering of her ideas.
>
> One of the advantages of her difficulties is that she has had to rely on and nourish her determination to succeed. She also learnt to be sensitive to emotions both her own and that of other people. She has well developed qualities of patience, perseverance and sensitivity which she uses well for her learning."

37. Although the claimant's scores in the aptitude test as well as reading and writing were higher than the national percentiles, Dr Harper wrote that she experienced difficulties in reading, a slowing down of her intake of information and in writing, transferring complex thinking into fluent and easily readable handwritten text.

38. As she was studying at Kings College London for an MSc in Gastro-Intestinal Nursing, Dr Harper recommended that she should be allowed

extra time of 25%, for written examinations and to be allowed to use a room. The College agreed to this. (883-892)

39. Dyspraxia is a life long condition, affecting any or all areas of development, physical, intellectual and emotional, social, language and sensory. In the claimant's disability impact statement, she stated in paragraph 10, that she had difficulty controlling the muscles in her mouth and consequently her speech. She also can find it difficult to moderate the volume of speech. However, during her five days giving evidence, we found her to be a fluent and articulate witness who was easily comprehensible. In the course of her work she used voice activated software and did not appear to have any difficulties in moderating the volume of her speech.

40. In Dr Pattani's report dated 23 June 2010, she stated that Dr Harper's assessment of the claimant regarding dyspraxia, was that the pattern of scores was typical of dyspraxia and the claimant showed some mild difficulties. If the claimant was to engage in a lot of writing she would need to use a dictaphone that would put speech straight on to a computer screen or to investigate a voice activated system. Dr Pattani further stated that there were five general recommendations in the report and she had asked the claimant to share those with the respondent, namely Ms Small, although the claimant did not have to share Dr Harper's entire report. Minimising the amount of typing or writing the claimant had to undertake would also help her musculoskeletal symptoms.

41. We have considered the claimant's disability impact statement and Dr Harper's report and have concluded that the claimant's dyspraxia is covered under section 6, schedule 1 Equality Act 2010 for the reasons given in Dr Pattani's and Dr Moody, principally with writing and a general difficulty with organisation, for example, with thought, writing and work schedules. (2039)

42. We find that the respondent's knowledge of the claimant's dyspraxia condition was on or around 23 June 2010.

<u>Dyslexia</u>

43. Dr Sylvia Moody, Chartered Practitioner Psychologist, conducted a cognitive assessment on the claimant on 28 November 2015, following the claimant's self-referral to her. In her summary, she stated the following:

> "Maria's verbal and general intellectual abilities are in the very high range, but she has dyslexic and dyspraxia difficulties. Specifically, she has weaknesses in phonology, auditory and visual short-term memory, visual tracking, spatial judgment and motor skills. There is also evidence that she suffers from ADHD (identified here as a specific learning difficulty, i.e. that it is not a medical diagnosis); her difficulty with focussing and concentration causes her problems

> in a variety of work context. Further, she suffers from visual stress and possibly also binocular problems.
>
> As regards literacy skills, her reading accuracy is above average and in line with expectations. Her oral reading speed is slow and her reading comprehension is below the expected level. Her writing is good in respect of content, but she writes slowly and suffers manual pain and fatigue when writing for long periods. She has some difficulty in structuring a lengthy piece of written work, especially when working to a tight deadline.
>
> Maria's difficulties were not recognised when she was at school and consequently she has never been given appropriate help. She has been motivated to improve her skills, but, as work demands have increased, her coping strategies have become less effective. This situation causes her anxiety and frustration.
>
> She would benefit from receiving appropriate specialist training, IT support, and reasonable adjustments in the work place. She should be allowed concessions in academic or professional examinations she may take in the future and account should be taken of her difficulties on any training courses that she attends.
>
> Maria's difficulties are substantial and long term and have an adverse effect on her ability to carry out normal day to day activities, as well as on academic work. They are likely to be significant enough to be covered by the Equality Act. It is important to note that any disciplinary proceedings should be halted until such time as Maria has received the appropriate skills, training and reasonable adjustments in her job."

44. Dr Moody stated that the claimant had suggestive dyslexic difficulties and recommended that she would benefit from an individual skills training programme tailored to her requirements and should be delivered by a personally recommended work place dyslexia specialist who should also provide help in all the areas in which she was inefficient, for example, reading quickly with good comprehension; structuring written work; note taking and organisational skills. At least 20 hours of training was recommended initially, but could be extended if necessary. Reasonable adjustments would also allow the claimant time for dyslexia related training and extra time for work tasks to be completed. In addition, the provision of a quiet work space when using dictation software. In relation to IT and technological support, Dr Moody recommended text reading and mind mapping programmes, screen reading ruler and digital voice recorder. She suggested that contact could be made to the Access to Work (ATW) scheme to assist the claimant in her learning difficulties in respect of her dyslexia, dyspraxia and ADHD. Dr Moody also noted that the claimant's reading accuracy is above average while her spelling is above the average range. Her general reasoning abilities are in the very high range. (2037-2075)

45. Dyslexia in adulthood is characterised not just by inefficient literacy skills but also by poor short-term memory, difficulty in being succinct in speech and writing, and weak organisational skills, Dr Moody. Dr Moody wrote that the results of a writing test taken by the claimant,

> "Maria's free writing was good from the point of content, style, grammar and vocabulary, but she wrote slowly. She suffers manual pain and fatigue when writing for long periods." (2039, 2045)

46. The claimant in her disability impact statement, stated that dyslexia affects her daily functioning such as reading accuracy, spelling accuracy, reading comprehension, written expression, punctuation, and note-taking. It also affects how she processes, stores and retrieves information. (124-157)

47. In the Access to Work report dated 31 August 2010, it stated that the claimant found the process of viewing black print on white paper produced symptoms of visual discomfort and distortion of the text. It was noted that she had dyslexic tendencies and that such problems were particularly common among those who have reading difficulties and suffer from dyslexia though not diagnosed with dyslexia at the time. (974)

48. The claimant stated in her witness statement that following her ATW assessment on 18 August 2010, she had been diagnosed as suffering from dyspraxia in February 2010 and had dyslexic tendencies but had not been diagnosed as suffering from dyslexia. Subsequently, on 28 November 2015, Dr Moody concluded that she suffered from dyslexia.

49. In a document entitled Draft Framework report prepared by Ms Small and dated 30 August 2013, she referred to the claimant's medical conditions being Ehlers-Danlos Syndrome, dyspraxia and dyslexia. However, from Ms Small's summary of the conditions, what she described were referable to EDS and dyspraxia and not to dyslexia as later set out by Dr Moody in her report. We acknowledge, however, that adjustments were made taking into account that the claimant had said that she also suffered from dyslexia. (1362-1377)

50. Dr Moody's report was read by Dr Pattani who wrote to Ms Joan Klein, Lead Nurse for Cancer and Palliative Care, on 15 December 2015, in which she referred to the three medical conditions in Dr Moody's report, namely dyslexia, dyspraxia and ADHD. Having considered the medical evidence, we find that on or around 15 December 2015, the respondent had knowledge of the claimant's dyslexia. With regard to Dr Moody's report and the claimant's disability impact statement, we have concluded that the claimant's dyslexia come under section 6, schedule 1, Equality Act 2010. Accordingly, she is a disabled person by reference to that disability in that her oral reading of complex text is slow and her reading comprehension is below the expected level and she demonstrates weak organisational skills. In any event the respondent treated her as if she had been diagnosed with dyslexia from the autumn of 2010 following the ATW report.

51. The claimant is no longer relying on ADHD and depression as additional disabilities.

The claimant's duties

52. As a Clinical Nurse Specialist - Colorectal Cancer, the claimant's duties were, as a senior nurse, to work at a higher level of practice to deliver a specialist cancer nursing service to support the colorectal cancer service across the Trust. The service developed in response to the National Cancer Agenda, the London Cancer Alliance Module of Cancer Care and the Trust's local service delivery plan. The specialist cancer nursing role is patient centered. The nurse working at this specialist level has responsibility for many areas of practice: clinical expertise; education; audit/research; and service development. Within the responsibility for clinical activity, the nurse works as a core member of a Multi-Disciplinary Care Team for Colorectal Cancer (MDT). The role involves direct engagement with patients and their carers. As a core member of the MDT, the Clinical Nurse specialist (CNS) will also communicate directly with a host of health care professionals across primary, secondary and tertiary care settings. This includes surgeons, Oncologists, In-patient Ward staff, Out-patient's staff, bowel screening, Nurse Practitioners, hospital based MacMillan team, District Nurses, Community Palliative Care teams, Secretarial and administrative tasks. The CNS would assess and prepare individualised care plans, considering the patients' needs and wishes and developing their pathway of care. Most of the claimant's duties and her working time would be devoted to meeting with the patients and their families in a clinical setting, or working with colleagues in different services to help deliver the appropriate care. As part of her duties, she is expected to keep accurate and clear records of patient care, to be written up soon as possible after the event. This is a requirement of the Trust, the Department of Health and the claimant's professional body, The Nursing and Midwifery Council.

53. On 26 March 2010, the claimant attended a sickness absence six months review meeting with Ms Small in the company of Ms Janet Paul, Unison representative. It was explained to the claimant that her absence had been reviewed and that she had taken six days absence due to sickness on two occasions. It was also explained by Ms Small that she had recorded details of long medical appointments in November and December 2009 which warranted the claimant's absence from work for either a part or most of the working day. Ms Small concluded that the amount of absence from work because of sickness absence and the time out for attendance at appointments, had resulted in more than double the target which had been set at the formal stage 2 meeting in September 2009. She stressed that the level of absence was impacting on the service and was a cause for concern affecting its reliability and reputation. She acknowledged that at the time the claimant was under pressure in maintaining a full-time job while undergoing academic studies at Master's degree level and coping with

ongoing tests and clinic appointments. She said that adjustments were made having regard to her long-term condition. She asked the claimant whether she had given any thought to how she may be able to juggle the pressures and whether she had considered the possibility of putting her study on hold or reducing her hours to lessen the burden on some of her commitments. The claimant replied that she had considered reducing her hours and/or putting her study on hold, but it was important for her to maintain a normal lifestyle. Ms Small replied that she was concerned that having too many commitments at any one time may have the potential of compromising the claimant's health. In summary, she stressed that the claimant's level of sickness absence continued to be a cause of concern and was not sustainable. They agreed to extend the review period for a further three months at which time a formal meeting would be held to review her sickness absence. Their discussion was summarised in writing by Ms Small in a letter dated 29 March 2010 and sent to the claimant. (895-897)

54. In the claimant's written response dated 1 April 2010, she took issue with a number of points raised by Ms Small during their meeting. She wrote that while she had been absent during office hours, she made up the time outside normal working hours and although she had previously put her studies on hold, it was not appropriate for her to do so again because the underlying issues in the service were due to inadequate staffing levels rather than her ability to cope. She then wrote:

> "Particularly in view of my disability, I still feel that it is very important to maintain as normal a life as possible and pursue my academic aspirations.
>
> Thank you for your support to date, I hope we can resolve any outstanding issues as they arise to the best satisfaction of service users and service providers." (899-900)

55. We find that Ms Small in suggesting to the claimant that she may want to consider either reducing her hours or putting her studies on hold, was not behaving in a discriminatory way as alleged by the claimant but was, having regard to the claimant's commitments at the time, making a reasonable suggestion which the claimant politely declined to accept.

56. As previously stated Dr Pattani in her report dated 23 June 2010, recommended that the claimant should use a dictaphone that would put her speech straight onto a computer screen or a voice activated system. This was recommended as the claimant was required to do a lot of writing. Minimising the amount of typing or writing the claimant had to undertake would also help her musculoskeletal symptoms with regard to her EDS diagnosis. (930-932)

57. On 4 June 2010, the claimant applied to the Department for Work and Pensions for disability living allowance and was eventually awarded, on appeal on 2 April 2012, the higher rate mobility component for an indefinite period for being "virtually unable to walk" and the middle rate

care component, also for an indefinite period, because she "required frequent attention throughout the day." (1236)

58. Ms Stout, counsel on behalf of the respondent, raised as a credibility point at the start of the claimant's cross- examination that there was an apparent inconsistency between the severity of the claimant's symptoms which led to the award of the DLA, the award of a care package by her local authority, and what she was telling the respondent at the relevant time. She put it to the claimant that she was either exaggerating her symptoms or misrepresenting the position to the respondent. The claimant responded by saying that she had told Dr Pattani of her difficulties but had learnt to manage them well after her diagnosis of EDS so that they did not affect her at work. She said in answer to a question put to her by one of the panel members that she had adjustments for mobility in the form of a laptop cart which was also for support when walking and that she would always use this cart to walk around and when she went out of her home she would use a walker. We noted that the occupational health reports do not refer to any difficulty with mobility, and this was not an issue in any of the many capability meetings or meetings to discuss adjustments. Although the claimant did have a disabled parking space and evidence was produced by her in the form of a contemporaneous letter in support of her request for a disabled parking space, Ms Klein told the tribunal that the claimant did not use a walker at work, that she had walked around with her laptop, used her laptop trolley infrequently and that the trolley had not been purchased as a walking aid. The ATW report of 30 December 2013, referred to later in this judgment, recommended the trolley so that the claimant could transport her laptop to clinics and work from the trolley as a workstation. Dr Claire Taylor referred to the claimant as being 'mobile' and able to move to alternative work spaces to complete her work in a quiet environment. We further noted that at the meeting with Ms Small, held on 24 October 2013 and referred to later in this judgment, the claimant was asked whether she anticipated using any walking aids or crutches on her expected return to work, she replied that she did not require them.

59. The claimant emailed Ms Danielle Holmes, an independent Healthcare Specialist, who had carried a workstation assessment on the claimant's workstation on 27 December 2009. The claimant stated that she found that some of the adjustments and changes already made were working very well but some were not. At the time the claimant was complaining about neck and back pain in relation to the desk provided and wrote that the desk worked better without the drawers as this allowed her to have two work areas, one for writing using a writing slope and the other for typing. She found sitting for prolonged periods difficult and that a fixed height table was not the most suitable solution. She referred to having used at Kings College University, an electric height adjustable table which she found very useful. She then referred to the monitor on an extendable arm and mouse, as having worked well but having regard to the width of the keyboard, she was unable to keep the mouse in a good

ergonomic position. She made reference to a more suitable keyboard as being compact without loss of any functionality and that she would benefit from voice activated software as well as from a vertical mouse.

60. In relation to a suitable chair, she said that she tried all three chairs and found the Opera chair quite useful, but the head rest was not very supportive of her neck and head. The other two chairs were not suitable and suggested that a Hag Capisco chair should be considered as she had the same model at home. (933-934)

Stage 2 meeting held on 14 July 2010

61. The claimant met with Ms Small on 14 July 2010, in the company of Ms Sandra Williams, her union representative. Ms D Williams, Human Resources Business Partner, was also present as well as Ms Fiona Bailey, who took notes. It was a meeting under stage 2 of the respondent's sickness absence procedure. They discussed the work place assessment and outstanding issues in relation to the desk, chair and vertical mouse. Ms Small agreed to contact ATW for a repeat workstation assessment. As regards to the claimant's musculoskeletal condition, she was unable to attend an assessment at University College London Hospital on 16 June and it was rescheduled for 26 October 2010. She told Ms Small that she was taking analgesia to manage her pain which was constant and it was recommended that she should undertake a COPE pain management programme at the National Hospital for Neurology and Neurosurgery and was on the waiting list. She had seen a Neuro-gastroenterologist and an Uro-gynaecologist and was expecting to undertake follow up physiotherapy appointments. She explained the nature of her dyspraxia condition and that she was having regular weekly sessions provided by the dyslexia advisor to manage her condition.

62. Ms Small had reviewed the claimant's sickness absence for the previous three months and noticed a significant improvement. As the claimant had used almost half of her yearly annual leave entitlement in the first quarter, they discussed her using annual leave to attend appointments rather than attending in work time. The claimant then raised her concerns about the apparent discrepancies and recording of her appointments. She said that she would arrive early in the morning at or around 8am and occasionally would return and work until 7.30pm. Ms Small said that she was unaware of the claimant working late hours and asked her whether she was aware of the Lone Worker Policy. This policy states that staff should not be working in the unit in isolation without informing security. They agreed that the claimant would devise a weekly chart to plan her appointments and identify prospectively when she would be working extra hours to make up the time. The respondent could not offer time back to staff who worked beyond their working hours and instead encouraged them to work a flexible shift/rota to cover clinics which may overrun.

63. There then followed a discussion about the claimant suspending her studies or reducing her working hours, but she responded by saying that it was not appropriate and would like to be considered for flexible working. Ms Williams explained the difference between reducing her hours and flexible working but they agreed that they would consider her application for flexible working. The claimant asked what the targets were in relation to her sickness absence and specifically in relation to her disability. Ms D Williams explained that the corporate trigger point in relation to sickness absence was 10 days and that the claimant's illness did not warrant her being offered a specific target. The courts would determine if someone was disabled. The claimant referred to the 2010 Sickness Absence Policy and whether she was entitled to extra sick days considering her diagnosis. It was confirmed that that was not the case and it was not appropriate to distinguish other sickness absence and those due to the claimant's existing condition. In relation to the agreed action points, Ms Small was to contact ATW to request a repeat assessment and to redesign the leave template to prospectively illustrate the claimant's appointments and her plans to work extra hours. Ms D Williams would forward to the claimant details of the flexible working policy. It was also agreed that a further review meeting should be held in three months' time. What was discussed was reduced to writing and sent to the claimant in Ms Small's letter dated 16 July 2010. (935-938)

64. We find that the meeting was a detailed discussion of the claimant's medical condition, adjustments to be made, a review of her sickness absence, flexible working, sickness absence trigger point and action plan. They took into account the claimant's concerns and addressed them during the meeting and where those concerns were unable to be resolved, they agreed action points.

65. The claimant wrote to Ms Small on 26 July 2010, taking issue with a number of matters discussed at the meeting and alleged that she had been discriminated against due to her condition, EDS, which was recognised under the Disability Discrimination Act 1995. The alleged discriminatory treatment being the assessment of her sickness absence. Further in her letter she wrote;

> "Finally with reference to your last paragraph, you mentioned D Williams' comment regarding my sickness absence. Unfortunately there is no reference to my concern as stated in the meeting that six of my total eight sick leave days since September 2009 were directly due to my disability. The first three days I was off work due to dental surgery directly related to dental crowning caused by EDS. Another three days I was off work due to pain and reduced mobility. I raised the issue in order to alter my work attendance record and recognise those six days as disability leave. I would appreciate that this comment would be mentioned in your letter. I would also like to raise the issue of the appropriateness of ten days of sickness absence being the recognised corporate trigger point for the instigation of the 'Sickness Absence Procedure' in my case as discussed in the meeting. I raise the issue of the fact that I believe more

> consideration should be taken into account when dealing with disability. I will appreciate that you mention this matter in your letter also." (939-942)

66. Her letter was responded to by Ms Small on 25 August 2010. She wrote that she drew to the claimant's attention at the meeting that she had used up almost half of her annual leave in the first quarter of the year and thought that it was important to have regular breaks throughout the year. She explained that she needed to be aware of the claimant's medical appointments as she wanted to know when she would be at work and emphasised that she was trying to support her in making adjustments to her work to help improve her performance. (965-966)

67. On 1 August 2010, the claimant applied for flexible working to work five days over a four-day period on Monday, Wednesday, Thursday and Friday to attend appointments and training sessions. Ms Small responded by asking her for further information. She invited the claimant to review her work plan and to discuss her request with her colleagues on how it may impact on the service requirements. Ms Small was also going to make a referral to Dr Pattani, Occupational Health doctor, on whether or not working longer days may be detrimental to the claimant's health. (944-962)

68. AME Disability Consultants Limited, on behalf of ATW, carried out an ergonomic assessment on 17 August 2010 and referred to the claimant's conditions of EDS and dyspraxia. They noted that the problems she experienced were posture related spinal, shoulder and arm pain. These were aggravated by: prolonged periods of sitting and when accessing her workstation; an uncomfortable chair as the seat was too long for the length of her thighs; the chair provided inadequate support for her neck and lumber spine; her use of the mouse and keyboard aggravated her hand/wrist pain; and that often she wrote and read documents placed flat on her desk which aggravated her spinal, shoulder and arm symptoms. They recommended a Hag Capsico chair which was the chair the claimant had earlier suggested; an electric sit to stand desk; short keyboard; contour roller mouse station; and a Docuglide document holder and writing slope. These items were also costed by the assessor, Ms Anne-Liese Badyan, AME Ergonomic Consultant, and came up to £1,057.59.

69. The ATW scheme is a scheme operated by the Department for Work and Pensions and provides funding for employers to make adjustments, buy equipment or arrange training for employees who are disabled. Application for funding is made following an assessment. It is for the employee to make enquiries about funding and ATW will arrange the assessment with them directly. Not all of the costs would be met by the employer. (943-957)

70. A technical assessment by AME Disability Consultants Limited took place on 18 August 2010 during which the assessor noted that the

claimant was experiencing difficulty with spelling when typing on the computer; difficulty with numeracy, that is transposing numbers; her concentration levels could diminish once distracted; she found it difficult to handwrite for extended periods; she had difficulty with planning and timekeeping; she found it difficult to answer questions and often gave a vague response; had difficulty with spatial awareness, knowing left from right and with her short term/working memory.

71. It was recommended that as possible solutions, the claimant should be supplied with a Dragon Naturally Speaking Professional Edition; a noise cancelling handset plus a switcher box and USB sound card adapter; a Texthelp read and write standard; Inspiration Mind Mapping software; Screenruler Claroview suite software; an Olympus digital voice recorder; a pack of coloured pink overlays; five half days dyspraxia strategy training; and seven half days training for Dragon Naturally Speaking Professional, Texthelp read and write standard, Inspiration Mind Mapping and Olympus voice recorder. (967-992)

72. In relation to the pack of pink coloured overlays, the assessor found that the claimant experienced difficulty in viewing black print on white paper as it produced symptoms of visual discomfort and distortion of the text. As already stated, it was noted that she had dyslexic tendencies and that such problems were particularly common among those who have reading difficulties and suffer from dyslexia. (974)

73. The cost of the special aids and equipment came to £3,668.25 of which ATW would fund £2934.60. (1006)

74. For the ergonomic aids and equipment, it was £1,285.38 of which ATW was prepared to fund £121.38. (1007)

75. In Dr Pattani's report dated 12 October 2010, she discussed the ATW's recommendations with the claimant and recommended that all equipment the respondent intended to order be processed as quickly as possible as the claimant felt that any delay was adding to her symptoms and causing unnecessary distress. (1013)

76. On 30 November 2010, the claimant completed a London Borough of Harrow Re-enablement assessment form and wrote that one of the problems she was experiencing was that it took some time for her to get into bed and that transfers could take up to four hours. She stated that she shared a house with a female friend who helped her with all her daily living activities. She stated that she worked full-time as a MacMillan Nurse working flexible hours but not involved in the care of patients but more as an advisor. We find that the last statement did not accord with her job description as she was a Clinical Nurse Specialist working in the Colorectal Cancer Unit engaged in clinical work and was not solely an advisor. Such a statement was, in our view, misleading**.** (2623-2647)

77. Following her application, she was given the services of a carer for five hours a day, a total of 25 hours a week.

78. Her circumstances were reviewed on 13 July 2017 and she was given a cash payment by the council of £260.15 per week to pay for the carer. (2646-2647)

Stage 2 meeting held on 8 December 2010

79. A stage 2 long term sickness absence review meeting was held on 8 December 2010 at which the claimant was accompanied by Ms Sandra Williams. Ms D Williams, no relation, was also present. The meeting was conducted by Ms Small. What was discussed was summarised in Ms Small's letter to the claimant dated 13 December 2010. The purpose of the meeting was to: review the claimant's sickness absence since the last meeting; review the progress regarding the adaptations being made to improve her conditions at work, such as the office equipment including IT equipment; IT support; flexible working arrangements and to obtain an update on the claimant's health and wellbeing.

80. Since their last meeting on 14 July 2010, the claimant had five days absence and Ms Small confirmed that there had been a general reduction in her absence from work to attend hospital appointments. It was noted that the position had improved since the claimant commenced flexible working in September 2010. It was further noted that the delivery of office equipment was on 8 December 2010, but the chair was, unfortunately, faulty and had to be returned. The claimant indicated that an item of equipment was missing and Ms Small agreed to chase it up and apologised for the delay in processing the IT equipment. They discussed the practicalities of how the training may work and if both sets of identified training needed to run simultaneously or concurrently. They agreed that they would take advice on this. It was confirmed that the claimant was working full-time hours on a four day a week basis which was to be reviewed in three months. It was also noted that she had booked four weeks special and annual leave, to look after her mother in Slovakia and had recently returned from that country.

81. In discussing the claimant's general health, she stated that she was taking analgesia for pain control and was having regular physiotherapy. It was acknowledged that these treatments were proving beneficial. She wanted advice and/or assistance in managing some tensions within the team as she perceived that her colleagues were giving her the impression that she was in receipt of special treatment because of the nature and extent of the adaptations made for her within the workplace. She had explained to her colleagues the effects of her disability, but felt that it was not helpful and asked that Ms Small intervene to assist her. They agreed to facilitate a meeting with the team to address the matter raised by the claimant and for the claimant to be in attendance. Ms

Small said that the meeting with the team should take place within the month. They concluded by agreeing that there would be a review on progress in three months' time. Ms D Williams explained that the reason for the review was to ensure that the respondent was doing all it could to improve both the claimant's attendance and health. She also said to the claimant that as she was under the respondent's formal absence management process, no formal action would be taken against her but her absences would be kept under review under stage 2.

82. It was noted that the claimant again raised the specific query regarding the trigger point for action on absence under the respondent's Sickness Absence Policy and was informed that it stood at 10 days per rolling 12 months and that it could be seen as a reasonable adjustment for someone with a disability to have that trigger point doubled, although Ms Small pointed out that just because someone had a disability "does not mean that they have time for work sick." The conclusion of the meeting was that there had been a general improvement in the claimant's sickness absence and that Ms Small would arrange a further review meeting at the end of March 2011. They were to meet informally at the end of January to review the flexible working arrangements to ensure that the revised working hours were not having a negative impact on the claimant's health. (1020-1022)

2011

83. The faulty chair was replaced on 9 December 2010. The claimant had a short period of sickness absence from 4 to 7 January 2011 and went on study leave from 17 to 21 January 2011. She was again absent from work due to sickness from 16 March to 7 April 2011 and went on annual leave from 8 April to 4 May 2011. She returned to work on 4 May. She began a pain management programme through University College London Hospital, from 17 May 2011 to 6 December 2011 with regular follow up sessions and was granted leave from work to attend them. (1031-1032)

84. Ms Small referred the claimant to the respondent's in-house Occupational Health Department on 4 April 2011 and a report was provided by Dr Pattani dated 7 June 2011, who noted that having regard to the claimant's symptoms she had learnt to cope with them with a variety of pain relief, lifestyle measures and stretching exercises. Her symptoms generally improved as the day progressed. She was having weekly sessions through the COPE Scheme over a six weeks period. Dr Pattani understood that it would continue on a three-monthly basis for up to a year. She stated that the scheme helps individuals with the claimant's condition to identify factors which may aggravate their condition and help individuals find strategies to manage them with a view to minimizing the impact of the exacerbation on their every day life and work.

85. The claimant told Dr Pattani that some of the software which had been ordered following the workplace assessment, had arrived and was working. She tried to contact the IT department to resolve the issue with no positive results. Dr Pattani suggested that Ms Small should contact the Head of IT to resolve the issue. She understood that some equipment which had been ordered had been delivered to the hospital but the claimant had not received them. In Dr Pattani's opinion, the claimant was fit to perform her duties, but it was important that the Dragon system was functioning as she found it hugely helpful. Dr Pattani was also of the view that having regard to the claimant's condition, there was the likelihood that there would be future sickness absence associated with her condition and it was important that any facilities which were available in the work place to ease her symptoms, were up and running. In answer to the question what were the claimant's likely capabilities on her return to work, Dr Pattani replied, "There is no reason why Maria cannot undertake all aspects of her work." She further stated that "The problem was not caused by work. Some of her musculoskeletal problems are exacerbated by typing or sitting for any length of time and therefore she has access to special equipment to minimise any impact work activities may have on her underlying symptoms and overall wellbeing." The doctor repeated that the claimant's health condition was covered under the Equality Act, therefore, "all reasonable adjustments do need to be considered." (1042-1044)

86. The claimant was written to by Ms Small on 2 June 2011, who invited her to a follow up meeting under stage 2 to be held on 13 June 2011. This was the three months review meeting agreed on 8 December 2010. (1041)

87. In terms of IT support, we find that the respondent has a small team of nine IT engineers servicing the needs of potentially 9000 employees. Based on its small size relative to the number of employees, it would not always be possible to respond immediately to an employee's IT requirements.

88. At the review meeting on 13 June, the claimant by then had two episodes of sickness absence from 4 to 7 January and 16 March to 7 April 2011. In addition, she had been absent due to clinical appointments. It was acknowledged that she had worked with a degree of flexibility and attempted to make up the time in attending medical appointments. Ms Small explained to her that the purpose of their weekly meetings was to plan for absences during the week. They then discussed the IT related equipment, IT support and training. Ms Small acknowledged that one item of equipment, namely the pack of pink overlays, was outstanding. Apart from that all of the recommended equipment had been purchased. The overlays had been delivered but had subsequently been lost. Ms Small agreed to re-order them to be delivered within a week. The main problem was around compatibility of the new software with the IT hospital system. It had initially worked but as soon as the claimant returned from leave the problems had been

exacerbated. The claimant explained that there was also a technical problem that affected the speech recognition system as well as the ability to record patient related clinical data. She said that often the job was closed before the problem was resolved, consequently, she was spending long periods of time submitting requests for help and in dealing with several members of staff. It was agreed that the matter should be investigated by Ms Pami Kalia, Human Resources Business Partner. The claimant referred to attending the COPE Programme on Tuesdays which was on her day off and said that she was not aware of any other treatments scheduled in the short term. They agreed to suspend convening the team meeting to discuss the claimant's concerns. They concluded by agreeing to meet within one month to review the claimant's progress regarding the implementation of the IT software, thereafter to reschedule a further meeting in three months' time to review her sickness absence. (1050-1051)

89. We find that the respondent had, by that point and going forward, made genuine and serious attempts to address the adjustment recommendations in a timely manner. By 13 June 2011, it appeared that the only main issues were the IT problem raised by the claimant which was around the compatibility of the new software with the respondent's computer system and the technical problem affecting speech recognition. The respondent agreed to escalate the IT issue.

90. We further find that one of the problems the respondent faced was that the claimant was using software packages which only a few people in the Trust were using and the IT department were not familiar with those packages. Moreover, some of the software packages used by her were not compatible with the respondent's systems. This added to the delay in implementing some of the IT recommendations. ATW would not have considered the incompatibility issue when they made their recommendations as we were not shown evidence that they were familiar with the respondent's IT systems.

91. From the email correspondence, we are further satisfied that the respondent's IT department were making strenuous efforts to resolve the claimant's IT issues from 2011 onwards. For example, Mr John Tranter, IT engineer, emailed the claimant on 29 July stating that he had read through the relevant guides and spoken to someone who worked for Hands-Free Computing, in an effort to identify the problems and would attempt to install the software on a test machine. He hoped to try it on her laptop and agreed to see her later. (1064)

92. The claimant was absent from work due to sickness from 20 June to 22 July 2011, due to abdominal pain and EDS. (576-577)

93. She made a self-referral to Dr Pattani who provided a report dated 3 August 2011. Dr Pattani noted that the claimant said to her that the software packages were not all functioning as they should and that the training associated with their use was not utilised appropriately. She

would like to request further training once the software packages were installed and running correctly. Dr Pattani suggested that the matter should be discussed directly with Ms Small. (1073)

94. It is unclear why the claimant felt the need to make a self-referral to Dr Pattani as Ms Small and the IT department were addressing her IT issues. She returned to work on 25 July 2011 on a phased return basis gradually increasing her normal working hours.

95. The claimant had a further meeting with Ms Small on 5 August 2011, to discuss the ATW recommendations and the difficulties with the software installation. Ms D Williams was also present to take notes. It was agreed that the claimant would contact ATW to enquire if it was feasible for them to extend the timeframe for technical support and to ask if it was feasible to add on scanning equipment and to change her voice recognition software to Dragon Medical. She was to organise dyspraxia support training to commence 2 September 2011. (1074)

96. The dyspraxia support training ran from 12 August to 14 October 2011. Ms Small attended one of the meetings with the claimant on 23 September 2011. (1080, 2011)

97. The claimant was absent due to sickness from 3 to 30 November 2011 for multiple joint pain, stomach problems and EDS. (579-580)

98. She made further applications to ATW for financial assistance with her software, in particular, an upgrade from Dragon Professional to Dragon Medical and a support worker/mentor to deliver dyspraxia coping strategies tuition.

99. She was also provided with training on the new software package and requested that the IT department look into a laptop to replace her desk top PC. She had problems with the headset that had been delivered as it was not compatible with the IT systems. She brought to work from her home her own headset. The respondent ordered a replacement headset which arrived in January 2012.

2012

100. As the claimant had been absent for 15 weeks due to sickness in the previous 12 months, Ms Small referred the matter to Occupational Health on 26 January 2012. (1172-1177)

101. Dr Pattani reported on 23 February 2012, stating that the claimant's symptoms continued to be relatively stable and manageable and that the nature of her condition required her to minimise any stressors both physical and emotional to avoid an exacerbation of her underlying symptoms. She noted that the claimant said to her that she no longer went out shopping and arranged for her goods to be delivered to her. Her car had been specially adapted to allow her to drive short distances

and she had contact with a variety of specialists in the management of her health conditions. Dr Pattani further noted that from a work perspective, the claimant did not undertake any manual handling and the nature of her work was not physically demanding. In that respect redeployment would not assist in altering her sickness absence pattern. The claimant had said that the way the IT system was arranged, her work was duplicated or triplicated, in that she had to enter information onto nursing records, medical records and GCIS. She felt that she was working in an inefficient manner which caused her some frustration and irritation and that having a laptop would help her to avoid unnecessary duplication or triplication of patients notes. Dr Pattani was of the view that if there were any outstanding IT solutions/software issues they should be addressed to enable to claimant to operate more efficiently. Whether or not any cost implications were reasonable would be a management decision. The claimant told Dr Pattani that she had resumed her studies on 1 January 2012 and it required two hours each month of online discussion time with a meeting with her supervisor every two months. She was in the final stage of her three-year course and it would be counter productive to stop her studies at that stage. In relation to the 20,000 words dissertation she would need to produce, she was able to use her voice activated software to complete her work. Her health condition meant that there were likely to be periods of related sickness absence in the future. Her condition was not in itself caused by work, however, any IT solutions would allow her to improve on the processes at work and would aid in her ability to undertake her work and feel supported in the workplace. This would have a positive psychological impact on her. (1189-1190)

102. What was noted was that the claimant felt that she was working in an inefficient manner and that Dr Pattani was of the view that resolving the outstanding IT and software solutions would make her work more efficiently. The respondent's position is that the need to work more efficiently does not trigger the duty to make reasonable adjustments.

103. Ms Small arranged a further meeting with the claimant on 8 March 2012 to review the IT packages and the issues experienced with the software. Prior to the meeting they had discussed the claimant's request to have her own laptop. The purpose of the meeting was to consider the recommendations made by ATW.

<u>Stage 2 meeting held on 11 April 2012</u>

104. From 15 June 2011 and 11 April 2012, the claimant had been absent for 11 weeks on four occasions. One episode preceded a period of annual leave and one followed a period of annual leave. Ms Small, therefore, met with her for a further stage 2 long term sickness absence review meeting on 11 April 2012. Ms D Williams was in attendance and Mr Peter Nzekwe, union representative, accompanied the claimant. The items discussed were later set out in writing in Ms Small's letter dated 27 April 2012. Having regard to that summary, Ms Small said that she

was concerned about the escalation in the levels of sickness absence and the impact it was having on the service because it was managed by two whole time equivalent Clinical Nurse Specialists. During the period under review the service had been managed single-handedly by the claimant's colleague. This affected the accessibility of the service and had potential to affect patients' experience of the care provided. Ms Small also stated that she was concerned about the impact the extra workload was having on the claimant's work colleague. The claimant was asked if there were any factors which influenced her sickness absence and she responded by saying that it was the stress associated with her working environment that affected the duration of her sickness. She was asked to clarify and she replied that she was unable to work efficiently due to the ongoing problems related to IT. This resulted in her coming in at weekends, on occasions, to catch up on work as she was unable to complete the administrative/paperwork aspects of her role during her working day. She also said that the background noise in the office was disruptive and she was concerned that privacy was compromised especially when she needed to dictate emails which were private in nature.

105. They then discussed the ATW's recommendations made initially in 2010. It was acknowledged that there had been technical problems with the installation of the software and that it had resulted in subsequent delays. Ms Small said that all the initial recommendations had now been completed and that she had obtained a breakdown regarding the dates and times of both the IT support training for Dragon as well as from the dyspraxia strategy training. The latter would include strategies to prevent duplication of notes, records and implementation of stickers to allow for minimal note taking within written notes. The claimant said that she had not received all of her IT support training and consequently was compromised in that she could not apply the learning. Ms Small expressed concern that the respondent had been invoiced and paid for training which the claimant said did not take place. She said that at the end of 2011, the claimant approached ATW regarding further recommendations and in January 2012, they indicated support to fund further refresher IT training for three half days as well as dyspraxia coping strategies tuition for 10 hours. ATW also expressed support in funding an upgrade to Dragon Medical version. Ms Small confirmed that the respondent had agreed to order both sets of additional training and some of this had started in March and the dyspraxia support training followed. She explained that following advice from Prahba Abaghe, ICT Project Lead, the respondent had decided not to proceed with the upgrade to the Dragon Medical version as it was thought that the benefits of this, including more extensive access to the medical vocabulary, did not justify the cost. The claimant challenged the decision and said that there were additional benefits specific to editing which may be of benefit. Ms D Williams agreed to contact the Trust IT Lead to gain further clarification around the merits of the application. The claimant went on to state that she would benefit from a portable device to allow her to be able to record her interventions/keep her

records up to date when she saw patients in a clinical setting. She said that she had taken advice from Mr John Bowden, ICT Purchasing Manager. Ms Small expressed concerns regarding the feasibility of carrying equipment to include a headset to various clinical environments and the lack of available space for privacy in busy departments to conduct this work. It was acknowledged that it was not appropriate to do this at the time of the claimant's interaction with patients. It was pointed out by Ms Williams to the claimant that significant investment had been made in adapting her workstation. This included attention to the seating, lighting, screen overlays and headset. She expressed concern that the portable device would compromise her ability to complete her work at the workstation and the benefits of the wider range of adaptations would be compromised if the claimant was to complete her work at other locations across the Trust. The claimant disagreed and said that she would continue to use her workstation in the main but there would be benefits in conducting some of her record keeping in specific clinical areas. It was agreed that the use of a laptop would be reconsidered.

106. At the end of the meeting the claimant again questioned whether there may be any relaxation of the monitoring of her sickness absence because of her disability as she understood that there may be grounds for disregarding sickness absence attributed to a disability. Ms Williams confirmed that that was not the case and absence from work had to be managed in accordance with the respondent's Sickness Absence Policy.

107. The meeting concluded with the agreement that the second stage sickness absence review would be held on Wednesday 13 June 2012 at 12noon. (1239-1241)

108. We find that it was reasonable for Ms Small to take the view that the respondent could not proceed with the upgrade to Dragon Medical version at that time as the benefits including a more extensive access to medical vocabulary, did not justify the cost. She and Ms Williams were, however, prepared to contact the IT Lead to gain further clarification around the merits of the application. Likewise, the approach taken by Ms Small to reappraise the need to provide a portable laptop device, was also reasonable.

109. On 28 May 2012, Ms Small met with the claimant to review the use of her laptop and other adaptations to her workstation. The claimant proposed using a laptop to record her notes after a patient consultation. She stated that the background noise was interrupting her and affecting the use of her voice recognition equipment. Ms Small suggested that the respondent could move her workstation to a different office space, but the claimant was against this saying that she did not want to be separated from the team and discriminated against.

110. At that time Ms Small knew that it would be particularly difficult to move the claimant within the department as space was especially tight and there were plans to develop the Chemotherapy Unit which would further impact on available space. An alternative was to move the claimant off the unit to another office space in a different location but the claimant was adamant that she did not want to move.

Record-keeping and GCIS entries

111. Record keeping is a fundamental part of the clinical practice of a Clinical Nurse Specialist who would spend on administrative and clerical duties. Nurses should record their notes as soon as possible but may not always be possible. Due to the nature of the work, nurses would write up their notes following the initial appointment with the patient. The notes of the first meeting would be more detailed as they would deal with the diagnosis, summary of the patient's medical history, the help the Trust provided, the pathway of care and all the psychosocial consequences, such as work and family matters. For follow up meetings, the records are likely be brief notes.

112. The standard practice is for nurses to record all their notes directly onto the Trust system called GCIS. The system had been specifically modified for patients' notes and includes generic templates for several processes, such as Holistic Needs Assessments (HNA). This is a standard document and the template has been created in collaboration with other NHS Trusts in the area. The function of the HNA is to capture all the information the Trust needs to understand a patient's needs and develop a pathway of care. This is one of the claimant's essential responsibilities. Ms Small's concern was that the claimant appeared to have consistent problems in completing the template and instead was writing information which did not support the assessment or care planning. The two busiest clinics in colorectal service are on Tuesday afternoons and Thursday mornings and as the claimant did not work on Tuesdays, it was difficult for Ms Small to understand why she had problems with her GCIS entries.

113. Ms Small and the claimant discussed further recommendations made by ATW including further training and an upgrade to her voice recognition software from Dragon Professional to Dragon Medical. The specific problems with the claimant's record keeping were around sentence structure, grammar and appropriate use of words.

114. We find that by 28 May 2012, the list of adjustments as set out in Ms Small's notes of that meeting were put into effect. These were: flexible working, to complete five days' work in four days; and the completion of ATW's recommendations to include the purchase of specific equipment, such as Dragon Naturally Speaking Professional, a noise cancelling headset, Switcher box and USB sound card adapter, Texthelp Read and Write standard edition, Inspiration Mind Mapping software, Screenruler Claroview suite software, Olympus digital recorder, a pack

of overlays, five half days dyspraxia strategy training, and seven half days training for use of Dragon software, the three half days refresher training on all software packages and 10 hours dyspraxia coping strategies tuition. Regarding the upgrade to Dragon Professional to include Medical edition and the purchase of a laptop, the respondent was going to review its position but in the end, it ordered both in June 2012. (1252-1254)

115. The claimant went on a long period of sick leave from 6 August 2012 to 17 December 2012, suffering with back pain.

The Harrow Association for Disabled People

116. In or around May 2012, she visited the Harrow Association of Disabled People to assist with her condition in her workplace. They wrote to the respondent offering their support to the claimant and requested an opportunity to meet with the Trust. Ms D Williams, Human Resources Business Partner, replied in writing on 22 May 2012, stating the following:

> "At present I believe Maria is receiving support via her union with any internal matters pertaining to her employment with the Trust. This also include input from Access to Work. Therefore it would be highly unusual to have an individual member of staff represented by two different organisations at the time. If Maria wishes to change these arrangements informally I would be grateful if you could ask Maria to notify us of this. Or you could liaise directly with her Trust Representative to provide this support.
>
> If Maria wishes you to be involved for any other reason then please could you let me know and could you include with that an acknowledgement from Maria that confirms that is her wish as well.
>
> I am away from the office on leave now for a week, please feel free to contact me if you wish to discuss this matter further." (1242)

117. The claimant said in evidence that Mr Asif Iqbal**,** to whom Ms Williams had addressed her letter, offered to provide training to her colleagues on her condition and disability in the workplace. Contrary to what the claimant said that the meeting was with Mr Iqbal, herself and Ms Williams, we find that Ms Small did meet with Mr Iqbal as she recalled the discussion was around providing global support rather than training.

118. Up until May 2012, the respondent had been dealing with the claimant and her union representatives. It was reasonable for the respondent to invite Mr Iqbal to liaise with the claimant for her to decide whether or not she wanted him to be her representative. This would have enabled the respondent to liaise with him on the claimant's behalf in relation to her medical conditions and disability related issues. If the initiative on the part of Mr Iqbal was to do with training, Ms Small and D Williams felt it was not necessary as all members of the team had disability and equal opportunities training.

119. In the letter sent by Dr Peter Kraus, the claimant's general practitioner, dated 2 August 2012, to Ms Small, he wrote that the claimant was suffering severely from the effects of EDS with dyspraxia and needed supportive software and equipment to carry out her job effectively. (1258)

120. In Dr Pattani's report dated 18 September 2012, followed the claimant's self-referral. The doctor wrote that the claimant had told her that she was experiencing an exacerbation of her chronic pain and it coincided at a particularly busy and pressured time in the workplace. Since her sickness absence her pain had gradually improved and was now back to her chronic baseline pain. She told Dr Pattani that there were some outstanding matters regarding facilities and equipment she needed to carry out her work. Dr Pattani advised Ms Small that following the claimant's return to work she should be placed on a rehabilitation programme and suggested a phase return to work, working four hours a day in the first, second week and third weeks, five hours a day gradually increasing to make up her full-time hours by the end of a four to six weeks period. She further advised that Ms Small should discuss the claimant's concerns either at her return to work interview or before. (1260-1261)

121. It is difficult to understand why the claimant felt it necessary while on sick leave to make a referral to Dr Pattani. She did not return to work until 17 December 2012.

122. In a letter dated 10 October 2012, sent by Professor Rodney Grahame, Honorary Consultant in Rheumatology, to Ms Small, he wrote:

> "As you know, Maria has been off work recently because of a vertebral fracture and an exacerbation of her chronic pain secondary to EDS. I was sorry to learn today that the new office equipment that had been recommended by Access to Work for her, comprising of a new laptop, voice recognition software with appropriate training has yet to be installed or activated. She is very keen to get back to work in the near future and it would be of enormous help in this respect if the equipment that she clearly needs could be made available as soon as possible. It is almost a year since I drew attention to this submission. I look forward to hearing further from you." (1262)

123. We find that the statement by Professor Grahame is not entirely accurate as we have found that by May 2012 many of the recommendations in ATW's report of 2010, had been implemented by the respondent including voice recognition software and training. The outstanding issues required further exploration such as the laptop and the change to Dragon Medical, both of which had been ordered by June 2012 in any event and the claimant was aware of the position during her meeting with Ms Small on 28 May 2012.

124. In a letter dated 6 December 2012, sent by Rupal Patel, Payroll Officer, to the claimant, the claimant was informed that with effect from 21

December 2012, her pay would be reduced to half pay in accordance with the NHS Occupational Sick Pay Scheme and would run until 21 June 2013 unless she returned to work earlier. She would receive in addition to her half pay, statutory sick pay at the rate of £12.26 per day until 21 February 2013. (1263)

125. It is the claimant's case that the respondent should have paid her full pay during any periods she was medically advised not to work due to her disability and until the respondent had completed all reasonable adjustments. The disadvantages according to her at this point in time, were not being provided with the laptop, the Dragon Medical and appropriate software training. She said that she was at a substantial disadvantage in that she was unable to type up her clinical notes on a laptop shortly after seeing the patient and that she could not use properly the IT equipment as she needed training. The Dragon Medical provided her with access to medical terminology which was extensive.

126. We find that notwithstanding her condition, she was able to input her clinical notes using her PC and was able to use stickers to put on patients' files to signal to other staff that she had seen the patient and there would be notes on GCIS to record this intervention. She had not demonstrated that the absence of the Dragon Medical caused her a substantial disadvantage or disadvantages. She was familiar with medical terms as she had to use them in her notes. What she was seeking was a more efficient way of working. As regards to training, she attended training and had benefited from it placing her in a position to use it as part of her work. She also had the advantage of using an Olympus digital voice recorder in her note taking. Dragon would also have assisted her with her note taking. She was not prevented from returning to work by any failures on the part of the respondent at this point.

127. When Ms Small received Professor Grahame's 10 October 2012 letter, she was of the view that the claimant was circumspect in her disclosure of the adjustments the respondent made as she told Professor Grahame only about the laptop, the voice recognition software and appropriate training. She did not discuss with him the other adjustments made by the respondent; the fact that the laptop had been a recent request by her and that she was already using Dragon voice recognition. (1262)

128. On 14 December 2012, Ms Small made a referral to Occupational Health as the claimant, by then, had not returned to work. In the referral she informed Dr Pattani that ATW had approved an upgrade to Dragon Medical and some further refresher training on all software packages. The claimant had completed further dyslexia coaching as well as refresher training specific to the practical use of the software and had requested the purchase of a laptop and portable devices as she felt that they would enable her to complete her records when seeing patients. Ms Small expressed the view that it was not standard practice and she

did have concerns about the practicality of using laptops in the range of clinical environments in which patients may be present and at a time when patients and families were often quite acutely distressed. She further stated that an appraisal was conducted by her to support the purchase of the equipment which was approved by her manager. The equipment was ordered in June 2012 including the Dragon Medical software application. Ms Small also wrote that having regard to the claimant's concerns about the location of her desk within the office, to minimise the disruption, she had relocated the claimant's desk to an alternative position in the office. (1264-1271)

129. As previously stated the claimant returned to work 17 December 2012. In Dr Pattani's report dated 8 January 2013, she stated that the claimant was fit to return to work and able to undertake all of her duties provided the appropriate IT support was in place. As she understood that the claimant's work was "largely sedentary", on that basis redeployment was unlikely to improve her position. Dr Pattani noted that the claimant said that although she had returned to work she was not undertaking clinical duties because the IT systems were not in place. In terms of further adaptations, Dr Pattani wrote that she and the claimant had discussed the matter at some length and thought that it would be helpful for the claimant to have wireless portable headphones to use with her laptop and training on the software package to enable her to return to her clinical duties as soon as possible. (1286-1288)

130. On reading the report, Ms Small was concerned that the claimant had conveyed to Dr Pattani that her work was largely sedentary as it was not. We find that the role of a Clinical Nurse Specialist in the Colorectal Cancer Unit, has a sedentary element but it is largely clinical. The specialist is required to move from one ward to the next and from one clinic to the next speaking to patients and their families, using medical equipment, talking to senior colleagues and responding to patients' needs. We, therefore, find that the claimant's role is mainly clinical with some administrative tasks associated with her clinical duties.

131. On 2 January 2013, a workstation assessment arranged by the claimant through ATW, was carried out by Mr Frank Gilbert from RBLI. This was arranged without Ms Small's knowledge and seemed to be part of a pattern of the claimant making self referrals to occupational health, consulting with outside medical specialists who would contact her line manager, and arranging ATW assessments. This meant that her line manager was not in a position to fully assess the adjustments implemented and was required to take on more recommendations at a time when the unit was under considerable pressure. Ms Small, understandably, expressed some concerns that she had not been involved. If the claimant had included her or another manager, it would have ensured that any further IT equipment and software recommended would be compatible with respondent's existing systems.

132. We also find that the claimant appeared to be in the habit of withholding information from medical professionals as well as from her managers. She reported to Dr Moody that she had not previously had a cognitive assessment nor received any specialist help for her difficulties. In fact, she had a cognitive assessment on 16 February 2010 by Dr Tim Harper and had the benefit of substantial dyspraxia training and support. She had given the impression to Professor Grahame that the respondent had not dealt with the adjustments to her work when in fact it had made considerable adjustments. She also gave the impression to Dr Pattani that her work was largely sedentary when it was not the case. In addition, the respondent having believed that it had addressed all the adjustments recommended by ATW in 2010, 2011 and 2012, was not informed about a further assessment to be conducted by them. At the end of 2012, the respondent was entitled to believe that it had addressed and implemented all of the recommendations and requests.

133. In relation to Mr Gilbert's work station assessment, he recommended further software packages and training; a lightweight laptop trolley; a wireless headset and a Livescribe Smart pen for digital audio recording. For her workstation, he recommended a Gold Touch ergonomic travel keyboard and numeric keypad. (1272-1283)

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134. The claimant visited to her doctor, Dr Peter Kraus, who then wrote to Ms Small on 3 January 2013, the following:-

> "The above lady suffers from Ehlers-Danlos Syndrome type 3 and dyspraxia. She needs aids to ensure that she is able to do her job effectively. She has been off work with long term sickness due to deterioration of her symptoms. She was assessed yesterday by an assessor from Access to Work who made further recommendations for equipment, software and training. I would support speedy implementation of these recommendations to avoid future deterioration of her symptoms." (1284)

135. Again, it is difficult to see why the claimant felt the need to consult with her GP in relation to the ATW's assessment the day after. By then the respondent had, as we have found, implemented the earlier recommendations and supported the claimant in her work.

136. Ms Small made a further referral to Dr Pattani who reported on 8 January 2013. She saw the claimant sometime between the referral, 11 December 2012 and 8 January 2013. She confirmed that the claimant was suffering from a chronic condition affecting multiple body systems and that there was no cure. She was actively managing the pain to the best of her ability and it was likely that she would require recurrent periods of absence if her pain intensified in the future and was receiving good support from the professionals involved in her care. (1286-1288)

137. On 11 January 2013 ATW approved a support worker to work for two hours on dyspraxia coping strategy tuition. (1294).

138. On 13 February 2013, there was a meeting with Ms Small. The claimant was accompanied by Ms Christiana Adekunte. Ms D Williams was also in attendance. It was confirmed that the phased return to work over six weeks had been completed and the meeting was to review the claimant's recent occupational health report and to get a general update on her health status. It was also to discuss the effects of her disability and the impact on her ability to carry out the responsibilities of her role. The claimant confirmed that she was in good health and was pleased to be back at work. She said that there were no specific symptoms related to her illness and felt able to complete all aspects of her role. She could use a pen for her medical case notes. They then discussed ATW's recommendations/adaptations already implemented and the recommendations made in January 2013. Ms Small again repeated that an ATW assessment had been completed without her knowledge and suggested that in the future any such appointments should be negotiated with her or the claimant's line manager and a representative from the respondent's IT services as this would reduce the problems in relation to incompatibility software and IT issues. Ms Small confirmed that the priority was to get the laptop upgraded with Windows 64 and 8 ram memory. She had taken advice from the IT department, Mr John Tranter, who recommended that any new software/upgrade of software would be completed at the same time. The new and upgraded software would be ordered and the respondent would aim to have it installed at the same time as the upgrade of the laptop. Ms Small also confirmed that training would be ordered at the same time as she was keen to avoid a situation whereby the trainer was available but there were technical problems with the application of the software. She confirmed that she would request permission from the divisional general manager to order the additional equipment. She said that all recommendations were sent to the procurement department for ordering. The plan was to have the equipment installed and training completed by end March 2013. She confirmed that a separate meeting would be convened in accordance with a stage 2 review under the Sickness Absence Policy. She would continue to manage the meetings and that Dr Claire Taylor, MacMillan Lead Nurse in Colorectal Cancer, would have regular one-to-one meetings with the claimant to ensure that she had operational management support at work. (1319-1320)

139. By then the ATW items which were approved were: Mindview software and training; Dragon Medical training; Texthelp Read and Write Gold version 10; scanner; lightweight trolley; headset; Livescribe Echo Smart pen; Goldtouch ergonomic travel keyboard; numeric keypad and electric stapler/punch. The total cost of the support was £2,630.60 with ATW contributing a maximum of £2,104.48. (1289-1290)

140. The Livescribe Echo Smart pen is an electronic smart pen with a memory for handwriting capture, audio recording and additional

applications. It is used like a normal ballpoint pen and the user writes with it in exactly the same was as they would a normal pen but it records whatever has been written so that it can be downloaded later and transferred directly into text in a word processing programme or another software package. The other advantage of the pen is that it can be used as a dictaphone, in addition to the digital dictaphone the claimant already had. In order to use the pen to capture handwriting, the claimant would need electronically sensitive paper. The paper could also be produced by a high resolution colour printer.

141. It is clear from the notes of the meeting that Ms Small was anxious to put into place ATW's recommendations. We bear in mind that Mr Gilbert wrote in his assessment in January 2013 that it may take some time before some of the benefits become obvious, "typically three to six months". (1277)

142. We further find, having regard to Dr Claire Taylor's evidence, that although the ATW's assessments were carried out in the workplace, the January 2013 assessment did not consider some of the issues the respondent would face in carrying out the recommendations within the NHS. The respondent has its own IT systems as well as its own procurement procedures, which it had to follow if it were to implement any of the recommendations. These factors accounted for the IT software problems as well as the delay in implementing the recommendations.

143. Dr Taylor met with the claimant on 1 March 2013 at a one-to-one meeting. The purpose was to discuss the support being provided to the claimant; her work; the recording of clinical appointments, and her productivity. Dr Taylor produced evidence of the claimant's poor GCIS entries and asked her to keep her entries succinct and clear. She also pointed out to the claimant that she was not working to her full job description which Dr Taylor felt she was able to do. She said that she was unable to grant the claimant's request for unpaid leave in March and could not justify releasing her from the service when she had only returned to her role working full hours for only a matter of weeks. It was important that she was at work to enable her to problem solve the issues and to enhance her activities within the service. Furthermore, Dr Taylor took into account that the claimant had several days of annual leave over the following month and had asked to undertake mandatory training. She also had another day's release on 13 March. This meant that the amount of time the claimant was working within the service in March was low, under eight days. Mr Tranter said that he would be able to return the claimant's laptop on 11 March 2013 but it would mean that the claimant would only have two days without being able to use it as she was due to take annual leave the following week. (1348)

144. On or around 5 March 2013, the claimant fractured her fibula while walking down the stairs at her home and was off work until 2 December 2013, a period of nine months. This meant that there was going to be

considerable pressure on the unit at a time when her involvement was already low and at a time when she had only been working her full hours for a few weeks.

145. In a letter dated 17 March 2013, the claimant was notified that her pay would reduce to half pay from week ending 15 April 2013. (1349)

146. In the Occupational Health report dated 15 May 2013, Dr Pattani wrote that the claimant was currently unfit to return to work and that upon her return she would require limited duties possibly of an administrative/clerical nature rather than patient facing. In due course, depending on her progress, she would be fit to undertake all aspects of her work including her clinical duties. In answer to the question "Whether or not Maria's condition predisposes her to this type of injury and whether or not she is at risk of recurrent injuries such as this." Dr Pattani replied:

> "The condition per se does predispose an individual to an increased risk of fractures, however, people with this condition and Ms Rakova is included in this, adapt their lifestyle as such that they avoid activities and modify their lifestyles to ensure they take good care of their musculo-skeletal system. Therefore whilst the condition per se predisposes to a risk of fracture, this is balanced by the fact that lifestyle adaptations reduces the opportunities where such fractures may occur. This is Ms Rakova's first proximity fracture so far in her lifetime." (1352-1353)

147. Dr Pattani was also of the opinion that it was possible for the claimant to return to work within four to six weeks depending on her progress.

148. In further Occupational Health reports on 20 June, 24 July, Dr Pattani stated that the claimant was still unfit for work and in the 24 July report that she was likely to be off work for three months. In Ms Small's referral dated 22 August 2013, she asked Dr Pattani to provide information in relation to 11 questions concerning further adjustments; alternative roles; whether the claimant was disabled under the Equality Act; prognosis of her likely return to work and date; the longer term prognosis; why Dr Pattani had previously stated that the claimant would make a full recovery and return to work within four to six weeks but had not returned to work two months later then wrote that she would be off work for three months; the likelihood of a recurrence of the injury; the frequency of Occupational Health reviews going forward; and what the claimant could do having regard to her job description?

149. In our view, the various referrals to Occupational Health focused on the relevant issues in relation to the claimant's sickness absences and the information likely to be useful to the respondent in assisting her return to work and in making adjustments. (1358-1359)

150. The claimant was informed that statutory sick pay would not be paid after 19 September 2013. (1385-1386)

151. In Dr Pattani's report dated 16 October 2013, she addressed the questions put to her by Ms Small. In respect of question 8, namely "What is the likelihood of the recurrence of the injury and the recurrence of the absence on her return in light of her current sickness absence?", she replied:

> "In my opinion the injury was not caused or related to her underlying health condition. Therefore the risk of recurrence is that of the average population of the same age."

152. The doctor went on to repeat her understanding that the claimant's work was "largely sedentary" which the claimant did not challenge as she had received a copy of the report. In answer to question 11, that being what the claimant could do in her current role, Dr Pattani wrote:

> "On Ms Rakova's return to work from her recent sickness absence which is not directly related to her underlying chronic health condition, I would suggest a gradual return to her full duties. My suggestion would be that she gradually builds on her clinical work perhaps starting with office based telephone consultations in combination with face to face work with patients. She can then start to introduce areas where she would need to walk to, for example, OPD followed by the wards and A/E. This could form part of her rehabilitation programme which I would like to discuss with you after Ms Rakova's next appointment with me in November……." (1391-1393)

153. On the face of it there appears to have been an inconsistency in the answers given as to whether the claimant's sickness absence was related to her EDS condition. We shall return to this issue shortly.

Stage 2 meeting on 24 October 2013

154. The claimant met with Ms Small on 24 October 2013, as part of the stage 2 sickness absence review procedure and was accompanied by Ms Adekunte with Ms D Williams present. What they discussed were summarised in Ms Small's letter sent to the claimant dated 15 November 2013. It was pointed out to the claimant that she had been on continuous long-term sickness absence since 4 March 2013. Ms Small reviewed her sickness absence and highlighted the impact it was having on the team and the Colorectal Cancer Nursing Service and said that the current situation was not sustainable. The claimant respondent by saying that she was much better and anticipated being able to return to work by mid-November 2013. She said that she had contacted Hands Free Computing to schedule her software and dyspraxia training immediately following her return to work. Ms Small emphasised that the respondent would also need to give priority to any outstanding mandatory training/clinical updates required as this was essential following the claimant's return to work.

155. Notwithstanding the concerns expressed by Ms Small that the claimant should inform her about any ATW assessment visits, she informed Ms Small at the meeting that she had contacted them and requested a further assessment on her return to work. Ms D Williams questioned

the claimant's expectations regarding a further assessment to which the claimant responded by saying that it was more to do with practical support/adjustments to seating and workstation in light of her recent fracture. It was agreed that Ms Small would ask Dr Pattani if there was any significant indication for further input from ATW at that stage. She asked that the claimant should arrange an ATW assessment at a time when either she or Dr Taylor would be present. She confirmed that in relation to the equipment and software recommended by ATW, there was only one outstanding item and that she would prepare an update on 4 November 2013. The claimant was asked whether she anticipated having any walking aids/crutches on her return to work and confirmed that she did not require them. She was also asked about the status of her study leave and completion of her MSc studies. She confirmed that she had completed her MSc dissertation while on sick leave and that her programme of study had been completed. They agreed to have a joint meeting with Dr Pattani on 4 November 2013 to determine her definitive return to work date and a return to work programme. The second stage review meeting would be scheduled for mid-January 2014 following completion of her phased return to work. In her letter, Ms Small expressed delight at the claimant's expected return to work in a full-time capacity and was looking forward to having her back in the team. (1395-1396)

156. We now turn to the apparent inconsistency in Dr Pattani's reports on whether the claimant's injury to her right fibula was caused by her underlying health condition? In Dr Pattani's report dated 15 May 2013, she stated that the claimant's condition, per se, did predispose her to an increased risk of fractures. In her later report of 16 October 2013, she apparently contradicted that statement by stating that the claimant's recent sickness absence was not directly related to her underlying chronic health condition. It was her first fracture. We find that the respondent was entitled to rely on the later report and to take the view the claimant's absence, over such a long period, was unrelated to her underlying medical health conditions, namely EDS and/or dyspraxia. It was a difficult issue to grapple with as EDS predisposes the person to dislocation of the joints but there could be other causes for an injury or fracture. Dr Pattani took the view that the claimant's foot injury was not caused by EDS. In the circumstances, it was reasonable for the respondent to rely on the later report.

157. We also note that two years later, in August 2015, Dr Alan Hakim, Consultant Physician and Rheumatologist, commented on the claimant's accident in March 2013 and her cellulitis in February 2014, but he did not see her at the relevant time, therefore, we preferred Dr Pattani's later opinion that her long absence in 2013 was unrelated to her EDS. Dr Pattani had seen the claimant throughout the relevant period.

158. From Dr Pattani's letter dated 7 November 2013, in respect of the meeting held on 4 November with Ms Small, Ms D Williams, the

claimant and Dr Pattani, she wrote that an insole for the claimant's right shoe had been prescribed and ordered and was due to be delivered on 19 November. It was agreed that the claimant would return to work on 25 November 2013, on a phased return basis, starting with 25% of her working hours in the first week, 30% in the second week, for the third week 50%, fourth week 60%, fifth week 80%, sixth week 90% and the seventh week 100%. They also agreed to discuss arrangements for her IT training and any statutory/mandatory training. The claimant would start some clinical work depending on her timetable, preferably telephone and face to face clinical work, gradually building up to work on the wards and A&E which required her to be more mobile. The claimant requested annual leave over the Christmas period as she planned to attend a rehabilitation programme in Slovakia. (1394)

159. In or around November 2013, the office layout had been reorganised and the claimant's desk had been moved to ensure it was quieter where she sat and would have fewer distractions.

160. She had a workplace meeting on 21 November 2013, to review the set up of her workstation in the new office and she identified several missing or broken items. She was, however, at the time not back at work.

161. In Ms Small's email to her dated 27 November 2013, she wrote that the respondent had placed an order for all the equipment that had been either lost or damaged because of the move and that they would not be delivered by the end of the week so it was not a good use of the claimant's time to attend work for a meeting on 28 November to check on her equipment. She also referred to the order of the pen and the difficulties with obtaining the relevant paperwork from the supplier and suggested a meeting on Friday of that week to discuss a planned phased return to work. (1400)

162. The claimant returned to work on 2 December 2013, on a phased return and had dyspraxia training. We find that on occasions she failed to attend work and did not inform Ms Small or one of the other managers in the department in advance of her absence, for example, on 9 and 11 December 2013, she failed to attend her clinical sessions arranged by Dr Taylor. She explained that she had got her working times mixed up on both occasions.

163. Although the claimant said in October that she requested an ATW workplace assessment on her return to work, Ms Small was unaware that it was due to take place on 20 December 2013 and only became aware of the assessment when the report was handed to her by the claimant in late January 2014. Discussing any adjustments in the workplace is a collaborative exercise and, in our view, should involve the employer, in this case the respondent. Yet again the claimant, without reference to either Ms Small or Dr Taylor, contacted ATW to undertake a workplace assessment despite Ms Small's repeated

requests, the last one being in October that she should be informed prior to the assessment taking place as she or someone from the respondent's IT department should be present.

164. The ATW assessment was carried by Mr Stuart Buckminster from RBLI. His report, dated 30 December 2013, was sent to the claimant. He recommended a mobile laptop cart which is a height adjustable laptop cart on a stand with castors with added features of a lockable drawer and handles. The claimant would be able to transport her laptop to the clinic and work directly from the station. The laptop could also be locked on to the cart but the claimant would need to discuss it with the respondent's IT department. Mr Buckminster also recommended a View Master LCD monitor arm to allow the claimant to adjust her monitor according to her posture. It would also assist with any visual impairments as she would be able to pull the monitor closer to her.

165. Mr Buckminster noted that the claimant had Dragon Naturally Speaking with additional assistive PC input devices as well as Dragon Medical Practice edition first level but was finding it outdated. He, therefore, recommended Dragon Medical Practice edition 2 as the current version was out of date and was slow in response. It was noted that the claimant had five more training sessions left on Dragon. In relation to Dragon Naturally Speaking Pro upgrade v11.5 to v12, this was recommended as it would ensure that the claimant was up to date with the latest version to coincide with the update of Dragon Medical Practice edition 2.

166. These two Dragon upgrades were recommended not because of any substantial disadvantages but to improve the claimant's efficiency.

167. Mr Buckminster noted that the claimant asked about further dyspraxia support as she had some support sessions left from her previous ATW assessment. She was advised to contact her advisor after the sessions were completed to see if she still required them. He then recorded the following:

> "The client reported that with the training she has recently received and the continuation of incoming workload, her work has backed up and feels that she needs some help to get up to date. I advise that this wouldn't come under the ATW issue and would need to speak to line manager for allowances for assistance. The client got emotional and suggested a support worker to assist her and she feels that the workload has increased. Again I advise that she should speak with her advisor."

168. We are somewhat surprised by this statement made by the claimant as recorded by Mr Buckminster because we bear in mind that she had returned to work on 2 December 2013, on a phased return basis. The first week she was required to do 25% of her working hours, the second week 30% and the third week 50%. The workstation assessment was carried out on 20 December 2013, when she was working at 50% of her full duties at the most. With these matters in mind it is difficult to see

how the claimant could come to the view and tell Mr Buckminster that her workload had backed up and had increased. Further, her workload had been covered while she was on sick leave.

2014

169. The claimant was on annual leave from 23 December 2013 to 10 January 2014 undergoing a rehabilitation programme in Slovakia and returned to work on 13 January 2014. She met with Ms Small and Dr Taylor on 15 January to discuss her phased return. It was explained by Ms Small that the purpose of the meeting was for Dr Taylor, her first line manager, Ms Small and the claimant to have an opportunity to sit down together to review the progress to date of her phased return to work programme. The claimant confirmed that she had dyslexia coaching and IT training and had five IT support sessions outstanding with three dyspraxia sessions remaining. She requested leave in February and March 2014. The February request was to have a procedure completed on her foot. The 24 March to 14 April request for leave was for her to attend a residential programme at the Royal National Orthopedic Hospital in Stanmore (RNOH). Ms Small said that she would make every effort to accommodate the requests but stressed that other members of the team also requested leave during March and April. The claimant asked whether Ms Small had considered the suggestion made by the dyslexia trainer to change the location of her workstation. Ms Small responded by saying that she was not aware that there had been such a clear request and was unclear as to the rationale for changing the location but agreed to revisit it in light of the ATW's recommendations and further correspondence from the trainer. (1470-1472)

170. In Dr Pattani's report sent in January 2014, she gave an outline of the claimant's treatments and stated that the claimant's in-patient care at RNOH was not for her ankle injury but was an intensive rehabilitation programme for her underlying chronic health condition. The claimant told her that the programme was aimed at providing coping strategies to support patients in managing the long-term effects of EDS. (1473-1474)

171. Ms Hilary Myatt, Health and Safety Manager, conducted an in-house workstation assessment on 28 January 2014, in which she acknowledged that the claimant had specific needs due to her disabilities and specific equipment had been purchased through ATW to enable her to do her job. She noted that in relation to the chair purchased that the claimant had no problems with it. Likewise, the height adjustable table. The adjustable monitor arm was broken in a recent move and an adjustable monitor was required as part of the Health and Safety (Display Screen Equipment) Regulations 1992. The claimant had no problems with the mouse and voice recognition software. It was noted that she wore blue tinted glasses which made her reading of print clearer. Ms Myatt acknowledged that the claimant

would need a trolley to take a laptop and associated equipment to and from clinics and recommended that it be lockable for security purposes. As regards her desk, Ms Myatt noted that the claimant had requested that it be rotated through 90 degrees as this would enable her to look at anyone she was talking to rather than the side of them. The effect of this would mean relocating the other desks in the room. The desk move came under the Disability Discrimination Act where reasonable adjustments are required to be made to enable disabled persons to work. It was also noted that it would be a reasonable adjustment to review the layout of the office but the office had to contain a specific number of staff and space was limited within the unit.

172. In relation to lighting, Ms Myatt wrote that the claimant had requested additional lighting around her desk and that it was reasonable to expect that it be provided to her. In relation to her writing board, Ms Myatt noted that it was not at a suitable secured angle for her. As one had been provided for her in the past the current one should be adapted or another one purchased. (1481-1482)

173. The claimant's first week of full-time hours commenced on 10 February 2014, however, she did not attend on 12 February stating that her car had been vandalised. At the phased return to work review meeting held on 14 February 2014, attended by Dr Taylor, Ms Small and the claimant, it was noted that the claimant's IT software training had been completed and the dyspraxia mandatory training was ongoing. She had seen one patient independently in clinic during the period of her phased return to work and there were delays in her writing up the telephone calls to patients. She said that she could perform all the aspects of her role, but inadequate IT support was preventing her from completing them effectively. She was finding it difficult to record her Holistic Needs Assessment findings. She raised further equipment issues: her headset was not working; her writing slope was damaged but the respondent was waiting for ATW's recommendation on it; the lighting to her workstation was inadequate but the respondent agreed to provide an interim light ready for her use on her return from annual leave on 17 March; and in relation to the monitor arm, the respondent was waiting on ATW's recommendations on the arm and the laptop cart. The claimant raised the position of her desk and Ms Small agreed to explore the possibility of relocating it but was mindful of the fact that it may be problematic due to the shortage of space considering the recent refurbishment to improve capacity in the Chemotherapy Unit. Ms Small noted that during the claimant's phased return to work there was a general lack of enthusiasm or energy in her resuming the clinical components of her role. This was challenged by the claimant who said that the statement was unprofessional and unfair as she was prevented from doing her role because the supports which were essential to enable her to function properly, were not in place.

174. We find, from the evidence, that appropriate supports were in place at this point following the advice given by Dr Pattani and the

recommendations made by ATW as well as by Ms Myatt. The claimant's headset was repaired the next working day after the meeting. (1486-1489)

The claimant's sickness absence

175. The claimant went on annual leave on 19 February 2014 to Brazil on holiday and was due to return on 14 March 2014.

176. In ATW's letter dated 11 March 2014, it agreed to fund what Mr Buckminster had recommended. The total cost was £2,235.88 to which both the respondent and ATW would contribute. (1490-1491)

177. On 17 March 2014, the claimant attended the Accident and Emergency department at Hillingdon Hospital as she became ill on the return flight from Brazil. From that date she commenced a period of sickness absence until 8 December 2014, a period of nine months. The reason given for her absence was cellulitis following an insect bite. Since her return to work on 2 December 2013 to 19 February 2014, she had only worked a few weeks, most of which was on a phased return. This recent sickness meant that was going to be absent for the remainder of the year. This placed an enormous pressure on the service. Her absence was unrelated to her disabilities.

178. On 31 March 2014, ATW agreed to fund a support worker working 260 hours per annum and another support worker for dyspraxia coaching sessions. (1523,1525)

179. On 28 April 2014, ATW agreed to fund seven more software training sessions at a cost of £294.00 per session. The total cost was £2058.00 of which they would contribute a maximum of £1646.40. The respondent to contribute £411.00.

180. On 30 April 2014, Ms Small made a referral to Dr Pattani and provided her with updated information on the claimant. At the time the claimant was signed off until 2 May 2014 and was scheduled to be seen by the doctor on 6 May. Ms Small wrote:

> "As stated in my previous correspondence……., I'm increasingly concerned about the significant impact this long term absence is having on the Colorectal Cancer Nursing Service. We have exhausted a number of strategies to provide cover for this absence, but obtaining locum cover at this specialised nursing level is problematic and not sustainable. We are breaching a number of key standards for the service and there is evidence that patient care is being compromised as a result of the shortfall in service provision. We have now escalated this on to the department's risk register.
>
> I am keen that when you review Maria's fitness to return to work, you consider Maria's ability to complete the full requirements of her role before confirming her fitness to work. We have invested significant time in supporting Maria on a phase return to work which commenced on 2 December 2013 and was

completed on 14 February 2014 – since 14 February 2014 Maria attended work on 17 to 19 February 2014 after which she commenced a period of annual leave (20 February 2014 to 14 March 2014 inclusive). Maria's sickness commenced on 17 March 2014, the week she was due to return from annual leave. Despite the investment in supporting this phased return to work, the ability to resume full time working with execution of full responsibilities of the post has once again not been sustained.

As a result of this and also a result of the existing pressures within the service, I would request that Maria does not resume work until she is deemed fit to resume the full requirements of her role.

I would also like to update you of the fact that we have taken receipt of a number of letters issued from Access to Work on 11 April 2014 which illustrates a number of further recommendations. These recommendations are as a result of the assessment completed on 10 December 2013. In my letter of 25 March 2014 I stated that I was concerned at being caught in a continuous cycle of recommendations being made by ATW without us being able to evaluate the need for such recommendations. Thus, I had asked Maria to complete a log regarding what equipment has been trialed to date and the outcome of such trials (if equipment is being used/if not used and why). It was explained to Maria that this log would be important to send to ATW in order to review their recommendations. I stated to Maria that I was reticent about purchasing further equipment/implementing further recommendations pending completion of this log and its content being taken into account by ATW.

Maria has not yet been able to complete the log to provide feedback on the recommendations which we have implemented to date. As it stands, all outstanding software training and dyslexia coaching from previous recommendations have been completed. In addition to this several further items of equipment to include laptop cart, writing slope, adjustment arm for PC, desk lighting and new headsets have been procured in February 2014 in advance of these recommendations being released.

As stated in my previous letter, I am keen that Maria completes this log in order to provide ATW the opportunity to evaluate the impact of previous adjustments/recommendations before advising further on the need for any further implementation. I would be grateful if this be taken into account by yourselves in respect of our request to you to advise of any further adjustments necessary."

181. It is clear from reading Ms Small's letter that she expressed some concerns about the frequency of the ATW's recommendations as little time had been given for them to be implemented and/or assessed. It was further complicated by the fact that the claimant had been, on occasions, absent from work for extended periods. The respondent is a publicly funded hospital with a duty to provide an efficient service to its patients complying with national standards. Ms Small, in our view and as a responsible manager, was entitled to express her serious and genuine concerns about the effectiveness of the Colorectal Cancer Nursing Service because of the claimant's long-term sickness absences.

182. On 12 May 2014, Dr Pattani reported that having considered the concerns raised by Ms Small, on balance, the recommendations would be of benefit to the claimant. (1541-1543)

183. Ms Small also wrote to the claimant asking her to clarify why there was the need for further ATW recommendations, in particular, dyspraxia coaching, software upgrade, software training and a support worker. The claimant gave her reasons on 11 June 2014. (1552, 1556)

184. In relation to the upgrades to software, the claimant noted in her response that there was no allocation for software training for the Livescribe pen. In relation to the support worker, it was a one-off recommendation and that person would be employed through the respondent's Bank. She had told Dr Pattani that she needed a support worker to help with the backlog in her casework. As already stated and found, in our view there should not and would not have been any backlog as her work involved seeing patients and was covered during her absence. Adjustments were made and she was on a phased return. (1543)

185. A long-term sickness absence review meeting was held on 18 June 2014 with Ms Small, the claimant was accompanied by Ms Rizvana Ahmed, her trade union representative. Kavi Gungaphal, Senior Employee Relations Advisor, took notes. In Ms Small's briefing notes prepared by Human Resources for the meeting, she was advised that prior to going on to stage 3 with the possibility of dismissal, to consider implementing adjustments to the claimant's working conditions. From the fit note supplied Ms Small put to the claimant that her current sickness absence related to a Cellulitis infection, namely that the left foot and leg had been infected due to an insect bite while she was on her return flight from Brazil. The claimant then explained that the infection was not Cellulitis, as first thought and that blood tests confirmed the diagnosis of Lyme disease. She said that she was under the care of Dr John, Consultant in Infectious Diseases at Northwick Park Hospital. She was asked by Ms Small what were the symptoms of Lyme disease, the claimant explained that they were a shortness of breath, painful throat, painful ears, dizziness, phases of extreme fatigue and fever. She confirmed that her statutory and mandatory training were up to date as well as her nursing continuing professional development training. (1577-1581, 1590)

186. They then discussed training, using IT software, dyspraxia coaching, as well as for the use of the Livescribe SmartPen. The breakdown of all training sessions, dates, cancellations, duration, costs were also discussed as well as the purchase of a trolley/cart for the claimant to transport her laptop and other essentials as her work involved visiting different locations around the hospital. She expressed her frustration at not having fulfilled her clinical role due to ongoing problems to do with the equipment. Ms Ahmed suggested that a period of phased return to work should be factored in. The claimant suggested some

administrative support would be advantageous, such as an Administrator who could share her workstation, type letters, check emails and be like an office support for her. She reported that she was coping well with her EDS.

187. Ms Small then reviewed the claimant's sickness/absence history since April 2011. From April 2011 to March 2012, the claimant had 51 days sickness absence; from April 2012 to March 2013, 23 weeks; from April 2013 to March 2014, 37 weeks; and from April 2014 to 18 June 2014, her sickness absence was ongoing. Ms Small explained that she was trying to manage a clinical service and it was operating at 50% capacity as the claimant was on sick leave. Shortage of staff was having a serious impact on the service and that the workload was not sustainable. It was a challenge to cover the claimant's post and there was a financial cost to the service. Kavi Gungaphal said that should the sickness/absence continue for a prolonged period then according to the Sickness Absence Policy, it could be escalated to stage 3. Ms Ahmed responded by saying that the claimant was a registered disabled person due to her EDS and dyspraxia and asked whether having regard to the respondent's equality and diversity policy, an equality impact statement had been carried out to support and recognise the claimant's disabilities. If not, she suggested that one should be done as soon as possible. Ms Small concluded the meeting by informing all those present that she would be leaving the Trust and that Dr Claire Taylor would be the claimant's line manager. Ms Lorraine Gilbert would be the interim manager and Ms Sue Field, Divisional General Manager, head of Nursing- Critical Care, would attend the review meetings. Ms Small agreed that Ms Field should keep the chain of communication simple and clear.

188. At the start of the meeting the claimant requested that she should record the meeting using a recording device as her dyspraxia restricted her ability to write and to take notes. Ms Small and Kavi Gungaphal did not agree to her request. (1573 to 1576)

189. In Dr Pattani's report dated 18 June 2014, sent in response to Ms Small's letter dated 6 June 2014 and following the report dated 12 May 2014, one of the matters the doctor made reference to was additional dyspraxia training. She wrote;

> "…… This has been a recommendation from Access to Work. Ms Rakova is familiar with using the software packages she has in place however she explained that the reason for the additional training is to co-ordinate and configure short cuts between the various software packages with a view to improving speed and efficiency. In my opinion without this additional training Ms Rakova could still do her clinical work but the additional dyspraxia training may improve the speed with which she undertakes her work. I have written to the Dyspraxia Coach to understand the exact nature of this further dyspraxia training as I am not an expert in this area. Once this information is available you and Ms Rakova can decide what additional value the training will add to in terms of the tasks that are needed to be completed within the work place. I

> cannot comment of this further without additional information from her Dyspraxia Specialist."

190. Dr Pattani also stated that it was her understanding that the Cellulitis was in the claimant's left foot and not her right foot. (1583 – 1585)

191. In relation to the issue of a Support Worker, Dr Pattani wrote:

> "…. I understand from Ms Rakova that this recommendation from Access to Work is due to the discussion around the backlog of administrative work that she feels is waiting for her on her return to work. Clearly I cannot comment on this as I have no access to information regarding the quantity and nature of her work. It is for that reason that I have suggested you try and clarify her workload, work content and any backlog of work to understand why a support worker has been recommended. Ms Rakova has her own summary of why she feels a support worker would be helpful which she can share with you and this may help you to decide if this is a reasonable request."

192. We make this observation that work for the claimant was mainly generated by her seeing patients and that if she was not at work, the work would not have built up. In other words, as we have already stated, it is difficult to see how a significant backlog of work could have developed during her absence. The nature of the work requires that the patients be attended to in a timely manner.

193. We accept the evidence given by Ms Joan Klein, MacMillan Lead Nurse for Cancer and Palliative Care, who stated in paragraph 6 of her witness statement in respect of the claimant's request for a Support Worker to help her adjust back to work and to deal with a backlog of administration, that there should not have been a backlog since the claimant was not seeing any patients during her absence and certainly not by June 2014 when she was still absent from work. The administrative duties would have been mainly generated by patient contacts. If the claimant was not seeing patients, she would have no notes to make or records to update. She might have some reading to do to bring herself up to date about departmental matters, but there would be no reason for her to expect any administrative work to be carried out.

194. We concur with her view because as from 2 December 2013 to June 2014, the claimant had been at work for a few weeks on a phased return programme.

195. Ms Sue Field, Divisional General Manager and Head of Nursing, Critical Care, Cancer and Outpatients, wrote to the claimant on 26 June 2014, a very detailed letter setting out matters discussed at the meeting on 18 June 2014. It is a useful document in that in summarised the adjustments to date and those being proposed. Ms Field wrote that the claimant had cancelled, at short notice, a Hands-Free training session scheduled to take place on 4 February 2014 and because insufficient notice of the cancellation was given to the trainer, the respondent was

obliged to meet the cost of the session. Three of the sessions were delivered at the claimant's home in April 2014, during the period of her sickness absence but the respondent was unaware that the sessions were conducted at her home. The claimant confirmed that she had received five two-hour sessions of dyspraxia training instead of four. In relation to IT training, the company, Hands Free Computing, provided her with six three-hour sessions from 16 December 2013 to 22 January 2014 and said that there was one outstanding session of Mindview Business Training.

196. She also noted that the claimant had said that ATW had failed to recommend training for the Livescribe Smart Pen and suggested that it should be included in the recommendations which followed the assessment on 20 December 2013. Ms Small was concerned that the Smart Pen should be encrypted and, if not, it would be in breach of issues relating to Information Governance and that the matter would be investigated by the Information Governance team. The claimant confirmed that the pen was encrypted.

197. Ms Field then listed those matters about which the claimant expressed some dissatisfaction. In relation to the electric sit to stand desk, the claimant was satisfied with the technical aspects of the desk but not satisfied with the location of it. It was confirmed there was no adequate space for the desk to move to different heights and it was reiterated that the recent refurbishment and expansion of the Chemotherapy Unit resulted in the reallocation of workstations for several of her nursing colleagues. Ms Field said that previously the claimant was in a position where it was possible to have interruptions from patients but that her new desk area was located in a corner of an office where there was no patient access and minimal traffic from clinical staff. It was difficult to further relocate her workstation as existing space within the unit did not allow the respondent to relocate two members of staff from the existing office which would have been necessary. Work was underway to explore the availability of space in other areas to cope with the increasing demand for space within the unit.

198. Ms Field recorded that the claimant was asked by Ms Small whether she had considered how she could manage completion of documentation and record keeping in clinical areas where there would be interruptions from staff, distressed relatives and noisy environments. The claimant confirmed that she would be able to have her laptop located on her laptop cart and that it would provide a temporary base for her to have access to patients' notes and information. Dyspraxia coaching sessions would be utilised to support her in adjusting to different work environments.

199. Ms Field then continued on the adjustments provided and we have explained, in square brackets, the purpose of the equipment and/or software. She wrote:

"Docuglide document holder and writing slope: you stated that the legs of this had been damaged in the office move. Sheila Small had not appreciated that these were two separate items. She confirmed that the writing slope had been replaced to the specification which you had requested. Sheila Small was not in a position to confirm if the Document Holder had been replaced separately and agreed to check this outside the meeting. [A docuglide holds the document at the same height as the PC screen to enable the user to glance left or right instead of up and down from the desk. A writing slope enables the user to write on documents which are at an angle.]

Dragon professional edition software with half day's training: you reported that there had been technical issues with the installation of the software and this resulted in a day's training. This software is no longer in use and had been replaced by Dragon Medical. [This software translates speech into typed words.]

Dyspraxia strategies: you stated that this was co-dependent on the installation of the software. You stated that five sessions were introductory and there was a need for ongoing training linked with the development of coping strategies for using the software effectively.

GT Netcom 2100 Noise Cancellation Headset: are now not needed as new computers have audial platform as standard.

Plantronics Savi W720 Wireless Headset: was satisfied until March 2013. This was replaced and the replacement was reported faulty in February 2014. This has since been replaced. [This equipment cuts out extraneous noise.]

Read and Write Standard Edition Software: need for upgrade as previous version not compatible with operating system. [This is helpful for people who read slowly and have difficulty retaining the information read. It highlights the word on a screen as they are read.]

Inspiration Software: this had been omitted from the log in error but you confirmed that you had completed this training. [This is an organisational tool for people with dyspraxia. It breaks down tasks into manageable sizes to assist in prioritisation, focus and communication.]

Mindmapping Software: you stated that there were delays in installing the software but then was not satisfied that it was appropriate for managing specific scenarios. [As above.]

Upgrade to Dragon Medical with 3 half days training sessions: you stated that there were problems with the software not working, there were problems with the microphone and there was distraction caused by the high level of background noise. [This software package recognises and translates medical terms in speech to the typed word.]

Mobility Trolley: needs lockable laptop cart. (This has since been purchased). [This transports the laptop and notes around the hospital.]

Dyspraxia Coping Strategies 8 hours tuition: you stated that intensive input was required to support your return to work – you stated that further support in establishing a management strategy would be beneficial. Dyspraxia training has

already been addressed earlier in this document and also features under ATW recommendations.

Mindview Software (public sector version): you stated that you require the business version of this. ATW agreed to replace and this was installed. You stated that 3.5 hours training are outstanding. [This is similar to Mindmapping.]

Read and Write Software (Gold v10): you cannot remember how much training was covered for this. You stated that the delays caused by the installation of Mindview Business software affected the training for this. [This is an upgrade on the Read and Write standard edition.]

Ergotron Neo Flex mounting arm for monitor: this had been damaged as a result of the move and whilst this had been replaced you were not satisfied with the model as it required dexterity of movement for the adjusting arm. Sheila Small explained that we had been waiting for the recommendations from ATW but since there had been a significant delay in the issue of these (20 December 2013 assessment – report received 17 April 2104) we had asked Posturite to issue us with a number of models so you could trial these and confirm which one was best suited to your needs. The trial had been arranged for 17 March 2014 to coincide with your return from annual leave but unfortunately this coincided with the start of your current long term sickness absence. [This equipment enables the user to move the screen closer to or further away from them.]

Reinstate lighting: Sheila Small confirmed the desktop lighting had been supplied and fitted. Whilst this was not a replica of lighting which had been supplied earlier (floor standing lighting), Sheila Small had checked with Hilary Myatt to confirm that this did meet H&S requirements. Ms Myatt had confirmed that this was acceptable to meet H&S requirements.

Elevation of Writing Slope: You reported that this had been damaged as a result of the previous office move. Sheila Small confirmed that this had been replaced in advance of the ATW recommendations. The new model was a more sophisticated model which allowed a higher range of elevation as requested by you.

Shopping Cart easy to maneuver and lockable: this has been procured by the Trust in advance of ATW recommendations. The specifications for this item had been supplied by you and the same was procured and is now located in the MacMillan Unit.

As a result of reviewing this information Rizvana asked if the IT department were closely involved in working with ATW to ensure that software is compatible with existing NHS systems. Sheila Small reiterated that there had been extensive support from the IT Workshop Manager in supporting the installation of the software as well as helping Maria with technical issues and trouble shooting. Sheila Small highlighted that a pattern was emerging as a result of repeated sickness absences which meant that the inability to sustain attendance at work did not allow for time to put training in practice. As a result of this any return to work was linked with an expectation that more/refresher training was required. This in turn affected the ability to resume the full responsibilities of the clinical role. This situation is not sustainable."

200. The letter referred to dyspraxia training requested by the claimant in her communication on 11 June 2014, in which she stated that it would help her to concentrate on present issues, assess challenges and how those challenges could be resolved. It would also help her establish a more effective way of working to cope with the stress of everyday work and that the training would allow her to make use of technology. Ms Field said that at the meeting it was explained that the Trust would still need to know what the dyspraxia sessions constituted in terms of number and duration. The claimant confirmed that it amounted to ten sessions. The cost per hour was £192 and that it was two hours each session, a total of 20 hours training. Ms Small asked what was included within the training which had not been covered in the previous sessions. The claimant explained the training was not different but a continuation and was aimed at giving her techniques to manage day-to-day issues. It worked in combination with the software training and was aimed at giving her hints and techniques around avoiding long-winded ways of using technology. It also helped her to prioritise her workload and manage on a day to day basis. Ms Field's letter also recorded that Ms Small had asked the claimant how she felt she would be able to conduct her work without further training and the claimant replied by saying that she would be able to perform without further training but it was important that the training was put in place to support her disability.

201. In relation to Hands Free Computing Software and Dragon Medical, Ms Field noted that in the claimant's correspondence on 11 June 2014, she stated that the software required regular upgrades which improved the working outcomes and that seven sessions would be needed. The only information provided by ATW at the time was that the Hands-Free Computing Software needed seven sessions at a cost of £294 per session. The equipment which the Trust had already acquired prior to ATW's recommendations, Dragon Medical edition 2 and Dragon version 12, would be at a total cost of £2,235.88. The claimant confirmed that the training required the seven sessions over three and a half days and that she would also require training on the Read and Write with Scanning, Mindview Business, Dragon Medical 2, Livescribe, the upgrades to Medical 2 and Dragon version 12 software.

202. When asked by Ms Small to explain the need to upgrade the existing software, the claimant said that Medical 2 had advanced to provide better interaction with other hospital uses to include Pathology, MRI and Radiology. Dragon version 12 allowed for easier navigation and also provided better sensitivity to make dictation easier. Ms Field was not exactly clear on what the new software/training would do compared with the old versions and how this would make it easier for the claimant to complete the requirements of her role.

203. In relation to the Support Worker, the only information provided by ATW was that they would contribute a cost of £13.50 per hour. In the claimant's 11 June correspondence, she wrote that the responsibility for recruitment lay with the Trust but suggested using those on the Bank as

an option. It was also noted that ATW stated that 260 hours' worth of support would be necessary, broken down into five hours, four times a week for three weeks. Ms Small asked the claimant to describe how she envisaged this role working. The claimant replied by saying that it would be time limited probably for four months duration to correspond with her return to work and would help her to adjust back to work and to deal with the backlog of administration. She was asked by Ms Small to define what she meant by administrative tasks to which she replied by saying that it was helping to put her folders in the right place on the shared drive, going through various databases and help with writing up letters which she had dictated. The person would be someone similar to a medical secretary who would be interested in working additional hours on the Bank. (1589 to 1600)

204. Following the departure of Ms Small, who left the Trust in June 2014, Ms Joan Klein was, thereafter, going to manage the claimant's sickness absence.

205. The claimant replied to Ms Field's request for further information on 13 August 2014, in a detailed response covering 17 pages. She set out some of the issues surrounding the IT equipment, training, the Support Worker, and her sickness absence levels. In relation to absence, she stated that the respondent did not have a Disabled Employee Policy and was, therefore, unable to differentiate between regular sickness and that which were directly related to disability. She asserted that most of her sickness absences were directly related to her disabilities. (1621 to 1638)

206. On 18 August 2014, she was written to by Rupal Patel, Payroll Officer, who informed her that with effect from 18 August 2014, her pay would be reduced to nil in accordance with the NHS Occupational Sick Pay Scheme. She would receive statutory pay at the rate of £12.39 per day until 2 October 2014. (1642)

207. In response to Ms Field's letter to Dr Pattani requesting a review of the claimant's fitness to return to work having regard to the diagnosis of Lyme's disease dated 28 July 2014, Dr Pattani reported that the main factor preventing the claimant from returning to work was residual fatigue from her recent health problem rather than her underlying health condition. The claimant had said to Dr Pattani that she had a new date for her in-patient rehabilitation programme at the Royal National Orthopedic Hospital which she missed in March 2014 and was on 15 September 2014 for three weeks. It was an intensive in-patient programme aimed at optimising her health having regard to her underlying health condition. (1643 to 1644)

208. In Dr Pattani's report dated 15 October 2014, she wrote that the claimant required abdominal surgery and her rehabilitation programme had to be postponed. Four weeks after her surgery she was making good progress. Her temperature and fatigue symptoms which were

troublesome were now settling. In the doctor's view the claimant would "be ready for her return to work in two to four weeks' time." The doctor recommended, in view of the lengthy sickness absence, that in preparation for the claimant's return to work, the following be considered:

> "1. A review of all her equipment to ensure it is in working order and ready for use.
>
> 2. A mutually agreed return to work plan with a gradual build up of her hours of work.
>
> 3. Would like to discuss with you the office layout and she has drawn up some plans which I suggest she shares with you.
>
> 4. She would like to discuss with you the dyspraxia training, supportive software training, administrative assistance and software upgrade as recommended by Access to Work for which I understand they will pay." (1649 to 1650)

209. Ms Klein had her first meeting with the claimant on 24 October 2014. What they discussed was summarised in her letter to the claimant of the same date. It was noted that the claimant visited the hospital and called at her office the previous day to review her workstation and had given Ms Klein a list of outstanding adjustments and training required. These were discussed in some detail and the claimant agreed to forward to Ms Klein any outstanding items in respect of her workstation. Ms Klein emphasised the importance of a clinical re-orientation as part of the claimant's return to work plan and suggested that she work for some time in a supernumerary capacity. The matter would be discussed with the claimant's direct line manager, Dr Claire Taylor. The claimant's outstanding dyspraxia coaching and supportive software training would only be requested once there was a firm return to work date. Ms Klein stated that she was waiting for the recent occupational health assessment on the date of the claimant's return to work and proposals for the phased return.

210. In relation to the claimant's request for a Support Worker, Ms Klein said that she had discussed the matter with Ms Field and that they agreed that the claimant should submit a copy of the duties and outline job description following which the matter would be further considered and a decision taken.

211. They also discussed the claimant's request to change the position of her desk and although Ms Klein understood, she did not believe that it was feasible at the time. Previously, when this was raised it was agreed that in order to move the desk it would result in the loss of desk space for some staff members. Ms Klein explained to the claimant that the cancer services team were exploring more space as some did not have an allocated office space. The claimant's request would be revisited once new office space became available.

212. Ms Klein recorded that the claimant had reviewed her laptop trolley and confirmed that it was what she had requested but noted that she also requested an all-in-one stand to go with it. She was advised to submit details for it to be actioned. It was confirmed that the claimant had tried the trolley with a Health and Safety Advisor and it was effective for her despite Ms Klein's concerns about the potential for injury in manipulating it through double doors. It was further noted that the actions to date were: a new data point requested to address the outstanding telephone requirements; email to be sent to IT requesting assessment of Plantronics Wireless Dictaphone Olympus, Scanner software and for the Adobe to be updated; Health and Safety to be contacted to assess the claimant's workstation for a noise reducing screen.

213. Ms Klein recorded that she said that the respondent would order a monitor arm for the claimant to assess on a trial basis and would purchase if satisfactory when a return to work date was confirmed. As regards the Livescribe Smart Pen, the claimant had stated that it was fully encrypted in line with Information Governance guidelines. Ms Klein and the claimant agreed to meet on Thursday 6 November 2014. (1658 to 1659)

214. From the letter it would appear that all outstanding matters in terms of facilitating the claimant's return to work were discussed and were addressed.

215. They met again on 6 November. What they discussed was confirmed in a letter sent to the claimant by Ms Klein on 6 November. From that contemporaneous record they again discussed outstanding training. Ms Klein confirmed that she was going to action the claimant's outstanding items and thanked her for the information regarding the equipment. They discussed the feasibility of continuing to use the Livescribe Smart Pen as it raised issues about Information Governance and encryption. Mr Simon Howarth, Trust Caldicott Guardian, would examine the equipment and confirm whether the claimant could continue to use it.

216. Ms Klein said that they were waiting on Dr Pattani to advise on the claimant's return to work plan and once received Dr Taylor would be asked to draw up a plan incorporating clinical orientation and IT software as well as dyspraxia training. The purpose of which was for the claimant to reach full Clinical Nurse Specialist duties within a reasonable timeframe, taking into account her needs and the needs of the service.

217. Ms Klein repeated that the dyspraxia coaching and supportive software training would only be implemented once there was a definitive return to work date. As regards administrative support, she said that she was waiting further information from the claimant about the duties and job description of the Support Worker.

218. Ms Klein re-iterated that it was not feasible at the time to change the position of the claimant's desk. She enclosed a copy of the Health and Safety assessment completed in January 2014. It was restated by Ms Klein that the cancer services team were currently exploring more space as several members of staff did not have any allocated office space. The matter would be revisited once new space became available.

219. In relation to those actions which were completed, Ms Klein noted that they included:

> "New data point created to provide your own phone with a unique extension to avoid interruption.
>
> Health and Safety contact to assess your workstation for a noise reducing screen – recommendations received will need to be source and purchase."

220. Ms Klein further stated that she would follow up with IT to request an assessment of Plantronics Wireless, Olympus Dictaphone, Scanner software and for the Adobe to be updated. She would also discuss the Dragon edition 2 version 12 with IT and arrange to purchase if it was approved. She would need some further information about the level of IT support which the claimant would require and would order a monitor arm for the claimant to assess on a trial basis once there was a return to work date.

221. In relation to the claimant's three weeks' in-patient rehabilitation, Ms Klein asked for further information on when it was likely she would be an in-patient at the hospital to enable the respondent could plan around it. (1663 to 1665)

222. During the hearing we were taken to the claimant's office plan. Having heard the claimant's evidence, we preferred the evidence of Ms Klein who told us that the claimant's plan was not to scale and that if they moved her desk to where the claimant wanted it to be, there would only be a gap of 45cm between her desk and the desk nearest to it. To comply with the fire safety regulations for access and egress, there had to be a minimum of 60cm and a recommended 90cm between desks. The dimensions of the office were 5metres by 3.5metres. (1639)

223. The claimant emailed her job description for the Support Worker to Ms Klein on 18 November 2014. (1675 to 1678)

224. She wrote to Ms Klein on 21 November 2014, thanking her for her letter and her agreement to take steps to "resolve the numerous difficulties I face with regard to having essential equipment and support in place at work." She reiterated what Dr Pattani stated, that as part of the return to work plan, it would not be feasible for her to undertake all clinical duties until all appropriate adjustments were in place. The claimant stated that Ms Klein having received the Support Worker role profile, she would now

be in a position to discuss the recruitment of such a person. Regarding her equipment needs, she understood that the Livescribe Smart Pen would be reviewed by Mr Howarth and if it was not possible to use it, further contact would need to be made to ATW to enquire about a suitable replacement.

225. The claimant understood that she would be provided with a unique telephone extension to be placed on the right hand side of her desk. She also understood that she would be able to keep her old one. She asked for further clarification on whether the telephone had a flashing function as they had agreed that it would be suitable for her needs. She stated that in addition to the items listed in Ms Klein's letter there was still the outstanding purchase of the Posturite Document Holder. She acknowledged Ms Klein's view in relation to changing the position of her desk which was recommended by the dyspraxia trainer and that the matter would be reviewed. She asked for a copy of an assessment of the layout of the office carried out sometime after January 2014 and for further information about working as a supernumerary and reporting strategy within the team to enable her to comply with all requirements.

226. As regards in-patient rehabilitation at the Royal National Orthopedic Hospital for her Ehlers-Danlos Syndrome management support, it had been cancelled and she was waiting for further information. (1736 to 1738)

227. In Dr Pattani's report dated 2 December 2014, she stated that in her opinion the rehabilitation plan in her letter dated 7 November 2013, was still valid and recommended that it should be implemented. She understood that the claimant would return to all aspects of her work with the use of the equipment which would be made available to her by the end of her rehabilitation programme.

228. In relation to further adjustments, she stated that provided the content of the previous rehabilitation programme was followed, there were no new adjustments required. As regards dyspraxia training, this was a management decision. Taking into account the advice Dr Pattani had previously given in relation to the likelihood of further absences, it was difficult to predict as the claimant "absences have been due to her chronic health condition but also more recently, unpredictable health conditions not directly related to her underlying health problem." She stated that one predictor of her future sickness absence could be the past record.

229. Dr Pattani concluded that she had not made a further appointment to review the claimant. (1740 to 1741)

230. On 6 November 2014, the claimant's GP, Dr Peter Kraus, wrote to Ms Klein stating that he was planning to send the claimant back to work on Monday 8 December 2014 and hoped that Ms Klein would be able to facilitate the purchase of the necessary supportive software, training and equipment to support the claimant's disability. (1666)

231. The claimant and Ms Klein agreed to meet with the claimant on 5 December 2014 to discuss her return to work on 8 December 2014. A summary of what was discussed in a letter sent to the claimant dated 29 December 2014. What was recommended by way of a phased return to work by Dr Pattani was considered and a draft plan was copied and given to the claimant who requested that she should work alternative days. Ms Klein would wait for confirmation from her regarding any changes to the plan. Ms Klein said that the recommendation by ATW for a dedicated Administrator had not been agreed by the Trust. In view of the additional adjustments yet to be implemented, it was necessary for the benefits arising from those adjustments to be first assessed before revisiting the request when the realised benefits were known. The claimant's phased return to work as recommended by Dr Pattani, was: week one 25% (10 hours); week 2, 30% (12 hours); week 3, 50% (20 hours); week 4, 60% (24 hours); week 5, 80% (32 hours); and week 7, 90% (36 hours). The hours were to include breaks. The claimant requested to defer her return to work to 5 January 2015 as she wanted to take some of her accrued annual leave. This was agreed.

232. Ms Klein said to the claimant that in accordance with the respondent's Sickness and Absence Policy dated 4 February 2010, her continued sickness absence at the current level was not sustainable. In her letter she set out the history of the claimant's absence from April 2009 to the date of their meeting. She noted that from April 2009 to March 2010, the claimant was absent for 89 days due to back pain and abdominal pain; from April 2010 to March 2011, 24 days due to back and joint pains, dental problems; April 2011 to March 2012, 51 days to fatigue, EDS and lower back pain/joint pain; April 2012 to March 2013, 23 weeks, back pain and ankle fracture; April 2013 to March 2014, 37 weeks, ankle injury, Cellulitis right foot; and April 2014 to 5 December 2014, 35 weeks, fever and fatigue, Lyme Disease.

233. Ms Klein said that in Dr Pattani's opinion regarding the likelihood of further absences that it was difficult to predict as some of the claimant's absences had been due to her chronic health condition but more recently, there had been unpredictable health conditions not directly related to her underlying health problem. She repeated that the doctor had stated that one predictor of future sickness absence can be the claimant's past record and informed the claimant that the Trust may need to consider proceeding to a stage 3 hearing under the Sickness Absence Policy in view of her high levels of sustained absence over recent years. She stated that the claimant would be a supernumerary for at least the first four weeks working alongside a team member. Her work would include attendance at multi-disciplinary team meetings, outpatient clinics and ward reviews. After that period, independent clinical duties would be phased in as well the equipment and training needs identified in a schedule set out in Ms Klein's letter. She stated that the claimant would have weekly meetings with Dr Taylor who would plan her weekly objectives and monitor progress against those. Her

return to work plan would be a dynamic process guided by her weekly achievements. In the schedule Ms Klein gave an account of outstanding adjustments, recommendations and requests and who would be responsible for actioning those and by what dates.

234. Apart from the actions already completed and the change of desk position which was under review, all outstanding requests, adjustments recommendations, would be actioned on the claimant's extended expected return to work date, namely on 5 January 2015 but not the Support Worker.

235. Ms Klein asked the claimant to confirm that Read and Write and Mindview Business software requirements were already in place. She was aware that the Plantronics Headset was already in place and noted that the claimant had mandatory training outstanding including Safeguarding Children Level 2 and Health and Safety training. She further noted that the IT training the claimant required as detailed in her list was quite extensive. She reiterated what they discussed and documented in previous correspondence, that her phased return to work was much about supporting her to return to the full clinical duties of a Clinical Nurse Specialist. They agreed to meet again on 30 December 2014. (1755 to 1759)

236. At the meeting on 30 December 2014, the claimant requested a further postponement of her return to work from 5 January to 26 January. This was to attend the rehabilitation programme at the RNOH to which Ms Klein agreed and agreed to the claimant's request for changes to the return to work plan. There was a further discussion about the Support Worker. Ms Klein reiterated that it was necessary for the benefits arising from the pending adjustments to be assessed before revisiting that issue. The revised return to work diary plan took into account the claimant's request and her medical appointment on 9 February 2015 and is a detailed document covering four pages. (1760 to 1765)

<u>2015</u>

237. In Ms Klein's letter to the claimant dated 26 January 2015, she informed the claimant that her request for a further extension of her annual leave had been granted and acknowledged receipt of the 12 January 2015 letter sent by RNOH to the claimant in which the claimant was informed that the intensive care treatment would commence from 2 February 2015 for three weeks. Ms Klein confirmed that the claimant would be on planned unpaid sick leave from Monday 2 February for the three weeks. She stated that Dr Pattani had confirmed that the claimant would not need to be reviewed prior to her return to work and that she was medically fit to undertake her duties. (1769)

238. The claimant returned to work on 24 February 2015, 11 months after the start of her sickness absence and had a return to work meeting with Dr Taylor on 27 February 2015. She said to Dr Taylor that she intended

to use the trolley to transport her laptop once she had her own clinical caseload which was planned after four weeks. The trolley would be wheeled into the clinic rooms, ward bays and could also be used as a table to rest her pen and splints.

239. A Biomechanical Podiatrist advised that the claimant should wear only certain brands of trainers to allow her to walk comfortably as she was unable to wear shoes due to lack of support for her feet. They discussed her footwear as she was wearing at the time of her return, a pair of blue coloured trainers and was aware that they were not in keeping with the respondent's uniform policy which states black shoes should be worn. She had asked Stanmore Hospital for a Specialist Podiatry referral as they may be able to customise her footwear.

240. The claimant was informed that the process for reporting any absences from work or delay in arriving at work, was to phone either Dr Taylor or Ms Klein. She was also aware that her direct line manager was Dr Taylor. The claimant said that in respect of IT issues, she would call the IT Helpdesk directly. She was informed that Ms Klein would be responsible for procurement of any IT equipment and software.

241. The claimant was given a copy of the return to work schedule and was informed that she would be meeting with Dr Taylor on 20 March. She was told that she had used all of her current annual leave entitlements including time accrued on sick leave up by 31 March 2015. No more annual leave could be taken until the start of the new leave year commencing 1 April 2015. (1780 to 1781)

<u>Finger splints and had braces</u>

242. The claimant was by now wearing finger splints and hand braces. An email from Mary Grummitt, the Lead Acute Infection Prevention and Control Nurse, dated 6 March 2015, advised Dr Claire Taylor that,

> "The gloves that are worn must cover the whole splint, there are disposable gloves available that have a longer cuff which can be obtained via the Suppliers Department if necessary.
>
> The splints should be cleaned between patients. The guidance on decontamination from the manufacturer of the splint should be checked to ascertain which solutions are recommended however, I would advise that between patients they should be wiped thoroughly with detergent wipes rather than being dropped in the sink, if the patient has an infection chlorine wipes should be used.
>
> I hope this answers your query, please contact me if you wish me to discuss further." (1787)

243. The previous advice to the claimant was to wash the splints/braces between patients using 1% solution sodium hypochloride but it irritated her skin. This changed in March 2015 when Dr Taylor having sought Ms

Grummitt's advice, informed the claimant that she could clean the splints/braces with wet wipes and wear gloves.

244. The advice again changed in May 2016, by Ms Diane James, Ms Grummitt's replacement, who advised that the splints and braces could be washed when the claimant washed her hands with normal soap. (2423 to 2424)

245. The claimant's concern was that over the years she had been given conflicting advice on the cleaning of her splints and wrist braces. In our view, it was reasonable, at all stages, for the Dr Taylor to follow Infection Control advice.

Stage 2 meeting held on 20 March 2015

246. In a letter dated 27 February 2015, sent by Ms Klein to the claimant, the claimant was invited to a stage 2 formal review meeting, four weeks after her return to work. The review meeting to take place on 20 March 2015. (1778 to 1779)

247. At the meeting Dr Taylor was in attendance along with Ms Klein, Kavi Gungaphul, Margaret Adesakin, Human Resourses Administrator, the claimant and Ms Ahmed**.** Ms Klein informed the claimant that she had taken 287 days sickness absence over the previous 12 months and an overall total of 1032 days since joining the Trust in 2003.

248. We are of the view that Ms Klein, in calculating the claimant's absences, had taken into account weekends when she assessed the claimant as having taken 287 days over the previous 12 months. The normal working week is five days and over a year it is 260 days. In any event, the claimant's absence over the previous 12 months was lengthy.

249. Ms Klein explained that the Trust had concerns about the claimant's physical capability to undertake the role of a Clinical Nurse Specialist, Colorectal Cancer. They were based on information from the claimant and observations and included: what the claimant said was her inability to answer a standard telephone call due to the risk of dislocation; she found it difficult to maintain a sitting/standing position for a long time while seeing patients, as observed in practice and based on what she said; and whether she was able to respond physically to any emergency situation, for example, cardiac arrest having regard to the risk of dislocation and injury. The claimant also raised concerns that her disabled parking space was no longer available and was required to walk up three steps which she was not physically able to do. The alternative parking space was too far and had made enquiries about an alternative parking space. Ms Klein recommended that she be re-referred to Occupational Health to which the claimant agreed. Ms Ahmed alleged that previous managers neglected the claimant's condition/illness. The claimant explained that when she broke her back she asked for a period of unpaid leave which was refused by her

previous manager. Ms Klein could not assist as she was not in post at the time.

250. They then discussed that due to the very high levels of sickness absence, the Trust would be at this stage reviewing her overall absence under stage 3 of the Sickness Absence Policy 2010 and that this may result in the termination of her employment under capability through ill health. Ms Ahmed expressed some concern that the Trust was moving towards a stage 3 final review and asked that it be deferred as it was not warranted at that stage as the claimant had returned to work and was due to be re-assessed at the end of the phased return period. It was agreed that they would meet again following the Occupational Health review. (1809 to 1811)

251. On 2 April 2015, the claimant emailed Dr Taylor stating the following:

> "I contacted the IT Department on 30 March 2015 however the manager of IT Karim was not at work despite last week's agreement. As you know I reported already outstanding jobs to the IT Department the previous week. I chased them again on Tuesday and Wednesday and I was reassured that the engineer would come to me as soon as they become available however nobody contacted me. I did report this to Joan on Tuesday.
>
> The most pressing issues regarding the computer:
>
> Bluetooth Headset has an unstable connection with Dragon.
> USB Headset has no connection with the computer. At present time I am not able to use my computer and the supportive software on it. I will contact the IT Department again on Tuesday next week as per your advice." (1808)

252. In Dr Pattani's report dated 12 May 2015, she answered the questions put to her by Ms Klein. Firstly, in relation to the claimant's inability to use a standard telephone having regard to potential risks in a ward setting and particularly in an emergency, as the claimant referred to her being at risk of joint dislocation using a standard phone, Dr Pattani responded stating that the claimant could use the standard telephone on the ward for relatively short conversations and in emergency situations. For lengthy conversations, she had a telephone with a headset in her office. For short telephone calls on the ward, it would not cause dislocation of her wrist joint and that her physiotherapist had advised her to hold the handset of the telephone to the ear with the opposite arm, that is to use the right arm for the left ear and vice versa. This would require less effort of the wrists, fingers and shoulders and would ease the discomfort in her hands. In summary, Dr Pattani was of the opinion the claimant could use a standard telephone handset on the ward in emergency situations or for short telephone calls.

253. Secondly, as regards the claimant's inability to maintain a position while in consultation with patients, the claimant informed Dr Pattani that she would sit for at least 30 minutes, if not longer and that it was no longer a problem maintaining a position while in consultation with patients.

254. Thirdly, potential risks to the claimant in managing an emergency situation, for example, a patient collapses or experiences cardiac arrest, Dr Pattani wrote that the claimant had had her cardiopulmonary resuscitation training and certificate and had said that over the past 15 years of practice she had not had to deal with an emergency situation of that kind except once in the hospital corridor. She was not, however, working alone and had access to colleagues who would be able to support her. She would be able to take part in the resuscitation of a patient although not able to sustain a cardiac massage for any length of time. As part of the team she would be able to manage in any emergency situations without putting herself at a significant risk.

255. In the final part of Dr Pattani's report she wrote:

> "Providing all her equipment is available and her training is completed and up to date I see no medical reason why she cannot meet all aspects of patient care in line with the NMC Code of Practice. Clearly, if moving forward there are specific areas she struggles with please send me the details and I can reassess this specifically. Again regarding her job description, my opinion is that she is fit for all aspects of role. The only concern might be if she is working across the different Trust sites and she would not have her equipment. If this situation arises we will need to address it.
>
> Ms Rakova has checked the content of this letter for factual accuracy and has given me permission to release it to you." (1839 to 1840)

256. In ATW's letter sent to the claimant dated 4 June 2015, they stated that they were not able to fund the cost of the purchase of additional splints as this was a Health and Safety matter and the Trust's responsibility. Also in relation to a coloured printer, it was standard equipment and should be supplied by the respondent as her employer. (1856)

257. A stage 2 meeting was arranged initially for 5 June 2015 but had to be cancelled as the claimant was unable to obtain union representation and had IT training. It was, therefore, rescheduled for 16 June 2015 but again had to be postponed as the claimant was unable to attend due to her union representative not being available. It was eventually held on 1 July 2015. A summary of the meeting was sent to the claimant by Ms Klein in her letter dated 24 July 2015. In attendance were Ms Klein, Kavi Gungaphal; Dr Taylor; Tanvi Ghia, note taker and Ms Sandra Williams from Unison.

258. During the meeting the claimant said that there were still issues with the software updates and the Livescribe Smart Pen and that she would require training on how to use the pen and that she needed special paper for it. She contacted a company and was advised that an alternative to the recommended paper was that she could use standard paper but it would require the use of a colour printer with a high resolution. The claimant said that ATW was willing to provide training but not a printer. The training would need to take place over two

sessions, a total of six hours and that 12 months IT support for software would also be provided by them. Ms Klein informed her that the Trust had no colour printers available in cancer services.

259. The claimant also raised issues about the PC monitor arm with Posturite. She had received items for her trolley and had lodged a complaint with Posturite regarding her chair and the issue with a loose screw had been resolved temporarily. She also said that her foot stool was wobbly and the screen was not stable. Ms Klein informed her that the new monitor arm had been requested on 1 June 2015 and that she would chase the matter up. As regard noise reduction, the claimant said that Health and Safety had recommended a floor base buffer board. She had obtained a quote for a screen booth as it would reduce noise pollution. She wanted a booth around her desk to reduce ambient noise in the office enabling her to concentrate more on her work.

260. Ms Klein explained that the decision to provide a Support Worker was delayed in order to understand specifically what support would be provided by the worker in addition to the other adjustments. The claimant explained that the role of the Support Worker would be to assist her with administrative planning, including typing. She also said that support in the evenings would help her prepare for the following day and during the day. Outlook would be fully utilised to ensure that she did not have to take work home. The support worker would also be able to help with some of her training requirements but she was unable to give details. Ms Klein said that the matter would be reconsidered at a later date.

261. Dr Taylor said that while IT had not been, from the beginning of June, up to speed, the claimant had been doing her own dictation. The claimant responded by saying that training was taking time on Dragon software and she had to register words correctly and particular names made it hard to register on the Dragon's software. It also took time to set up the microphone to pick her voice properly.

262. When she was asked what else was outstanding, she replied that her outpatient appointments for her disability had been discussed with Dr Taylor. Ms Klein informed her that it was expected that appointments would be booked at the start or at the end of the day, if possible, to avoid service disruption. The claimant had previously requested condensed hours to facilitate many of her appointments which took place on Thursdays. She said that on occasions there was no flexibility as she would be offered last minute investigations/appointments. Since her return to work she had three appointments and had made up the time. She said that the team structure had changed and she would like her colleagues to feel informed and included about her medical condition. Ms Klein informed her that Dr Taylor had been promoted to Nurse Consultant and that Ms Manju Khanna, had been promoted to Senior Clinical Nurse Specialist. Also, Ms Sarah Pitcher, had been

promoted within the team to Band 7 and that another work colleague, Nicoleta, had left the team.

263. The claimant said that she had six out of ten sessions of dyspraxia training outstanding and that the training dates were agreed with Dr Taylor. In relation to managing her workload, although the patients' cases were complex and could be quite challenging, her counselling and clinical supervision were helping her to cope. It was agreed that Dr Taylor would arrange one-to-one meetings with her.

264. The claimant then said that additional stress was caused by having to work from home as she was unable to dictate into GCIS. That statement caused Ms Klein some concern as she was unaware that the claimant was working from home and did not expect this practice to continue once the IT equipment were fully in place. Dr Taylor said that the claimant working on Sunday in the office was something she did not give approval to. The claimant said that this was a short-term solution and that she would inform security when she would be working alone. Ms Klein informed her that she would need to discuss working alone as the respondent had a responsibility for her wellbeing and rest time and would continue to support her current outstanding additional adjustments. The purpose of the meeting was not to discuss her capability or her clinical work but to support her through sickness in line with the Sickness Absence Policy.

265. Ms Klein then recorded what she said in the letter;

> "I stated that since our last meeting and with the letter you had received I explained that I may have proceeded in moving your case to a stage 3 of the Sickness Absence Policy. With the following information received from OH, I am now in a better position to make this decision. I stated at the meeting that I will now be formally writing a management case that will be presented to a panel for consideration at stage 3 final review hearing.
>
> This decision has been made due to your high level of absences that have occurred in the last three years; 2012, 133 absence days, 2013, 272 absence days, 2014, 266 absence days. Given the fact of these number of days absences, I am in a position where I would like a panel to review your absence history.
>
> I stated that you have now been at work since February 2015, without any further absences and I commended you in this improvement. I believe that as a manager I think I have done everything within my capabilities to support you and I believe that it would be better for a panel to consider your case and provide you with their decision. I stated that given your overall work history since employment 2006 you have accrued 983 absent days on 27 separate occasions."

266. The claimant's representative questioned why Ms Klein had gone back to 2006 as the claimant had started work prior to 2006. She was informed that 2006 was the first time the department recorded the claimant's sickness. (1876 to 1980)

Promotion

267. It is the claimant's case that the respondent places the onus on individual employees to apply for promotion and/or redeployment. She asserted that it should have actively explored what steps could be taken to support her in seeking promotion. In her evidence before us she said in paragraph 119 of her witness statement, that despite completing a Masters Degree in Advance Nursing Care in Gastroenterology at Kings College London, she was never encouraged nor supported to apply for a more senior banded role but her nurse colleague, Ms Manju Khanna, was encouraged to apply.

268. Dr Claire Taylor was appointed in 2012 to a Senior CNS role. The claimant said that reasonable adjustments were not in place in 2012 and she was not told verbally about her previous role that had become vacant although she knew that the advertisement had been published. Though she could write and type, she felt that she was at a disadvantage and would be unsuccessful if she applied. She said that over the years she had lost confidence and was worried that if she applied for the job and was successful, her "invisible" disability would not be recognised and that she would be dismissed in due course. She felt that she had to be working with her equipment for at least six months before she could apply for promotional positions.

269. We find that the claimant was aware of the advertisement but chose not to apply. Ms Small told the tribunal and we accepted her evidence, that as someone who would be on the interview panel, it would not have been appropriate to have a conversation to proactively encourage a member of staff to apply for a vacant post as this would lead to being accused of bias. The claimant knew about the Band 8A role in 2012, but did not discuss it with her.

270. In relation to the Band 8A position in 2015 that had become vacant, Ms Khanna gave evidence and we found her to be a credible witness. She said that she first heard about the role because one of her colleagues had mentioned it to her as it was coming up as a vacancy. Dr Taylor was her line manager and she, Ms Khanna, wanted to discuss the job with her. Dr Taylor refused to engage in a discussion about the role because she was the "first handler" that is she would be holding interviews and did not want to appear to be doing Ms Khanna a favour. Ms Khanna then spoke to the claimant who had returned from sick leave and said to her that she was thinking of applying for the position but would not apply if the claimant applied. The claimant responded by telling her that she was not going to apply although she was aware of the vacancy and encouraged Ms Khanna to apply instead. The claimant told her that as she had just returned from a period of sick leave and having regard to her sickness absence record, she was unlikely to get the vacant position. She then helped Ms Khanna with the presentation she had to do for the interview. Once it was known that

Ms Khanna was successful in her application, the claimant sent her flowers to congratulate her on getting the position.

271. We, therefore, find that there was no encouragement to Ms Khanna from the respondent to apply for the position nor was there an obligation to do so. On both occasions the claimant, highly educated and experienced, consciously made the decision not to apply for the vacant posts.

272. Regarding the Support Worker, on 29 July 2015, the claimant forwarded to Ms Klein the job profile. (1890 to 1893)

273. This was responded to in writing by Ms Klein on 4 August 2015, who wrote that having contacted ATW, it was already too late to get funding for the Support Worker and that there was no evidence that the funding had been extended. She referred to Dr Pattani's opinion on the need for a Support Worker, namely "the idea of all the adjustments so far is that Maria can continue to work independently at her level of expertise." Ms Klein queried some of the matters documented in the Support Worker profile, such as, "help with cleaning your trolley." On IT training, she acknowledged that ATW had confirmed that they would be funding a further ten sessions at the claimant's request. Ms Klein asked the claimant to confirm what they were for and how long each session would last. (1894)

<u>Lyme disease</u>

274. During the period from March 2014 to December 2014, the claimant attributed her absence partly to the "confirmed" diagnosis of Lyme disease and not to cellulitis as she had previously stated. We noted, however, from the report prepared by Dr Alan J Hakim, Consultant Physician and Rheumatologist, dated 12 August 2015, that the claimant had not been diagnosed as suffering from Lyme disease or from any other infectious diseases as all the antibodies were negative. He wrote,

> "In February 2014 Maria was treated for severe cellulitis and suspected Lyme disease following an insect bite whilst on a trip to South America. Subsequently she was referred to Dr Buckley [Consultant in Infectious Diseases and Intensive Care Medicine] who investigated her extensively and concluded that Maria did not have Lyme disease or other infectious disease, as all the antibodies were negative. (1900 to 1901b)

275. The fit notes relevant to the period of absence from March to December 2014, refer to "temperature symptoms" in the period from April to November 2014 but no reference to Lyme disease. We further find that a copy of Dr Hakim's report was sent the respondent's Occupational Health Department and to the claimant. The claimant later wrote in her letter dated 13 August 2014, to Ms Sue Field, the following:-

> "At the time of the meeting my understanding was that the test results for Lyme disease had been completed and this may well have contributed to the confusion that my blood tests were positive for Lyme disease." (1623)

276. Dr Taylor conducted the claimant's appraisal on 7 September 2015 during which they discussed her workload, her performance and the management structure. In relation to her workload, we find that Dr Taylor had given her a reduced workload and although she was more experienced, her workload was the same as a newly qualified Band 7 Nurse Specialist. In reality, she was doing less work than her colleagues. Dr Taylor was aware from her work in the department and from discussions with her colleagues, that the claimant would often devote a significant amount time to some patients to the detriment of others. She noted, in particular, that the claimant had attended the memorial service for one of her patients in June 2015. This was not usual practice in the team. W further find that the claimant's workload was also lower than her colleagues throughout 2015. In the Department's Annual Report, she saw 21 new patients in the year, whereas her Band 7 colleague, Ms Sarah Pitcher, saw 98. Ms Khanna saw 80 and Dr Taylor saw 101 complex patients. (page 2364)

277. In addition, the claimant recorded 530 interventions in that year which was lower than most of her colleagues. Ms Deborah Smith joined the team in September 2015 and recorded fewer interventions, 342 but she only started seeing patients in the last quarter of the year. Ms Pitcher recorded 1207, Ms Khanna 1439 and Dr Taylor 2152. (2365)

278. Dr Taylor explained to the claimant during the appraisal meeting that she had reviewed 20 of the claimant's patients and noticed that a pattern emerged of the claimant losing contact with many of her patients after the initial contact and that she was devoting a significant amount of time to three or four patients. She was spending, on occasions, an hour to two hours with one patient which left little or no time to deal with her other patients or it meant that they would have to be seen by her colleagues. It was also noted by Dr Taylor during the annual appraisal that she had attended many training sessions over the previous six months which took her away from other aspects of her role. In addition, she experienced technical difficulties with her IT equipment, in particular, her headset which made it very time consuming for her to complete her dictations and record patient interventions in a timely and understandable way. She spent a lot of time arranging training, sourcing IT equipment and trying to set up new working systems, all of which made it difficult for her to spend as much clinical time in the service as the respondent would have liked. It was acknowledged by Dr Taylor that it was a frustrating time for the claimant but that the issues raised were all addressed and as the IT issues occurred the respondent worked as a team to try to support her as much as possible to help her overcome any difficulties in a timely manner. The funding and practicalities involved in reducing noise levels further were yet to be resolved. It was further noted that one-to-one sessions had taken place over the previous six months with further sessions planned but did not take place as the claimant was either unavailable attending health appointments, on training, on leave or did not reply to the invitations. Dr

Taylor said that she had discussed with the team, at a meeting, how the complex cancer service had changed over the previous year and how, since April, her role, that is Dr Taylor's, was focused primarily on clinically supporting complex cancer patients. The claimant did receive an invitation to the meeting but was unable to attend the meeting. Dr Taylor explained that Ms Khanna would supervised the claimant on a day-to-day basis and that Ms Klein would manage the sickness absence process. (1914 to 1925)

Stage 2 review meeting held on 16 September 2015

279. A stage 2 long term sickness absence review meeting was held on 16 September 2015 with Ms Klein and the claimant. The outcome of this was summarised in Ms Klein's letter dated 2 October 2015 sent to the claimant. It was noted that there was no reported sickness absence in seven months from 23 February 2015. Accordingly, the respondent would not be moving to stage 3. However, the claimant's absence would continue to be monitored. They discussed outstanding equipment requirements including access to a suitable printer for her Livescribe Smart Pen, headset problems and IT software issues. Ms Klein confirmed that the claimant was being supported by her and her team in resolving these outstanding issues. Tanvi Ghia, Team Administrative Support, was also assisting in the practical resolution of outstanding equipment issues. The matter of the Support Worker was discussed as well as a noise reducing booth. Ms Klein stated that she had confirmation from Hilary Myatt, Health and Safety Advisor, that the noise reducing booth would cause minimal impact on the other staff using the office but funding for it needed to be addressed as this was not an ATW recommendation and the approximate cost was in the region of £3,000 including value added tax but she did not have a budget to cover the purchase, however, ATW had requested that they conduct a workplace assessment to review the booth following the claimant's approach to them for funding. She stated that the respondent would wait for the outcome before coming to a final decision.

280. In relation to the Support Worker, Ms Klein wrote that she received an email confirming extension of funding but was still looking into the matter. The respondent needed to establish the remit and how the post would be conducive to the claimant and the department. She was still unclear about what the claimant required this person to do and again repeated what Dr Pattani had written that with all the adjustments provided, the claimant should be able to fulfill her entire role once all the training had been completed. (1946 to 1947)

281. The claimant wrote to Ms Klein on 3 October 2015 with reference to Ms Klein's stage 2 outcome letter dated 24 July 2015. She stated that as at 24 July 2015, she had not received training on the Livescribe Smart Pen and her mobile headset for Dragon Medical edition 2 was not working. She raised the issue of the purchase of a Nautilus Booth to reduce the

noise and the provision of a Support Worker. She was still unclear as to the hierarchy and role of her line managers. With reference to disability related absences and the respondent's policy, she wrote;

> "I am unclear why the Trust decided to forward this to stage 3 particularly in view of the fact that recommendations from Access to Work are still not in place and my sick leave record has considerably improved. I believe that this is contrary to the Trust Policy.
>
> It is also unclear to me as to why the Trust decided to measure my sick leave in the last 36 months rather than the last 12 months as described by the Sickness Absence Policy 2015 (6.2). Furthermore, there is a clear recommendation in the Sickness Absence Policies of 2010 and 2015 that reasonable adjustments need to be in place before the case is referred to stage 3 (7.2)."

282. The claimant then gave an account of how her absence had been managed since February 2008 to 26 June 2015 as well as her reasons for a Support Worker.

283. In relation to a Support Worker she wrote the, "..It would allow me to carry out my job more effectively. It would have a positive effect on my timekeeping in that it would prevent me from staying behind to finish my work or even having to take my work home." (1948 to 1954)

284 ATW conducted a holistic workplace assessment on 14 October 2015 and noted that the claimant was suffering for EDS, dyspraxia and dyslexia, but the dyslexia had not been confirmed. It was further noted that some adjustments were in place. They recommended that there should be additional Dragon training, four half day sessions; additional Mindview training, four half day sessions; additional Livescribe training, half day; and the provision of the desktop printer for her Livescribe Smart Pen as the printer would allow the claimant to print her own A4 forms and documents which could be use in conjunction with the pen. The claimant would be able to use the printer to print her own note pad which could be used as an alternative to the post-it notes which were being purchased by her. It was also recommended that she should have an Ergo split wrist support. This would be a twin split keyboard wrist support to compliment the Gold Touch split keyboard being used when at her workstation. This support recommended provides two wrist cushions that can be positioned in line with the keyboard segment as they are split to any degree unlike a single wrist support that provides support when the keyboard is set to zero degree. ATW also recommended was a twin monitor stand to allow the claimant to have both monitors mounted off the desk and at a position that was more suitable for an improved posture when seated at her workstation; a portable keyboard and mouse; a laptop ergonomic stand; a bar mouse, this being an alternative to the vertical mouse; acoustic freestanding screen; 8 workplace coaching sessions at 2 hours each session; and for the respondent to consider awareness training for all staff and managers. (1956 to 1967)

285. The claimant was on sick leave from 21 October 2015 suffering from flu like symptoms and returned to work on 2 November 2015. She was due to attend a clinic on Wednesday of that week but was not prepared, as a result, Ms Khanna covered for her.

286. A case conference meeting was held on 2 November 2015 with the claimant, Ms Klein, Dr Pattani, Dr Taylor, Kavi Gungaphal and Tanvi Ghia. The purpose was to discuss the Support Worker role. The claimant had forwarded to Ms Klein on 15 October 2015, a revised job profile for the role. Ms Klein said that she understood that the original purpose was to re-settle the claimant back to work from long term sickness absence and that ATW's funding for the role was up to 20 hours a week with a maximum of 260 hours over three months. The Support Worker would assist in printing out labels and would be working 10 hours a week not 20. In terms of the additional tasks he or she would engage in carrying, setting up, putting away and cleaning equipment in line with Health and Safety Infection Control Guidance, cleaning splints in between patients, carrying spare splints, laptop and equipment to different departments. The claimant was asked how were the tasks currently managed and she replied that she would do them but it was time consuming and demanding because she was asked to clean them in between each patient in a sink with soapy water and the cleaning of her braces was extremely difficult and tedious due to her mobility issues. She said that she would like to see patients on a ward and then move to the next without having to clean in the corridors as Infection Control required.

287. Ms Klein said that she contacted Access to Work to get clarification on a Support Worker but was unsure as to what calibre of support can be sourced in line with the agreed cost of £13.50 per hour, up to ten hours a week for four months. The grant would not cover the full cost and was not financially viable at the time with the turnaround team in place. The turnaround team had been brought into the hospital to look at cost savings and rationalisation. The claimant said that she would look at the pay of a medical secretary on the Bank to determine the rate for the Support Worker. Ms Klein and Kavi Gungaphal stated that there was a block on recruitment due to the respondent's financial position. They then discussed the claimant's reduced workload both in number and complexity of patients. She responded by saying that she was still working overtime to cope with her workload. Arrangements were made for her to stay behind after 5pm when the clinics were over as she expressed concerns about office noise during office hours. She said that in respect of the Livescribe Smart Pen, that she had no compatible printer and had brought herself note pads. The purpose of the printer was to print on electronically sensitive paper. The note pads were not effective as they cut into her clinical time.

288. It was agreed that Dr Taylor would meet with the claimant to discuss protected time; the claimant to chase ATW regarding outstanding matters; Ms Klein to raise the case for a Support Worker at divisional

level and management to consider ways of reducing the noise level in the office. (1990 to 2004)

289. At a case conference on 2 November and at a one-to-one meeting on 4 November 2015, the issue of lone working was discussed. It was emphasised by Dr Taylor that unsocial hours overtime should not be worked without notification. In the note of 4 November, it stated;

> "It was made clear to Maria that this cannot continue for reasons of health and safety." (1990 to 2004, 2010, 2546 to 2547)

290. We find that the claimant was not prevented from working outside of her normal work hours but had to inform security as it was a health and safety issue.

The claimant's informal grievance dated 24 November 2015

291 On 24 November 2015, the claimant lodged an informal grievance against Dr Taylor to Ms Klein. In which she wrote with reference to a case, that when the patient requested a change in her Key Worker, namely the claimant, the claimant was unaware of the request and that Dr Taylor had sent an email to all members of the team but she was not copied in. In addition, Dr Taylor was sending emails to the claimant's private email address during the week, telling her that she could not find her on a Friday evening and was concerned for her health and safety. Further, at a one-to-one meeting, the claimant said that Dr Taylor expressed her anger at the claimant by saying that she was annoying her and that her case was very complicated. Moreover, on several occasions during discussions regarding ATW's adjustments, Dr Taylor did not have the up to date information and that weekly meetings were not taking place. She stated that messages that Dr Taylor was looking for her were left on post-it notes in front of the locked office door or on her desk. There was also no space for her to be relocated and that IT recommendations or issues relating to malfunctioning equipment or software, were not addressed.

292. She also alleged that Dr Taylor, at the last meeting, raised her voice and made accusations about her patients and her study leave was cancelled. These matters caused her stress and had compromised her performance, she alleged. (2028 to 2031)

293. We were not taken to the post-it notes during the hearing but we do find that, on occasions, Dr Taylor found it necessary to leave post-it messages as the claimant was much harder to contact than her colleagues. The messages were not urgent and Dr Taylor believed that it was a convenient way of letting the claimant know that she wanted to speak to her but would try to contact the claimant by phone first. In urgent cases, she might try bleeping her. The service was always very busy and as Dr Taylor had many calls on her time, she found it necessary, in certain circumstances, to leave messages for the claimant

and other members of the team. An example of a post-it note from Dr Taylor to the claimant concerned Ms Tanvi Ghia's attempt at trying to arrange IT for the claimant's benefit. (1907)

294. On 26 November 2015, Ms Klein wrote to the claimant regarding their meeting on 13 November 2015 when they discussed her recent sickness absence. She informed the claimant that because of her sickness absence, her case would go to stage 3 and that no final decision had been made on a Support Worker. (2033)

295. As already referred to earlier in this judgment, in a cognitive assessment report dated 28 November 2015, by Dr Sylvia Moody, diagnosed the claimant's mental conditions as dyslexia, dyspraxia and ADHD. (2037 to 2076)

296. With reference to the case conference meeting held on 2 November 2015, the claimant stated that she was unaware that she was seeing fewer patients than someone at her level would be expected to see. Dr Taylor had told her that she was seeing a similar number of patients to a new Band 7 CNS Nurse. The claimant said that she was unaware of this. We have already made a finding that the claimant was given work equivalent to a new Band 7 CNS Nurse following her return to work from long term sick leave in February 2015.

297. On 4 December 2015, Ms Klein wrote to Ms Amanda Pye, Lead Nurse, London North West Healthcare NHS Trust, about funding the Support Worker post. She stated that she anticipated recruiting someone through Staff Bank within the funds stipulated by ATW, namely £13.50 an hour for a total of 260 hours and that the funding needed to be used by the middle of February 2016. It would be for an initial trial period of three months. She invited Ms Pye to confirm whether she would support and authorise the funding for such a post. (2079)

298. On 7 December 2015, Ms Pye emailed Ms Klein in reply stating that the request for a Support Worker had been approved on a trial basis for three months. (2079)

<u>Claimant's formal grievance dated 10 December 2015</u>

299. The claimant wrote to Ms Klein on 10 December 2015, lodging a formal grievance in which she stated that the respondent had failed to make reasonable adjustments for her as a disabled person. The adjustments concerned noise pollution as well as health and safety. She had requested a noise cancelling booth as well as an electronic pen to assist her in writing her notes and to enable her notes to be transferred easily and converted into type text. She had requested a Support Worker, a fully functioning laptop with supportive software and to have access to hands free IT support. She asserted that there was a lack of clarity regarding the timelines when the adjustments would be implemented. Further, she had been humiliated at many meetings at

which senior management and human resources representatives were present. She stated that she had been on stage 3 since June 2015 under the 2010 sick leave absence policy but that policy had been updated. She requested that she be taken off stage 2 within immediate effect. (2080 to 2082)

300. An earlier meeting was scheduled to take place on 7 December 2015 to discuss her informal grievance but that was cancelled, however, an informal meeting was held on 14 December 2015, to resolve her formal grievance. In attendance were the claimant, Dr Taylor and Ms Klein. It was agreed that the claimant's hours would be reduced to two days a week, 50% of her normal weekly hours. Her workload had already been reduced and had not returned to a full clinical workload following her return to work in February 2015. Her workload would again be reduced in line with her reduced hours and it was further agreed that the Human Resources, Procurement and the IT Department would be contacted to resolve the IT issues as soon as possible. (2528 to 2530)

301. At a meeting with the claimant, Ms Klein and Dr Taylor on 16 December 2015, it was confirmed that the claimant's hours would be reduced from 16 December 2015 to 10 January 2016, to 50% at her request due to stress. That was for a period of four weeks. Although the claimant alleged that she was pressured to return to full-time hours, she only did so from 8 April 2016. When she worked 50% of her hours, this was on two consecutive days, 10 hours each day, 9.30am to 7.30pm

<u>2016</u>

302. Dr Taylor made a referral to Dr Pattani on 11 January 2016, for a report seeking guidance on stress management because the claimant had complained about feeling stressed. (2104 to 2108)

303. Dr Pattani replied on 1 February 2016, in which she noted that the claimant had been working two days a week and that it had been extended to 16 February 2016. She suggested that the claimant should not jump straight from 50% to full-time and should instead step up to 75% for a period agreeable to both her and the respondent and advised the claimant to discuss the content of her stress risk assessment with Dr Taylor who was familiar with her work. Dr Pattani stated that she had discussed the criteria for ill health retirement but once all adjustments were in place, she and the claimant would discuss the matter again. She understood that the claimant had a Support Worker who started the previous week and was extremely helpful. Dr Pattani did not have any further advice or assistance and had not made an appointment to review the claimant. She concluded stating that the claimant had checked the letter for factual accuracy and had given permission for it to be released to Dr Taylor. (2154 to 2155)

304. As Dr Pattani noted, we find that the Support Worker was in place to assist the claimant from 20 January to 24 February 2016. (2147)

305. We noted that the claimant was due to go up to 75% of her working hours by 11 January 2016 but she remained on 50%, at her request, until 16 February 2016, when it increased to 75%. She made a further request to work 75% for one more month but this was not acceptable to Dr Taylor because the team felt clinically stretched. It was, however, agreed as a compromise that the claimant should work 75% of her hours for a further two weeks with a review at the end of it. (2168)

306. Dr Taylor in fact extended the claimant working 75% working hours up to 8 April 2016.

307. Bearing these facts in mind, we do not take the view that the claimant was pressurised to return to work on a full-time basis. Dr Taylor was reasonable in that she took account of the claimant's general practitioner's advice and extended the 75% working hours considerably beyond the date originally proposed for the resumption of full-time hours.

Staff meeting on 25 February 2016

308. In late February 2016, some staff members in the department approached Ms Klein to raise their concerns about the claimant's reduced hours and reduced workload and the impact on their workloads. They were, according to Ms Klein, frightened to approach the claimant and instead approached her. The group included Dr Taylor, Ms Khanna, Ms Pitcher and Ms Debbie Smith. The demands on the service were constantly increasing and they felt that the claimant did not appreciate the efforts they were making to support her by taking on her patients when she was in training, on health-related appointments, or attending other meetings related to her adjustments or adaptations. One complaint Ms Klein received was that the claimant would not give her colleagues as much sensitivity to their concerns. She was given, as an example, a day when the temperature in the office was about 37 degrees centigrade but the claimant refused to allow anyone to open the window because she did not want a draught.

309. Ms Khanna requested a meeting with Ms Klein to discuss staff's concerns which was arranged on 25 February 2016. Dr Taylor said that while she was working on securing a Support Worker, negative feedback had been received about the claimant's working practices. Ms Khanna highlighted that whilst the team understood the claimant's medical issues, many of the problems related to her behaviour, attitude and poor performance. She would regularly disappear from the office for extended periods of time and took no accountability for her actions. The team were falling apart as it was very difficult to meet clinical demands due to the claimant's lack of responsibility. She had approached Ms Klein on a Thursday which was a busy clinic day with a last minute request to attend an Occupational Health meeting. It was mentioned that on Fridays she was supposed to commence work at

07.15 yet regularly attended the multi-disciplinary team meetings late at or around 09.15.

310. Ms Klein informed those present that several adjustments had been put in place to support the claimant but it would appear that there had been little improvement. The claimant had been witnessed crying in the corridors and complained of stress due to unfair treatment and lack of support which she felt contributed towards her lack of productivity. Dr Taylor mentioned that, on average, the Colorectal Team would receive between 15 to 20 patient calls daily but the claimant would answer 1 or 2 of them. Ms Khanna said that they were worried about telling the claimant their concerns as it may cause more stress. She said that the team had 36 new patients that year. Ms Smith had seen 12 to 13 of those as a relatively junior member of the team, however, the claimant only saw either 1 or 2 new patients. Ms Klein asked the team whether they thought that the claimant had an insight into the stress that they were under and advised that they should not be afraid to speak to the claimant about any issues. Ms Khanna made the observation that the quality of the claimant's written communication in GCIS was "awful and difficult to understand" and that it did not improve on days when the Support Worker was present. It was mentioned that the claimant had complained that she was not greeted by the team when she entered the office. Dr Taylor said that staff were concerned that their conversations were being recorded by the claimant using her dictation device. They were informed by Ms Klein that the claimant had been asked not to record staff conversations without their permission. The fear of recording conversations, according to Ms Smith, put stress on the team. Ms Pitcher mentioned that on weeks when Ms Klein and another member were on annual leave, the claimant refused to support clinical workloads. Dr Taylor said that she was making a record of each conversation with the claimant. Ms Klein said that she was keen to keep sickness absence and capability issues separate. Ms Khanna said that Ms Smith was a Band 6 member of staff yet took on a significant proportion of the workload and that the claimant's issues were impacting on the sustainability of the service. It was agreed that Ms Klein, Ms Khanna and Dr Taylor would meet with the claimant to discuss her capability to do her job. (2169A to 2169B)

311. Dr Taylor, Ms Klein and the claimant met on 26 February 2016 to discuss returning to full time hours following the temporary reduction in her hours due to stress. It was hoped that the claimant would return to full time hours from 7 March but she was unable to do this due to work related stress. It was noted that the claimant had arranged without consultation with Ms Klein or Dr Taylor, medical appointments week commencing 29 February 2016. They discussed stress management indicator responses to highlight what might be causing her to have ongoing work-related stress. She had completed an Employee Work Questionnaire- Staff Stress Management Indicator on 15 January 2016 and had discussed it with Dr Pattani. It was agreed that she would clarify what arrangements were outstanding which needed her attention.

She said that she had told Dr Taylor that her curt emails were a cause of stress. Dr Taylor responded by saying that their brevity was simply a reflection of her workload and similar emails had been sent to all clinicians and team members. She was prepared to provide examples of emails to illustrate her point. The claimant said that another cause of her stress was that the team did not always use greetings when they addressed her. Both Dr Taylor and Ms Klein said that they discussed this issue with the team and explained that sometimes they did not greet the claimant because they were busy on the phone or in the middle of a conversation. It was, however, acknowledged that the rest of the team were feeling stressed at times. Part of the reason for this was that they were carrying extra work while the claimant was on reduced hours. The claimant said that another stressor was that she felt she often had to neglect tasks because she had too much work to do. Dr Taylor replied that her clinical activity was much lower than any other team member and thus the workload should be manageable. The claimant's reply to that was that she was seeing more complicated patients and had to do more follow up work than the rest of the team. It was noted that her statement was not borne out by the review of the team's activities which was shared with her.

312. As we have already found, Dr Taylor took responsibility for the great majority of all the complex colorectal cancer patients and the rest were shared between the senior team members. All team members provided follow up support to their patients and the new referrals they took on, the more follow up work was generated. Those with the highest number of new patients would have the highest number of follow up interventions.

313. The claimant said during the meeting that she felt pressured to work long hours but it was noted that the long hours she was working were of her own choosing and were not the most convenient for the service. Dr Taylor suggested that if they were causing her stress that she should return to five shorter days as it would be preferable to the service. It was agreed that she would highlight any other reasonable ways she could help reduce the stress she was feeling related to work be discussed further. (2176 to 2178)

314. Having heard the evidence we find that Dr Taylor was in the best position to determine the workload of the team including the claimant's and her workload. We were satisfied that during the claimant's absences, her workload was shared amongst the remaining team members and that the new team member had taken on a greater proportion than expected of someone in her position. We do not accept that the claimant's workload had increased, to the contrary, steps were taken to reduce her workload as well as her hours. We also do not accept that she was seeing more complex cancer patients as that function was performed by Dr Taylor.

315. There then followed correspondence between the claimant and Dr Taylor on the date when the claimant would able to return to full time hours. It was agreed that it would be on the 8 April 2016. (2198)

316. The claimant met with Dr Taylor and Ms Klein on 3 March 2016 to discuss the feedback on her work and any further adjustments required. It was described as a clean feedback meeting. The claimant asked to record the meeting but this was refused. She explained that because she suffers from dyslexia, dyspraxia and ADHD, she had difficulty remembering things and not allowing her to record the meeting would be discriminatory. The claimant was, however, not prevented from taking her own handwritten notes and, in any event, as was the practice, she would be sent a summary of the meetings with her managers and was able to comment on them. Dr Taylor raised the issue of the quality of the claimant's notes and record keeping. (2184 to 2186)

317. Dr Taylor wrote to the claimant on 8 March 2016, concerning ATW's recommendations and some of the outstanding items. She noted that the trial pack of gloves and wipes had arrived the previous week and was waiting the claimant's comments. The Posturite monitor arm had not been delivered and the printer was printing darker than expected but legible. The respondent's IT Department promised to attend to it. In relation to the screen or noise reduction booth the claimant was concerned that fingers might get caught when her desk was raised or lowered. (2218)

318. The claimant responded on 21 March 2016,

> "Dear Claire
> Further to email the Mindview, Dragon, Read and Write Livescribe and Postscript need update (Livescribe and Postscript for Echo Pen). Not having update of these applications slowing the computer right down. The most accurate situation is with Mindview and Livescribe and short battery life, this has been reported." (2217)

319. We make this observation, that the claimant had not in her email set out precisely the substantial disadvantages the existing equipment and software were causing her. What seemed to be evident from her email was that she was anxious to have more efficient and up to date equipment and software.

320. The concerns Dr Taylor had about the claimant's GCIS entries were attached to an email dated 3 March 2016, sent to the claimant, in which she stated that if the claimant's Support Worker wrote the notes, then they must write their name and state that they were dictating on the claimant's behalf as they typed up the records. If they did not have GCIS training, did they have GCIS access? It was important that they did not use the claimant's log-in to write up the notes as the use of her account was not in keeping with the respondent's policy. She further stated that, overall, the structure of her GCIS entries was fine but the

content was not always clear as she had discussed during the meeting on 3 March. She highlighted in red her concerns about the wording. Some sentences did not make sense as they were either too short or incomprehensible and there were spelling errors. Her records were not completed promptly instead they were completed several weeks after the appointments had taken place. It meant that any one of her colleagues relying on her records, in her absence, would not have all the relevant and up to date information to hand. (2208 to 2210)

321. Dr Taylor had concerns about the claimant's note taking and record keeping for some time. In her notes of her one-to-one meeting with the claimant on 20 October 2015, she raised with her that for most of the time her dictation on GCIS was not making sense. Dr Taylor surmised that it might be due to the Dictaphone/Dragon, therefore, the claimant should proof read her entries. She gave the claimant an example of a GCIS entry she made,

> "Further to Our discussion I would like to just to recap. You do not required patient to have a prescription for longer dose of antibiotics prior her surgery next week as well the patient does not need to start medication for nerve pain." (2018)

322. Ms Khanna also expressed concern as she did say, as we have found, at the team meeting on 25 February 2016, that the claimant's GCIS notes were "awful and difficult to understand." She also said in evidence and we do find as fact that the claimant's notes would be one month behind which was an important issue as it was against the Trust's Code of Conduct. Most members of the team would complete their entries within three to four days or one week maximum. Some of the claimant's patients' notes were mixed up and some of her notes were incomprehensible. The claimant accepted during evidence, the importance of making clear and accurate notes because this was and is a requirement of her professional body.

323. Her response to the criticisms of her GCIS entries was to stay behind on 3 March until about midnight, according to Dr Taylor, searching for any errors Dr Taylor had made in her entries. She sent Dr Taylor an entry she, Dr Taylor, had written in respect of a patient. Dr Taylor wrote:

> "…She hardly slept and mixed with soem confused and very aggressive patients in her bay so was glad to lave at day 6. She would have left sooner but her Long acting octreotide was given on Friday – accordng to the regime and this set off terrible diarhoea – as it had previously. Now at home, in tears and askign for advice..
>
> ….. I have asked her to monitor her urin output and if she has drak urine or stop weeing, then this is usually an indication of dehydration. ……" (2220)

324. We find that Dr Taylor's errors were either to do with spelling or had transposed the letters incorrectly but the sense was clear. She also had a much greater and complex workload than the claimant. In the

claimant's case, having regard to the various correspondence we have read, she was able to communicate her thoughts and ideas clearly and logically, yet her entries were, at times, incomprehensible. We also note that she was perfectly able to identify Dr Taylor's spelling errors but did not correct her own.

325. In her reply sent on 21 March 2016 to Dr Taylor and Ms Khannu, she stated that the majority of the GCIS entries were done by the Support Worker and that Dr Taylor's comments were related to either spelling mistakes or grammar. The first Support Worker's input was invaluable, however, the two subsequent support workers, their skills and knowledge were limited and in many respects, were not meeting her needs. She raised the issue of how much they were being paid which was less than what was required for the role which might account for the apparent poor quality of their work. She became aware that the Support Worker was paid an hourly rate of £9.57 corresponding to a Band 2 salary. She said that she was informed that a Band 3 hourly rate was £11.40 and with a 12% increase, it came to £12.75 per hour and asserted that this was within the recommended ATW offer of £13.50 per hour. She requested that the respondent provide a Support Worker at Band 3 and with GCIS access. (2212 to 2213)

326. In cross-examination, the claimant said that she preferred a temporary Support Worker to assist her and not a permanent one. During the hearing she said that first Support Worker, Rose, was very good but left because she was not being paid enough. Dr Taylor disputed this and said that Rose had left because she was offered and accepted a permanent role. We were satisfied that Dr Taylor had made all reasonable efforts to recruit a suitably qualified worker at the agreed rate and Band, up the maximum hourly rate funded by ATW to assist the claimant, but had found it difficult. The preference was to recruit someone from the Bank who had knowledge of GCIS and would be familiar with the respondent's systems thereby avoiding lengthy training. There was also a freeze on administrative posts which meant that the respondent could not recruit agency staff. We accept Dr Taylor's account of the respondent's difficulties encountered in recruiting a suitably qualified person to work as a Support worker.

327. We bear in mind that in her detailed letter dated 3 October 2015, already referred to earlier, the claimant wrote that she needed a Support Worker because;

> "..It would allow me to carry out my job more effectively. It would have a positive effect on my timekeeping in that it would prevent me from staying behind to finish my work or even having to take my work home. This arrangement would enable me to overcome the barriers as a result of my disability. Since my return to work I have accumulated over sixteen working days over time. This has been completed by working longer hours regularly and coming in during my time off such as annual leave." (1949)

328 Having regard to the emails in April 2016, we find that serious attempts were made to get a suitably qualified Support Worker to assist the claimant. (2267 to 2268)

329. In an email dated 31 March 2016, Dr Taylor wrote to the claimant informing her that she intended to proceed, the following day, with an informal meeting and that the claimant was not required to have a representative present. The respondent had put in place 90% of the recommendations and as far as she was aware what was outstanding was the issue to do with noise levels.

330. The claimant replied the following morning, stating that she would prefer to have someone representing her at the meeting to take notes or that she should be able to use her recording device and record the meeting. She further stated that there were outstanding items which were:

1. Monitor arm had not been installed;
2. The noise level and constant interruptions;
3. Ongoing difficulties with the printed notebook paper to work with Livescribe as it did not keep a paper trail and only stored an audio file instead of readable text;
4. Supportive applications requiring software updates as well as a review of antivirus programme compliance, updates for Mindview, Livescribe, Postscript, Dragon and Read and Write; and
5. Support Worker to be booked with an appropriate skill level grade 5.

331. She asked Dr Taylor to explain how she came to the conclusion that 90% of the recommendations were in place. (2230)

332. The meeting went ahead as planned on 1 April 2016 during which Dr Taylor informed the claimant that it would be informal under the Trust's Capability Policy. She emphasised the importance of the claimant keeping concise and accurate records of her patients' contacts in a timely manner and that she was required to produce evidence of clear coherent GCIS entries within the next six weeks. They must be easy to read and understand without mistakes or unclear meaning. They then discussed unresolved IT issues. The following recommendations were made;

> "That you use another location away from the office to reduce external noise as necessary for your dictation.
>
> That you proof read entries before finalising on GCIS.
> That you keep her [your] entries brief/to the point and only write key points.
>
> To review in four to six weeks." (2266)

333. In March 2016, it was confirmed that the monitor arm was on order. On 9 May 2016, the claimant was chasing up Mr Jamie Pownceby at Posturite, for the installation of it. (2292 to 2293)

The claimant's grievance dated 25 April 2016

334. Having regard to the respondent's grievance, on 25 April 2016, the claimant lodged a formal grievance against Dr Taylor sent to Ms Klein. It is a detailed document covering 13 pages. In summary, she wrote the following:

> "1. Complex management structure as direct result of my disability and therefore discriminatory.
>
> 2. Failure to use appropriate Sickness Policy and lack of adherence to change of the Policy in the Trust within the scope of Sick Leave Policy.
>
> 3. Failure to comply with standard operational procedure as per Capability Policy and inappropriate use of Capability Policy.
>
> 4. Failure to put in place reasonable adjustments as per Access to Work recommendation in timely manner.
>
> 5. Lack of appreciation or awareness of necessary reasonable adjustments.
>
> 6. Inappropriate and discriminatory behaviour towards me by management that occurs as a direct result of my impairments, and continuous and ongoing behaviour that could be considered harassment.
>
> 7. Lack of appreciation or awareness of my role."

335. She alleged that she had been under capability proceedings from 3 March 2016 and accused Dr Taylor of discrimination, harassment and bullying. She asserted that she was dyslexic and complained that the respondent had referred her to her doctor without her consent. She further alleged that Dr Taylor had sent an email to all members of the team except her about a patient's decision to change her as the key worker. Dr Taylor had also failed to record on GCIS the patient's request as the claimant was unaware of the change. She had called the patient in ignorance of Dr Taylor's email to staff. She complained that Dr Taylor had raised her voice and accused her of being annoying and complicated during the one-to-one meeting held on 2 December 2015. (2246 to 2261)

336. Dr Taylor admitted in evidence that she had used the word "annoying" on one occasion during a one to one meeting with the claimant when the claimant was asked about a piece of software and went off on a tangent. She did not say that the claimant was annoying but that the situation was complicated and that complications are annoying. As will become apparent below, the grievance was not dealt with as it was overtaken by subsequent events.

Incident on 9 May 2016 and referral to Occupational Health

337. In Ms Klein's referral letter dated 26 May 2016 to Dr Pattani, she made reference to an incident on 9 May 2016 in the office where the claimant worked. At or around 9am on that day, the claimant suddenly began screaming in pain complaining that she had a neck spasm caused by a draught from an open window. Two of her colleagues stayed with her. At the time she was meant to be in the Oncology Clinic. Her work schedule had to be changed for that day and her clinical duties were undertaken by Ms Khanna. She, according to Ms Klein, experienced some difficulty in picking up items from her desk and from the floor on Monday 16 May and had reported in sick on 26 May complaining of muscle aches. Ms Klein expressed concern about the claimant's physical and psychological wellbeing hence the need for the referral for her to be assessed. She asked Dr Pattani to confirm whether there had been any changes in the claimant's health status that she, Ms Klein, should be made aware of and whether there were any new restrictions on her ability to perform her role as a Colorectal Clinical Nurse Specialist. (2494 to 2495)

338. Following the referral, there was a formal review meeting under stage 2 held on 18 May 2016 but it had to be adjourned following representations made by the claimant's union representative who said that as there was an existing grievance it should be with dealt first. (2481 to 2482)

339. The claimant met with Ms Teresa Jones, Human Resources Advisor ICS Division, on 19 May 2016, to discuss whether or not she would like her grievance to be dealt with informally or formally. Notes were taken by Ms Jones which were later typed up and sent to the claimant. They set out the claimant's desired outcomes and invited her to consider whether she wanted to have the issues addressed either at the informal stage or formal stage and to advise Ms Jones by week commencing 23 May 2016. (2444 to 2447)

340. In Dr Taylor's email to the claimant on 23 May 2016, she referred to the claimant having apologised for saying that the respondent's record of her training was incorrect. She asked the claimant to provide dates for all her training and was advised to be mindful of her clinical commitments and for her to agree with the rest of her team on the cover arrangements while attending training or any meetings. (2449)

The claimant as a key worker

341. The incident in respect of the patient changing the claimant as her key worker, was on or around 5 August 2015. The claimant had raised her concerns with Dr Taylor in an email of 14 August 2015 which was responded to the same day by Dr Taylor in which she stated that she had discussed the request with Ms Pitcher and had meant to talk to the claimant about it but had forgotten and she apologised. The patient

suggested that it might be better if she was dealt with by someone else other than the claimant. Dr Taylor did not consider it appropriate to make an entry in GCIS at the time. She thought that Ms Pitcher would take the patient's care forward and that the claimant would not have to call the patient. It had been a very busy few weeks for everyone and she was willing to call the patient and apologise if the claimant wanted that to be done. She suggested that they could talk about it the following Tuesday. (2933)

342. On another occasion the claimant alleged that Ms Khanna, on 18 May 2016, contacted a patient's family members to apologise for the claimant implying that she, the claimant, had done something wrong. The claimant alleged that Ms Khanna's conversation took place in the office in front of her work colleagues.

343. According to the email by Ms Pitcher dated 17 May 2016, sent to Ms Khanna, she wrote that a patient's daughter came to the MacMillan Unit the previous day, that is Monday 16 May 2016, and requested a meeting with her. The patient's daughter attended and was accompanied by her niece. She appeared to be distressed and said that she wanted no further dealings with the claimant and was planning on putting in a complaint. The daughter said that she found the claimant's "attitude and manner direct, dismissive and argumentative" as she was made to feel that she was not doing the best for her mother and this had made her very upset. (2413 to 2414)

344. Ms Khanna was not at work on Monday 16 May and when she returned the following day, she found the claimant at work that morning even though it was her day off. Ms Pitcher had raised the conversation she had with the daughter and niece with Ms Khanna. Ms Khanna then spoke to the claimant and passed on the information that the patient had complained about her. Ms Khanna asked the claimant whether she wanted her, that is, Ms Khanna, to contact the daughter directly but the claimant replied that she would prefer to speak to the daughter herself. She then telephoned the daughter and later informed Ms Khanna that the daughter was now happy and that there were no further concerns. Ms Khanna, the following day, 18 May 2016, contacted the daughter as it was her responsibility as the claimant's line manager dealing with operational issues. The daughter informed her that she did not wish to have the claimant as her mother's key worker and Ms Khanna agreed to take over her mother's care. She said in evidence before us that she did not mention the claimant's name in her conversation with the daughter and no one was able to hear what the daughter was saying on the telephone. She could not recall, however, whether her work colleagues were present in the room at the time of the conversation.

345. We find that the work of the team is particularly sensitive given the nature of the diagnoses and that many of the patients and their families are understandably upset when team members speak to them. Ms Khanna told us and we find as fact that it is not at all unusual for

patients and their families to complain about how the team members spoke to them. Often, it is nothing personal. She, Ms Khanna, would call other patients or relatives to inform them of a change in their key worker if they had complained about members of the team. Patients have, occasionally, complained about her and asked to be allocated another key worker as they can choose to change their key worker for any reason. It is not taken as a criticism of the key worker and it is not dealt with as a formal complaint. The issue of the removal of the claimant as key worker to the patient was not raised by Ms Khanna with her line manager nor was it escalated under the respondent's complaints procedure.

Re-scheduling of Dyspraxia training

346. The claimant emailed Dr Taylor on 18 May 2016 at 5.14pm, stating that she would be at work the following morning one hour early and would be available to cover the afternoon clinic without interruptions and attend the human resources meeting at between 9am and 10.30am as well as the dyspraxia training which was booked between 11am and 1pm. She stated that the dyspraxia session was planned for 29 April as referred to in her email of 21 April 2016 but due to shortage of staff on that day, she requested that it be rescheduled to new date and it was now on 19 May. She asked Dr Taylor whether it was her understanding that she would still like her to reschedule the session on 19 May.

347. Dr Taylor replied 10 minutes later stating that the claimant should reschedule the dyspraxia training as she only gave one day's notice. (2404)

348. Dr Taylor again wrote to the claimant the following day, 19 May 2016 stating that she would leave the matter to Ms Khanna to decide whether there was enough clinical cover that morning to enable the claimant to attend her training. She stated that the claimant's diary entry writing was so small that it was not seen and also it did not give the times. She advised that, moving forward, when booking her two outstanding dyspraxia training sessions that she must agree the dates and times with Ms Khanna before confirming them with her trainer. (2549)

349. Although the claimant referred to pre-arranged study leave having been cancelled at short notice and gave the above page reference number in the joint bundle, it was not study leave but the postponement of her attendance on dyspraxia training. She did state in an email dated 18 May 2016 that the dyspraxia training was not study leave. (2408 to 2409) We note that during the claimant's cross-examination, she said that it was neither belittling nor dismissive to be asked to cancel the training but her concern was that she would lose money. She, however, accepted that the potential loss of money was the respondent's problem. Notwithstanding her acceptance that the respondent's request was neither belittling nor dismissive, she has pursued this as part of her harassment claim.

On sick leave from 26 May 2016

350. Although the claimant on 26 May 2016, had reported in sick complaining of muscle aches, in the statement of fitness for work, it was stated that she was suffering from stress at work and would be absent from 31 May to 14 June 2016. The follow up fit note gave the diagnosis as suffering from depression and that she was unfit for work from 10 June to 3 July 2016. A similar diagnosis featured in subsequent fit notes up to 2 January 2017. (623 to 632)

351. The claimant worked full-time hours for seven weeks before going on sick leave. Her last day of work was on Wednesday 25 May 2016 and she is currently on sick leave.

Guest Wi-Fi

352. The claimant alleged that she was not given access to the hospital guest Wi-Fi. She stated that she wanted to be connected to the respondent's Wi-Fi using her laptop and mobile phone and to have guest Wi-Fi on her laptop. The guest Wi-Fi and intranet were two different things. With the intranet she stated that there were pages she was unable to use or have access to because of the firewalls. The guest Wi-Fi had different settings to protect the hospital but everything else was accessible. She needed to access supportive applications and said that she was told that access to guest Wi-Fi was not possible.

353. She wrote to Dr Taylor on 8 April 2015, stating,

> "I am not able to do formatting of the letter on the iphone. Furthermore despite the fact that my phone has got 4G connection it doesn't work everywhere in the hospital and I do not (have) Wi-Fi access and as dictation is directly related to internet, having access to hospital Wi-Fi would improve its performance." (1814)

354. In evidence Dr Taylor said she corresponded with the claimant on 2 and 17 April 2015 about IT issues and said that the claimant told her that there was an issue with her headset. She was using her own mobile phone for her work-related dictation and wanted access to the respondent's Wi-Fi system. Dr Taylor thought that this was unnecessary as the claimant had been provided with her own digital dictation recorder and several software packages to help her including voice recognition digital dictation. As the claimant thought that access to the Wi-Fi system would help, Dr Taylor did not want to prevent this and suggested that she contact the respondent's IT department. On 17 April 2015, she emailed Dr Taylor stating that she had checked with the IT department and they were happy to allow her Wi-Fi connection if requested by her manager. They were, however, not able to arrange Wi-Fi connection on her private mobile phone. She asked whether it was possible to have, for an interim period, a hospital handset. (1814)

355. On 20 May 2016, she attended a meeting with Tanvi Ghia, MacMillan Team Co-ordinator; Mr Michael Sanderson, Head of ICT; Mr Karim Nour, Computer Engineering Manager and Dr Taylor. The purpose was to discuss her IT support needs and her ongoing difficulties with software. She said in evidence to us that Mr Nour kept telling her that she could not get Wi-Fi access outside of the local intranet on her phone or laptop but Mr Sanderson gave her guest Wi-Fi access on her phone and laptop following the meeting.

356. We find that for a short period the claimant's laptop was with the IT Department to be fixed. By 6 May 2015, Mr Nour emailed Ms Klein stating that the claimant's laptop was now set up for use and it was fully functional and he did not think that there was anything else the team could do to it. (1834) To assist the claimant Dr Taylor had written earlier to the team on 21 April 2015, asking that a rota be drawn up to help the claimant with her GCIS entries for the "next 2 weeks until her IT system is set up." (1822-1823)

357. In evidence the claimant said that by end of May 2015, she did not need guest Wi-Fi on her mobile phone but needed it on her laptop.

Noise reducing booth

358. As referred to earlier, the claimant was concerned about the noise in the office because it affected her dictation. The matter was addressed by ATW and they recommended a perspex noise reducing screen. The respondent's Health and Safety Officer agreed with the recommendation. By April 2015, the claimant was using a sit to stand desk that enabled her to move its position up and down by pressing a button. In her email of 25 April 2015, sent to Ms Myatt, Health and Safety Officer, she stated that Ms Myatt's recommendations following her health and safety assessment some time previously, had made a difference to her but there was still one outstanding matter regarding a baffle board, a type of screen. The claimant had been told that it needed to be see through acrylic and thought it was a good idea but had one reservation, namely that she had been informed that the see through baffle board would need to be clipped on to her desk and was concerned that she and her colleagues' fingers could get trapped, particularly when the desk was being mechanically moved either up or down. She suggested that she be considered for a Mobile Screen 24 on castors or something similar. (1820)

359. She followed the Health and Safety Manager's advice and contacted a company, giving them photographs and dimensions of her office. They recommended a Nautilus Booth at a cost of around £3000 to the respondent as ATW would only fund the perspex screen at a cost of around £273.

360. The Nautilus Booth would have surrounded her desk and is made out of sound reducing materials. Precisely what the substantial disadvantages the claimant would have experienced had the perspex screen been provided was not clearly set out in the course of the evidence before us.

361. From the evidence given by Dr Taylor and Ms Sheila Small, the claimant was offered a different office space but was against moving saying that she did not want to be separated from the team and discriminated against. Ms Small said that it would be especially difficult to move the claimant within the department as space was severely limited and there were plans to develop the Chemotherapy Unit which would further impact on the availability of space. An alternative was to move the claimant off the Unit and find office space in a different location but the claimant was particularly adamant that she did not want to be moved. The Chemotherapy Unit was moved in 2016 while the claimant was on sick leave.

362. The claimant could work at times when there was either no other team members present in the office or if she moved her equipment using the cart to a quieter location. She also worked long hours at times when no one else would be present in the office. Dr Taylor was aware that she would eventually be provided with a room of her own but it was dependent on the availability of space when the Chemotherapy Unit moved out. During the claimant's evidence in cross-examination, she said that someone else in the office was using Dragon dictation software. No evidence was given that that other person either requested a perspex screen, booth or any noise reducing equipment.

<u>The claimant's time engaged in non-clinical work</u>

363. During the claimant's evidence she was asked by a member of the tribunal how much time she spent on health-related appointments, IT training and communicating with the IT department. She originally said that it was 8% of her time. During the hearing she asked the tribunal whether she could be recalled to clarify this aspect of her evidence and we acceded to her request. She was again asked by the same tribunal member the same question to which she replied by saying that she had misunderstood the question the first time and said that the percentage of her time spent in these three areas was 50% and that her earlier reference to 8% was to a specific period of time, namely in February 2016 but in general it was 50%.

364. We have already found, having heard the evidence given by the respondent's witnesses, that a Colorectal Nurse Specialist would spend the majority of their time engaged in clinical duties, namely seeing patients or talking to patients.

Managers' time devoted to the claimant

365. Ms Small, in evidence, said that she had been spending around three quarter of a day each week, possibly more, attending to the claimant's various issues. Ms Klein said in evidence that in the autumn of 2014, she was spending about half a day a week addressing the claimant's issues but over time this diminished as Tanvi Ghia became more involved. We find that Dr Taylor and Ms Khanna also devoted a significant amount of their time addressing the claimant's many issues. In Dr Taylor's evidence she said that as well as dealing with the claimant's IT queries, she was spending an increasing amount of time having to deal with aids, adaptations and equipment she needed. In addition to attending meetings, Dr Taylor said that she had to write up the outcome and follow up on the actions discussed with IT and third-party suppliers. By 2015 these took up a day a week of her time. She also said that the claimant would spend a considerable amount of her time in training on different software packages as well dyspraxia coping strategies. At the start of Dr Taylor's evidence, she became visibly upset at having been accused of discriminating against the claimant because of her disabilities.

366. We bear in mind that in relation to the IT Department, there were only nine IT Engineers serving 9000 staff and the evidence given by Ms Small was that Mr John Tranter, IT Engineer, was spending about 2 to 3 hours a week solely devoted to the claimant's IT issues.

367. Attempts were made to meet with the claimant while she was on long term sick leave to discuss her grievance but she said that she was too unwell to attend. Consequently, no such meeting took place. She also did not attend a meeting with Dr Pattani on 5 September 2016, due to her ill health.

368. In Dr Pattani's report dated 19 July 2016, in response to Ms Klein's referral on 16 June 2016, she wrote that the claimant had been referred to a specialist by her GP for her psychological symptoms and had started treatment which only had a small impact on her but this was at the early stages. She was currently not fit to return to work due to her psychological symptoms and would be reviewed on 5 September. Dr Pattani ended by stating that the claimant checked the letter for factual accuracy and gave her permission for it to be released to Ms Klein. (2501 to 2502)

369. In Dr Sameer P Sarkar's, Consultant Psychiatrist and Forensic Psychiatrist, report dated 6 June 2016, he wrote that he would like to treat the claimant's depression as it was masking/conflating some core symptoms of ADHD. (2497 to 2498)

370. In a further report dated 30 August 2016, Dr Sarkar noticed a deterioration in her mental state since he last saw her and advised her to obtain adequate representation and that under no circumstances

must she allow herself to be interviewed or interrogated in relation to her employment disputes. He also advised that her medication be increased. (2506 to 2508)

371. The claimant made arrangements for Dr Taylor and Ms Khanna to attend co-coaching dyspraxia training by Ms Martine Foreman from Genius Within which they attended on 4 March 2016 and found useful.

372. In the joint bundle of documents the respondent provided a schedule detailing adjustments, recommendations and requests made and those which were implemented and those outstanding as at the 25 May 2016 which we have accepted as being the position by that date. These were:

UPDATED Outstanding Adjustments. Recommendations or Request	**By Whom**	**To be actioned by**	**Date**
Dyspraxia Coaching 10 Sessions @ 2 hours each. Recommendation	**Access to Work** (ATW) delivered by Hands Free Computing	Joan Klein	Purchased 31/07/2015
IT training sessions for Dragon Medical 12 software 8 sessions @ 3.5 hours each. Recommendation	**ATW** Delivered by Hands Free Computing	Joan Klein	Purchased 13/03/2015
Purchase of Dragon 12 V2 medical edition software. Recommendation	**ATW** Delivered by Hands Free Computing	Joan Klein	Purchased 13/03/2015
Purchase of Penclic Mini Keyboard wired C2 (quote ref: QUO0064664)	**Maria Rakova** to facilitate use with laptop trolley	Joan Klein	Purchased (date tbc)
Purchase of Penclic Nicetouch touchpad T2 (quote ref: QUO0064664)	**Maria Rakova** to facilitate use with laptop trolley	Joan Klein	Purchased (date tbc)
Trial & purchase of CBS Flo Monitor with clamp	**ATW** From Posturite	Joan Klein	Purchased (date tbc)
	Maria Rakova to facilitate use of several applications. Provided by IT department NPH		

Purchase of additional monitor		Joan Klein	Purchased (date tbc)
Purchase of additional CBS Flow Monitor arm with clamp (for additional monitor)	**Maria Rakova** to use to adjust height of monitor	Joan Klein	Purchased 23/02/2016
Purchase of Vu Ryte document holder Recommendation	**ATW** From Posturite Ltd	Joan Klein	Purchased
Own extension number phone with flashing light and ringer that can be silenced. Request October 2014.	**Maria Rakova** (internal)	Joan Klein	Complete
Live scribe pen Request	**Maria Rakova**	Simon Howarth	Complete Use authorised – guidance for use
Desk position Request	Reviewed by **H Wyatt** Health & Safety Officer	Joan Klein	No action at present due to restricted space – for further considerati on if more staff space becomes available
Noise reducing screen. Request October 2014	Reviewed by **H Wyatt** Health & Safety Officer	Joan Klein has agreed to this if ATW/MacMi llan can fund	Awaiting response from MR re. funding
Examination Gloves Vinyl Recommendation	Reviewed by **M Grummit** (Lead Acute Infection Prevention & Control Nurse NPH)	Joan Klein	Purchased 29/03/2016
Splint & Brace disinfectant	Reviewed by **D James** (Lead Acute Infection Prevention & Control Nurse NPH)		

foam Recommendation		Joan Klein	Purchased 24/05/2016
Additional Laptop	Reviewed by **K Nour** (Computers Engineering Manager NPH)	Joan Klein	Provided to MR (date tbc)

372. Dr Taylor said in evidence in relation to the pink overlays the claimant used over text to help with her reading, that she began to wear tinted glasses from March 2012 and was not seen using the overlays. Tinted glasses were recommended by an optometrist and it has helped the claimant considerably with her reading and concentration. Before this she did not exhibit any difficulties in reading text. The claimant also said in evidence that since she began to wear tinted glasses, there was no further recommendation for overlays. (1210)

373. Up until 15 December 2015, the claimant's disabilities were EDS and dyspraxia. On 28 November 2015, Dr Sylvia Moody prepared her cognitive assessment report on the claimant in which she stated that the claimant's cognitive profile is suggestive of dyslexic difficulties and the respondent became aware of the formal diagnosis of dyslexia on 15 December 2015 because Dr Pattani informed them. Dr Moody opined that the claimant has weaknesses in phonology, auditory visual short-term memory, visual tracking, spatial judgment and motor skills and recommended dyslexic training. Her report we have already referred to in our findings on disability.

374. The staff rota allows for all Clinical Nurse Specialists to have protected time, that is time when they were not required to work in clinic. This meant that they could use the time to catch up on patients' notes and developments in their specialist area. The claimant's protected time by November 2015, was on Wednesday afternoon as there was no clinics during that time. (2546)

ACAS conciliation

375. As already referred to, the claimant was absent on sick leave from 26 May 2016. On 12 August 2016, she notified ACAS and a conciliation certificate was issued on 26 September 2016. She then presented her claim form on 25 October 2016.

Submissions

376. We have taken into account the very detailed written and oral submissions by Ms Crasnow QC, on behalf of the claimant and by Ms Stout, counsel on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. Their written submissions can be referred to as they encapsulate most of what they told us.

The law

377. Section 6 and Schedule 1 of the Equality Act 2010, "EqA" defines disability. Section 6 provides;

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

378. Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

379. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

380. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

381. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

382. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

383. Section 20, EqA on the duty to make reasonable adjustments, provides:

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

> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage."

384. An employer's failure to adhere to its own time limits during a disciplinary procedure could not amount to either a provision , criterion or practice and "taking care" cannot amount to a reasonable step. "Incompetence, a lack of application or a failure to stick to time limits cannot be properly be characterised as a provision , criterion or practice.", Carphone Warehouse Ltd v Martin [2013] EqLR 481.

385. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

385. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.
>
> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

386. The employer's process of reasoning is not a "step". In the case of

General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

387. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

388. In the earlier case of Meikle v Nottinghamshire County Council [2005] ICR 1, the Court of Appeal held that where the disabled employee's sickness absence was caused by the employer's failure to implement a reasonable adjustment, it may be a reasonable adjustment to maintain full pay.

389. On sick pay, paragraph 17 of the EHCR Code 2011, states:

> "Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so., 17.21.
>
> However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make." 17.22.

390. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

391. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

392. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "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, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

393. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

394. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

395. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's

findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

397. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

398. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

399. There is no reason artificially to narrow the concept of what constitutes a “step” within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of

amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

400. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

401. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

402. Harassment is defined in section 26 EqA as;

> **"**26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
> (i) violating B's dignity, or
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

403. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

404. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable,

adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

405. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

406. As regards victimisation, section 27 EqA states;

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-
(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

407. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls. In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan

408. In relation to discrimination arising in consequence of disability, section 15 provides,

"(1) A person (A) discriminates against a disabled person (B) if --

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

409. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

410 In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

411. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

412. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

413. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a

range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

414. Under section 13, EqA direct discrimination is defined:

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

415. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

416. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

417. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

418. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

419. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

420. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

421. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

422. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

423. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management

consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal and her argument was accepted that the employment tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

424. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

425. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex.

426 A similar approach was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

427. Under section 123 EqA a complaint must be presented within three months;

> "starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

428. Whether the same or different individuals were involved in the alleged discriminatory treatment is a relevant factor but not a decisive one in determining whether the conduct extended over a period, Jackson LJ, Aziz v FDA [2010] EWCA Civ 304.

429. In the case of Robertson v Bexley Community Centre 2003 IRLR 434, the Court of Appeal held that the exercise of the tribunal's just and equitable discretion is the exception rather than the rule.

430. We have also taken into account the following cases: Land Registry v Grant [2011] EWCA Civ 769, [2011] ICR 1390; and Cordell v Foreign and Commonwealth Office [2012] ICR 280

Conclusion

431. In our conclusions we have followed the claimant's amended List of Issues in numerical order repeating or summarising the claims. The List was also adopted by the respondent.

Failure to make reasonable adjustments

432. We acknowledge that the claimant's Ehlers-Danlos Syndrome "EDS", is a chronic condition for which there is, unfortunately, no known cure and that she has been suffering with it for many years. We have also concluded that she suffers from dyspraxia and dyslexia. The issue is whether the respondent failed in its duty towards her or had discriminated against her because of her disabilities? In relation to the claim of failure or make reasonable adjustments, she claimed as a pcp that she was required to use conventional software provided by the respondent and set out the reasonable adjustments, claim 1, (Table 1/1).

> "Reasonable adjustments would have been: the respondent should have provided electronic sensitive paper and printer to allow her to use her electronic pen effectively.
> - Processes should have been in place for software to be efficiently purchased, downloaded and updated.
> - Processes should have been in place for out of order supportive aids to be replaced quickly.
> - The claimant should have been given a reduced clinical work load until all adjustments were in place.
> - The claimant should have been given full access to the hospital Wi-Fi when she was forced to work from her personal phone.

- The claimant should have been given direct access to the guest Wi-Fi."

433. We remind ourselves that the claimant's disabilities are EDS from 12 January 2010, affecting her joints causing pain and discomfort; dyspraxia from 23 June 2010, which affects her writing and her organisational skills; and with dyslexia, her oral reading of complex text is slow, her reading comprehension is below the expected level and she demonstrates weak organisational skills.

434. In relation to claim 1, from our findings of fact, the claimant did not identify either a provision or criterion. The issue is whether the above could be described as a practice? The wording in the Amended List of Issues is that the pcp is referable only to the claimant. If that be the case, we do not accept that she was required to use conventional software because the respondent did allow her to install, upgrade and use different software packages at her requests. It provided, originally, Dragon and Dragon Medical; Mindmapping; Read and Write; Inspiration and Mindview. Applying Rowan, the first step has not been established.

435. Alternatively, even if this is a pcp, we are unable to discern the substantial disadvantage suffered by the claimant compared with non-disabled employees or employees without her disabilities. She was able to type and write for short periods and could use the voice activated recorder and put the sticky labels with her notes on patients' files. We conclude that the use of the Livescribe pen, electronic sensitive paper and printer, would have made her more efficient. Accordingly, the respondent was not in breach of its duty to provide a reasonable adjustment in relation to this aspect of her reasonable adjustment claim.

436. The claimant argued, as a reasonable adjustment, that processes should have been in place for software to be efficiently purchased, downloaded and updated. We found that there was a process to be followed and that required that there be approval at departmental level before the order and delivery process could begin. When the claimant requested software and equipment these were in the main purchased for her. There was, however, the frequency of her requests which did not allow for the earlier adjustments to be assessed, for example, Dragon Medical 2. This would have made her more efficient. Any delay did not place her at a substantial disadvantage. We conclude that the respondent did all that was reasonable having regard to its ordering process.

437. As regards the process that should have been in place for out of order supportive aids to be replaced quickly, we make the same comments as in the above paragraph.

438. In relation to reducing the clinical workload until all adjustments were in place, this is imprecise as the claimant kept making referrals to ATW without the prior involvement of her managers. She was, however, on

several phased returns to work programmes, such as working 50% of her normal working hours from December 2015 to February 2016. At her request, she remained on 75% of her hours until 8 April 2016. When she resumed full-time work, she worked at the level of a newly qualified Band 7 nurse and recorded fewer interventions than her colleagues. She is a very experienced cancer nurse specialist but the number of interventions she made with patients throughout this period when working full-time, was proportionately lower than all her colleagues but no action regarding her capability was taken by the respondent against her. Reasonable adjustments were made in relation to her clinical workload.

439. In our view, it was not a reasonable adjustment for the claimant to have been given a further reduced clinical workload until all adjustments were in place because with the existing adjustments she was able to carry out her reduced clinical work.

440. We agree with Ms Stout's submissions in relation to the alleged reasonable adjustment, namely that "The claimant should have been given full access to the hospital Wi-Fi when she was forced to work from her personal phone." The claimant was not forced to work using her mobile phone. She was without her laptop for two weeks which was fully functional by 6 May 2015. Wi-fi access on her personal phone was not constant in the hospital. She did not pursue hospital wi-fi access on her personal phone and acknowledged that there were confidentiality issues in having hospital wi-fi access on her personal phone. In the circumstances, full access to the hospital's wi-fi may have made her more efficient but was not a reasonable adjustment.

441. Was it a reasonable adjustment to have had direct access to the respondent's guest wi-fi? The claimant suggested in correspondence with Dr Taylor on 8 April 2015, that having hospital wi-fi access on her iphone would improve its performance. Dr Taylor felt it was unnecessary as the claimant had been provided with her own digital dictation recorder and software packages to help her with voice recognition digital dictation. However, she did not prevent the claimant from having access and advised her to contact the respondent's IT department. A year later when she pursued the issue of guest wi-fi access, at the meeting on 20 May 2016, she told the tribunal that Mr Michael Sanderson, Head of ICT, gave access on her iphone and laptop shortly thereafter. There was no evidence nor have we concluded that the delay in giving her access caused her a substantial disadvantage.

442. Even if there had been a substantial disadvantage by the application of the alleged pcp, in our view, the respondent had taken all reasonable steps to remove it. Accordingly, this claim is not well-founded.

444. In relation to being required to make handwritten notes in one-to-one meetings and consultations with patients and in their follow up, claim 2, (Table1/2).

> "Reasonable adjustments: The claimant should have been permitted to use audio equipment during all meetings.
> - The respondent should have provided electronic sensitive paper (as recommended by ATW) to allow her to use her electronic pen effectively.
> - The claimant's workload should have been reduced.
> - The claimant should have been permitted to remain at work out of hours to catch up on tasks."

445. The claimant alleged, as a pcp, she was required to make handwritten notes during one-to-one meetings and in consultations and follow up with patients. This pcp is drafted as if it only applied to her. We have come to the conclusion that she was not required to make handwritten notes of one-to one meetings. She was permitted to take notes at meetings of the Trust and was given a full summary after meetings with her managers to which she responded at length on most occasions. She could use her Dictaphone to make oral notes during breaks and at the end of meetings.

446. As regards making notes of consultations with patients, the respondent did require its nurses to make notes of their consultations with patients and follow up work and this is also a requirement of the nurses' professional body. The claimant had problems with joint pains, writing and organising her thoughts which put her at a substantial disadvantage when compared with her non-disabled colleagues or those without her disabilities. We, therefore, consider the alleged adjustments in relation to this pcp.

447. The claimant submitted that she should have been allowed to use audio equipment during meetings. Applying Rowan, steps were taken by the respondent. With her patients she could use the Dictaphone. In addition, she was permitted to use pre-printed sticky labels to put on patients' files to avoid duplication of notes. The Livescribe pen could also be used as an audio device. She could also use her laptop and voice recognition software to make notes.

448. She had use of her Livescribe pen since 2013. She wanted to use electronically sensitive labels which had to be printed by a colour printer. The respondent was willing to provide the paper and the claimant was willing to wait for the printer to print the labels which would be placed on to patients' files. The respondent could not afford to use coloured ink and nothing was printed out in colour. The claimant was provided with a printer but it did not have a high enough resolution to print the paper correctly. This was a refinement as the disadvantage was already removed by the provision of audio equipment and pre-printed labels.

449. As regards the claimant's workload being reduced, we refer to our conclusion above in paragraph 438.

450. The claimant asserted that she should have been permitted to remain at work out of hours to catch up on tasks but we have found that the respondent did not prevent her from working outside of her contracted hours but advised that she should inform security if she was working late as working alone is contrary to the Lone Worker policy as well as a health and safety issue. At the stage 2 meeting held on 1 July 2015, Ms Klein noted that the claimant, who was working on Sunday, had said that it was a short-term solution as she was worried that she would not remember patients' information. She agreed that she would inform security when working alone. Ms Klein said that for the future the claimant working alone would have to be negotiated taking into consideration her wellbeing and rest time over the weekends. We refer to paragraphs 264 and 289 to 290 above in our findings of fact. The respondent took the reasonable step of allowing the claimant to remain at work outside her contractual hours if she informed security and it did not affect her well-being and rest time. In any event the claimant could catch up during her protected time on a Wednesday. In our view it could not be reasonable adjustment if it is likely to be injurious to a disabled employee.

451. The respondent took all reasonable steps, in that the claimant was provided with a Dictaphone; Dragon Voice Recognition software and could use pre-printed sticky labels to put on to patients' notes to let her colleagues know that she had intervened and thus refer them to the patients' electronic notes, that is, the GCIS entries. In 2015 and up to 25 May 2016, she was seeing substantially fewer patients which minimised her note-taking. In 2015 she saw 21 new patients followed by Ms Khanna who saw 80.

452. Accordingly, the respondent complied with its duty to make reasonable adjustments.

453. Going back to the first part of the alleged pcp, namely that the claimant was required to make handwritten notes in one to one meetings, even if we are in error that his is not a pcp because there was no such requirement, it had not been made clear to us why the respondent required her to make notes during one to one meetings. As far as we are aware no other staff member was required to make notes of formal meetings with their managers. It was unclear why it was a reasonable step to audio record all her meetings. She claimant was provided with detailed accounts of her meetings with managers and there were few challenges to the accuracy of the summaries. She could write albeit for short periods and her trade union representatives were able to take notes at the capability meetings.

454. With regard to the provision of electronic sensitive paper and the use of her Livescribe pen, the respondent had already made all reasonable

adjustments to remove the disadvantage, such as the voice recognition software, sticky labels and Dictaphone. The claimant had the pen since 2013. She wanted to use electronically sensitive labels to put on to patients' notes. This may have made the process more efficient. She was prepared to wait for the coloured printer. It was expected by September 2015 but delivered in March 2016. The poor quality of the print did not enable her to use the printer and attempts were being made to resolve the problem. We come to the conclusion that provision of electronic sensitive paper and the Livescribe pen may have enabled the claimant to work more efficiently. It is, therefore, not a reasonable adjustment.

455. In relation to the workload being reduced, we refer to our earlier conclusions on this aspect of her case set out in paragraph 438.

456. The claimant asserted that she should have been permitted to remain at work out of hours to catch up on tasks. As already found, we repeat that the respondent did not prevent her from working outside of her contracted hours but advised that she should inform security when working late as working alone is contrary to the Lone Worker policy and is a health and safety issue. As previously stated, on 1 July 2015, during the stage 2 meeting, Ms Klein noted that the claimant was working on Sunday. The claimant said that it was a short-term solution as she was worried that she would not remember patients' information. She agreed to inform security when she would be working alone. Ms Klein instructed that in future the claimant working alone would have to be negotiated taking into consideration her wellbeing and rest time over the weekends. We refer to paragraphs 264 and 289 to 290.

457. We also take into account that, in any event, the claimant could catch up during her protected time on Wednesday.

458. As regards claim 3, the claimant alleges that she was required to make handwritten notes with a conventional pen and paper during one-to-one meetings, multi-disciplinary team meetings, team meetings, patients' assessments and when taking phone messages, (Table 1/3).

459. For the reasons already given, she was not required to take handwritten notes with a conventional pen at one-to-one and team meetings. There was, therefore, no such pcp. She was required to take notes of patients' assessments and phone messages in relation to patients. For the reasons given above, it put her at a substantial disadvantage but the respondent did not fail in its duty for the reasons given above.

460. In relation to taking phone messages, this is a pcp, but the claimant did not suffer a substantial disadvantage as she was able write for short periods. Accordingly, this failure to make reasonable adjustments claim is not well-founded.

461. The claimant alleged that "being required to work at a desk positioned in the respondent's offices which could not face from any direction/door and being required to work at a desk positioned against the wall, with a desk neighbouring on the side and another desk behind her", was a pcp, claim 4, (Table 1/4).

> "Reas adjustments: The respondent should have given the claimant her own office, or at least ensured that her desk was positioned (in the way described above) or given her a noise-cancelling booth."

462. In order to hear and understand clearly what was being said, the claimant would need to face the person who was speaking to her when at her desk. She repeated this to Ms Myatt who recorded it in her Work Station Assessment report dated 28 January 2014. (1481-1482)

463. The claimant said in evidence that because of her dyspraxia, she required her desk to be positioned so that she would be facing the person speaking to her. This was confirmed, she said, by her dyspraxia tutor. In her disability impact statement, she stated that because of her dyspraxia she could be easily distracted and finds picking up non-verbal signals and judging tone or pitch of voice in others difficult. This is supported by the Genius Within coach in a report dated 21 January 2014 which also stated that another helpful way, apart from repositioning her desk at 90 degrees, was to take her laptop to a quiet room. (635-636)

464. It is questionable whether the re-positioning of her desk in such a way that the claimant was not able to see the person speaking to her, is a pcp as, according to the claimant, it only applied to her. Even if it was a pcp, did she suffer a substantial disadvantage? We accept that she was at a substantial disadvantage in that she found it hard to filter out irrelevant information especially from the back and sides of her. This meant that she could become easily distracted making it difficult to focus on the job in hand. (635)

465. She suggested that the respondent should have offered her own office as a reasonable adjustment. We found that she was offered her own office in 2012 but refused because she did not want to be separated from the team. She could move to a quiet location by taking her laptop and trolley/cart. The respondent did not have the space to give so that she had her own office until the Chemotherapy Unit was moved. The Unit was moved in 2016 when the claimant was on sick leave. We also found that to re-position her desk to 90 degrees would not have been in accordance with the fire regulations as it would have left only a gap of 45cm which would be below the minimum standard required under the regulations. Her desk was repositioned in or around November 2013. When she visited in that month while on sick leave, she complained about many things and listed seven items at the time but not the repositioning of her desk. (1398-1399)

466. The noise cancelling booth was not to minimise distraction or remove noise altogether but to reduce ambient noise when using the Dragon

voice recognition software. The claimant wanted to be able to see those speaking to her, a noise cancelling booth would not have achieved that purpose and was not recommended by ATW but was her preference. They recommended a perspex screen to reduce the noise. The cost of the booth was unreasonably expensive because an office move was planned in the near future which would have resulted in the claimant being given her own office space.

467. The claimant could work during quieter periods with no distraction. When she went from 5 to 4 and then to 2 days a week, her daily working hours were longer than the core hours. She, therefore, had the opportunity of doing her work during quiet periods outside of the core hours.

468. We have come to the conclusion that the respondent had taken all reasonable steps to minimise or eliminate the disadvantage of her dyspraxia related distraction issues.

469. In claim 5, (Table 1/5), the claimant claims that she was required to share an office. We do not accept that this is a pcp as she offered the chance of moving to an office space but refused as she wanted to stay with the team. Even if this is a pcp, the claimant's case is that a reasonable step was for her to have been given her own office. For the reasons given above in paragraph 465, the respondent had taken all reasonable steps to remove or ameliorate the disadvantage. There was no breach of the duty to make reasonable adjustments. This failure to make reasonable adjustments claim is not well-founded.

470. In relation to "being required to work in an environment with every day work place conversational, and telephone noise, along with noisy handovers amongst other teams who were sharing the same office space (Table 1/6);" the claimant contends that a reasonable adjustment was for her to have been provided with her own office. We refer to the above paragraphs 463 to 468 and conclude that there was no breach of the duty to make reasonable adjustments. This failure to make reasonable adjustments claim is not well-founded.

471. Being required to use a table with moving parts (an electric sit to stand desk) without a protective screen, claim 7, (Table 1/7), we do not conclude that this is a pcp. The claimant wanted an electric sit to stand desk which was provided by the respondent. ATW recommended a perspex screen which the respondent was willing to provide. It was the claimant who contacted Nautilus and they recommended the booth. It is inaccurate to assert that the claimant was required to use the table without a protective screen.

472. Even if the above is a pcp, the substantial disadvantage is likely to be working at the desk with ambient noise and is not, in our view, the risk of injury as asserted by the claimant. She had not been injured by not having a protective screen. She referred to the risk of injury to

someone's fingers being trapped between the top of the desk and the screen but this would be unrelated to her disabilities.

473. She argued that the respondent should have ensured that the desk should have a screen to prevent injury and help improve the use of voice recognition software by eliminating noise pollution. ATW took the view that the Nautilus booth was not suitable and was not recommended by them. The space it would take up and the cost could not be justified. The respondent was prepared to put in a floor standing screen but the claimant did not agree and wanted the booth. There was no evidence before us that she had used the screen and the booth on a trial basis to determine their suitability. We are satisfied, based on the ATW recommendation, that the provision of a perspex screen would have been a reasonable adjustment. (1959) This reasonable adjustments claim is not well-founded.

474. The claimant also claims that she was required to work without the assistance of a Support Worker and that a reasonable adjustment should have ensured that the correct grade of worker was fully available to her, claim 8, (Table 1/8).

475. We have concluded that her disabilities by March 2014, were EDS and dyspraxia. The respondent did not have knowledge of her dyslexia until December 2015. The claimant was on an extended period of sick leave from 17 March 2014, when she applied to ATW for funding for a Support Worker. ATW agreed to fund 260 hours. According to Dr Pattani, the claimant needed a Support Worker to deal with her "backlog" of casework but there was no such backlog as we found, paragraphs 184 and 192. On 18 June 2014, in discussion with Ms Small, the claimant wanted a Support Worker on a temporary basis for 4 months. The respondent expressed concern that not enough time was given for the recommendations implemented to bed in and be assessed. The claimant was required to explain why she needed a Support Worker and had provided a written rationale in response. The job description she provided referred to her disabilities as the reason why she required the worker. It is clear to us that her rationale for a Support Worker changed from helping with the backlog and settling her in on her return to work, to ongoing support to assist her in her work, like a medical secretary (1598). Yet she needed a Support Worker on a temporary basis for four months and was clear in her evidence under cross-examination that the role was only temporary. If the requirements for a Support Worker were ongoing it is difficult to see why she needed someone on a temporary basis. She did not return to work until 24 February 2015 and the respondent did process the request once the job profile was provided by her. Funding was approved in December 2015. A Support Worker was in place in January 2016.

476. In our view, the respondent did provide the claimant with a Support Worker and it is not correct to assert that she was denied one. If she is

suggesting that she was not provided with a suitably qualified support worker, we accept the evidence of Dr Taylor that a Band 3 Support Worker could have been recruited within the budget of £13.50 per hour and every effort was made to do this. The respondent was looking for someone with GCIS access and experience. Even if the claimant was disadvantaged by not having a suitably qualified Support Worker, we come to the conclusion that all reasonable efforts were made to recruit one. Accordingly, there was no breach of the duty to make reasonable adjustments. Alternatively, the claimant wrote in her letter dated 3 October 2015, that she needed a Support Worker because "It would allow me to carry out my job more effectively. It would have a positive effect on my timekeeping in that it would prevent me from staying behind to finish my work or even having to take my work home." (1949-1954) She, therefore, needed a Support Worker to improve her efficiency. This is also an efficiency issue and not a substantial disadvantage. This failure to make reasonable adjustments claim is not well-founded.

477. The claimant claims that she was required to attend disciplinary meetings with management/human resources and her team without being allowed to record the meetings and that as a reasonable adjustment she "should have been permitted to use audio equipment during all meetings.", claim 9, (Table 1/9).

478. The claimant was not required to attend disciplinary meetings but capability meetings. We acknowledge that reference to disciplinary is to capability meetings. Her case is that she was not allowed to audio record the meetings. We accept that this was a pcp as she was told that she was not allowed to audio record the meetings and appears to be general practice. She asserted that because of her disabilities she was unable to take notes of the meetings. We conclude that there was no disadvantage because she was able to take some notes. She also had a union representative present at the meetings who was able to take notes and there was always someone acting in an administrative capacity present who took detailed notes which were then summarised and sent to her. On many occasions she would send a reply in response to the summary contained in the letter, for example, her 7 page reply dated 3 October 2015 to Ms Klein's letter dated 24 July 2015, which referred to the formal review meeting on 1 July 2015 under Stage 2 of the Sickness Absence policy.

479. We have come to the conclusion that the claimant was not substantially disadvantaged by this pcp. This reasonable adjustment claim is, therefore, not well-founded.

480. In relation to claim 10, (Table 1/10), the claimant asserts that on her return to work from 2012 onwards, she was expected to return to full duties and full-time work without waiting until adjustments had been put in place, as required by occupational health. She asserted that it was a reasonable step to have reduced her clinical caseload and she should have been entitled to her full pay during periods when she was medically advised to reduce her working hours.

481. Having regard to our findings of fact, the claimant was not required to engage in full-time duties following her return to work from 2012. During periods of her sickness absence the respondent sought occupational health advice. From August to December 2012, she was on sick leave due to back pain. Occupational health suggested a phased return to work from December 2012 for 6 weeks. In March to December 2013, she was again on sick leave and was on a phased return to work for 6 weeks. In 2014, she was absent from March to December 2014 due to cellulitis. She was then on leave until February 2015 when she was on a phased return on a supernumerary basis. From December 2015 to February 2016, she was on 50% of her normal hours. Thereafter on 75% until April 2016.

482. In submissions to us, Ms Crasnow QC, submitted that the claimant was relying on her return to work in December 2015 and was expected to work her full duties rather than waiting until adjustments have been put in place as required by occupational health. We found that the claimant was required to work 50% of her normal working hours until 11 January 2016 when she was expected to be on 75% but this was extended to 16 February 2016 thereafter she worked at 75% on an extended basis up to 8 April 2016. From 20 January 2016, she had a Support Worker until 24 February 2016. The respondent followed Dr Pattani's advice. There was no such pcp as contended by the claimant.

483. The wording of the pcp and the alleged reasonable step are not consistent. In the pcp the claimant referred to until "adjustments" were in place as required by occupational health whereas, as a reasonable step, she stated "until such time as all reasonable adjustments were in place."

484. The respondent did follow occupational health advice at all stages including implementing Dr Pattani's recommendations. Dr Pattani did not advise that the claimant should not return to work until adjustments were in place. We conclude that there was no pcp on two counts, firstly, the claimant was not required to return to work on full duties, and secondly, following Dr Pattani's advice, adjustments were put in place when the claimant returned to work.

485. Even if it is a pcp as claimed, the claimant did not suffer a substantial disadvantage because the adjustments she wanted were in place. She was given a reduced caseload. According to Dr Taylor, the work the claimant was doing when she took over her line management, was less than a new Band 7 nurse.

486. The claimant requested at the informal grievance meeting on 14 December 2015, that her hours be reduced to 50% due to stress and was advised to discuss it with Dr Pattani which she did on 16 December and her request was acceded to. It was agreed that she would work 2 days a week with a reduced caseload. (2528)

487. The medical advice to reduce her hours in December 2015, was unrelated to her disabilities but followed on from a stress assessment. The sick notes do confirm she was suffering from stress at work. (618-622) The requirement to reduce her hours was unrelated to her disabilities. She was, therefore, not entitled to full-pay. Paragraph 17 of the ECHR Code and the dictum in Meikle do not apply as her absence was not caused by any failure to make reasonable adjustments. This reasonable adjustment claim is, therefore, not well-founded.

488. The claimant alleged that she was only permitted to remain at the work place during her contracted hours, claim 11, (Table 1/11). The reasonable step "should have been either to reduce the claimant's clinical caseload until such time as all the necessary software and support adjustments were in place, or allow her to remain in the office out of hours to catch up. This, she asserted, had a profound effect on her developing into depression."

489. We have found she was not prevented from working outside of her contracted hours. The only requirement being that she inform security. She was advised of this by Ms Small on 14 July 2010 by reference to the respondent's Lone Worker policy. Dr Taylor also informed her during the stage 2 meeting held on 5 June 2015, that she had not been informed that she was working Sundays in the office. The claimant stated that it was a short-term solution and that she would inform security when she would be working alone. We found in paragraphs 62, 289 and 290 above, that the respondent did not prevent her from working outside of her contracted hours but advised that she should inform security when she was would be working late having regard to the Lone Worker policy.

490. We have come to conclusion that it was not a pcp that the claimant was only being permitted to remain at the workplace during her contracted hours.

491. If it is a pcp, when the claimant complained of stress, assuming her stress was a substantial disadvantage, having regard to her health, she and other employees, were told not to work unsocial hours. We agree with Ms Stout's submissions that it is not a reasonable adjustment to allow a stressed employee to continue working long hours to midnight or to 1am.

492. Even if the claimant did suffer a substantial disadvantage, the respondent did reduce her hours as well as her caseload. We note an inconsistency between the claimant wanting to work long hours in the evenings and at weekends compared with her wish to reduce her hours during core working time when under stress. Further, we find that the respondent having put in place numerous adjustments, were entitled to take the view that it was not necessary for the claimant to do her work outside of her contracted hours. There was no breach of the duty to make reasonable adjustments. This claim is not well- founded.

493. As regards claim 12, namely putting the onus on individual employees to apply for promotions/redeployment, (Table 1/12), the claimant alleged that the respondent should have taken the reasonable step in actively exploring what steps could be taken to support her in seeking promotion.

494. We conclude that this is pcp as the respondent's policy was not to proactively encourage existing staff in applying for promotion because it is possible that the line manager may be on the selection or interview panel.

495. In Ms Crasnow's submissions she stated the because of the claimant's disabilities she lacked the confidence to apply compared with other members of her team and was never given any encouragement to do this and perhaps her disabilities led her managers to doubt her competence. The claimant was, after all, a highly experienced and responsible nurse.

496. In paragraph 269 of our judgment, we found that in 2012, the claimant was aware of the advertised vacancy, but she consciously decided not to apply as she had been absent for a considerable period of time and felt that she would be at a disadvantage in getting the job. She did not discuss her reservation with her line manager and there was no evidence that the respondent knew or ought to have known that she lacked the confidence to apply for the post.

497. We are of the view that in 2012, there was nothing preventing the claimant from discussing the Band 8A role with Ms Small. By then she had completed a Masters Degree in Advance Nursing Care and Gastroenterology at Kings College London and was able to type as well being able to express herself orally. There was no substantial disadvantage to her. As she had not discussed with the respondent applying for the vacant position, the respondent would not have known the reasons why she chose not to apply.

498. In relation to the vacant position in 2015, we accepted Ms Khanna's evidence that she had a discussion with the claimant and said to her that she would not apply if the claimant was going to apply for the post. The claimant responded by telling her that she was not going to apply although she was aware of the vacancy. She also said that as she had just returned from a period of sick leave and having regard to her sickness absence record, she was unlikely to get the vacant position. In 2013/14, she was absent as a result of a foot injury. In 2015 it was Cellulitis/alleged Lyme Disease following the insect bite in Brazil. Her more recent absences were unrelated to her disabilities. She helped Ms Khanna with her presentation during the selection process who was successful and the claimant congratulated her by sending her flowers. We have concluded that the claimant was not at a substantial disadvantage as she was able to apply and could have spoken to Dr Taylor about the role as she had engaged in conversations with Dr

Taylor over a variety of adjustments. She had also spoken to Ms Khanna. This claim failure to make reasonable adjustments claim is not well-founded.

499. As regards claim 13, the claimant alleges that the respondent misapplied the sickness absence policy and that disability related sickness absences were not discounted, (Table 1/13). She asserted that the respondent should have made reasonable adjustments to the sickness absence procedure by discounting the periods when she was on disability related sickness absence.

500. Ms Crasnow submitted that the fracture and Cellulitis arose from the claimant's disabilities and referred to Dr Pattani's letter dated 15 May 2013, in which she wrote that the claimant's condition does predispose her to an increased risk of fractures. We found that the doctor also wrote that people with the claimant's condition adapt their lifestyles as such that they avoid activities and modify their lifestyles to ensure that they take good care of their musculo-skeletal systems. Dr Pattani did not say that the claimant's injury to her foot while walking down the stairs at her home, was directly caused by her disabilities, in particular, her EDS. We accept that the recovery might be slower because of her EDS. The respondent accepted Dr Pattani's later report that the injury was unrelated to the claimant's EDS. The claimant's Cellulitis/Lyme Disease occurred after Dr Pattani's May 2013 report.

501. Ms Crasnow further submitted that Ms Small's evidence about how disabled and non-disabled people are treated under the sickness absence policy was far from clear. The claimant, once she reached stage 2 of the policy following ten days sickness absence in a twelve months period, remained on stage 2 regardless of her levels of absence. No thought was ever given to her going back on to stage 1 purely because of the amount of absence she had in the past. Although Ms Small said in evidence that the respondent did not apply the ten days trigger, the claimant was never told about this. Ten days over twelve months was not an upper limit under the policy but a trigger, but Ms Small never considered discounting her absence. In fact, the claimant was treated like a non-disabled employee, in that all of her absences were counted against her. The only reason why she was not dismissed earlier was that Human Resources said that the respondent had to make reasonable adjustments and set out options for Ms Small to consider. (1581). The sickness absence policy was misapplied in relation to the claimant as Ms Klein stated on several occasions that she was preparing a case to put before a stage 3 panel despite the criteria for so doing not being satisfied. Ms Klein's response was to say that she was relying on Human Resources advice, but was neither able to explain nor justify the decision. The sickness absence policy makes no reference to a two years period during which if absences occurred would entitle management to proceed to stage 3. The claimant never came off stage 2 and was alarmed, stressed and

extremely upset at the prospect of being placed on stage 3. It is only at stage 3 that dismissal becomes an option.

502. Ms Stout submitted that there were no breaches of the respondent's sickness absence policies and that the claimant remained on stage 2 by way of being monitored. There could be a referral to stage 3 at any point should there be further sickness absence during the monitoring period. It properly applied paragraphs 3.2.6 and 4.2.3 of its policy, in that the claimant's absences did persist and was monitored. The respondent did not proceed to a stage 3 hearing in accordance with paragraph 4.2.3.

503. The claimant referred to the misapplication of the sickness absence policy. Her case is that she was not taken off the 2010 policy as it had been updated by the later 2015 version. She asserted that she was treated like a non-disabled person with reference to the policies.

504. We have come to the conclusion that the misapplication or the application of the sickness absence policies in the claimant's case is a pcp and that she was placed at a substantial disadvantage, in that the respondent's 2010 sickness absence policy applied to her and she was monitored. We are, however, mindful of the fact that in respect of the more recent extended sickness absences in 2013/14 and 2014/15, namely the fracture and Cellulitis/Lyme Disease respectively, that neither period of absence was disability related.

505. In any event, even if the more recent long absences were disability related, adjustments were made by the respondent, in that the claimant never, despite her high absence level, attended a stage 3 meeting where she could have been dismissed. She had such a high level of sickness absence from 2009 to March 2016, 879 days, which when adjusted to remove weekends, was approximately 628 working days. It was, therefore, unreasonable to expect the respondent to discount all of her sickness absences in applying the sickness absence policy. We apply the judgment in the case of Griffiths referred to in Ms Stout's written submissions. In Griffiths, it was held that it may not be a reasonable adjustment to extend the trigger point for absence management when lengthy further periods of absences are anticipated and extending the trigger point is unlikely to remove the disadvantage, paragraphs 77 and 78 of the judgment. We have come to the conclusion that there was no breach of the duty to make reasonable adjustments. This claim is not well-founded.

506. In relation to the claim 14, (Table 1/14), that of "being paid the contracted rate at times when disability restricts ability to undertake all duties," the claimant asserted that as a reasonable step the respondent should have paid her full pay during any period she was medically advised not to work due to her disability/ies until the respondent completed all reasonable adjustments.

507. Although similarly worded to claim 10, it is much wider, in that the claimant's case is that she should be paid when her disabilities restricted her ability to undertake all duties and referred to the period from late 2015 to April 2016. During that time, she was paid for the hours she worked. From late 2015 to April 2016, the reason why she felt unable to undertake all of her duties was because of stress not that her disabilities restricted her ability to undertake her duties. It is, therefore, not a pcp as drafted by her. It was not an Occupational Health recommendation that she should be on reduced hours due to her stress. Prior to late 2015, she was paid in full during her phased return to work and time off for medical appointments.

508. Even if it is a pcp, the claimant did not suffer a substantial disadvantage because of her disabilities. She had not listed stress as one of her disabilities and at each stage in the process the respondent made reasonable adjustments such as paying her in full during her recommended phased return to work as advised by Dr Pattani. We have concluded that by December 2015, the respondent had implemented all reasonable adjustments and had not failed to make reasonable adjustments when required to do so. This failure to make reasonable adjustments claim is not well-founded.

509. The next act relied upon by the claimant is claim 15, (Table 1/15), that "If dictation equipment is needed in the course of one's duties, adequate equipment will be provided, that is dictation device." She asserted that as a reasonable step the respondent should have ensured that she had access to fully functional dictation devices at all times.

510. We accept that this is a pcp but do not accept that the claimant was substantially disadvantaged in not having use of a dictaphone or a Live Scribe Pen. She did have use of a Dictaphone and a Livescribe pen which were functional at all material times. The Dragon software was a reasonable adjustment but the Dragon update version 2 and Dragon Medical were refinements to make her more efficient. They were, therefore, not reasonable adjustments. Alternatively, issues with Dragon were to do with maintenance and were not a failure to make reasonable adjustments. We have, therefore, come to the conclusion that this failure to make reasonable adjustments claim is not well-founded.

511. In claim 16, (Table1/16), the claimant claims that as a pcp during IT updates she was, "being given substitute equipment, PCs and laptops". She asserted that as a reasonable step the respondent should have made reasonable adjustments to ensure that she had suitable software equipment available to her at all times and be given additional time to complete tasks.

512. Ms Crasnow submitted that the claimant's software was still not up to speed by late 2015 and even into 2016 with regard to the upgrades and compatibility issues. She asserted that the problems were due to the

claimant's managers and the respondent's IT department not prioritising such an adjustment and allowing the process to stall during the claimant's absences save where trials were necessitated.

513. In the Further and Better Particulars, the claimant this aspect of the claim can be clarified as she referred to the respondent having failed to make reasonable adjustments to ensure updates to her supportive software were done separately from the main IT system/software and that she was not provided with substitute equipment and left using her own phone without access to her supportive software, or patient/hospital databases.

514. If it is the case that the pcp is a "practice" following the case of Nottingham City Transport Ltd v Harvey, it has to have something of an element of repetition and if it relates to procedure, something that is applicable to others than the person suffering the disability. There was no evidence that the respondent made it a practice of not providing suitable substitute equipment as we have found. Where the respondent experienced problems were in applying its IT systems to the new software. ATW before making their recommendations did not liaise with the respondent's IT department to ascertain whether the proposed software packages would work efficiently using the respondent's systems. With respect to the claimant's laptop, she did not have access to it for a limited two weeks period and it was fully functional by 6 May 2015.

515. We are unsure what is meant by the further reference to PCs and this had not been elaborated in the claimant's written submissions.

516. We have come to the conclusion that the pcp, as asserted by the claimant, is not a pcp. Even if it is and she was substantially disadvantaged by its application, during the two weeks period in April/May 2015, when she was without her laptop, the respondent had set up a typing rota to assist her with the GCIS entries. She, therefore, did not need substitute equipment. The rota was set up by Dr Taylor in her email to the team dated 21 April 2015. (1822 to 1823). The respondent experienced problems working with the new software packages and it had purchased new equipment for the claimant.

517. Accordingly, this failure to make reasonable adjustments claim is not well-founded.

518. In relation to claim 17, (Table 1/17), the pcp is not having access to the hospital guest wi-fi. As a reasonable step, the respondent should have made reasonable adjustments to ensure that she had access to the hospital wi-fi at all times, be given reduced clinical duties and more time to complete tasks.

519. We accept that not having access to the hospital guest wi-fi is a pcp but in relation to the claimant's mobile phone, she told the tribunal that she

did not need guest wi-fi on it by the end of May 2015, she, however, needed it on her laptop.

520. As regards her laptop, she needed access to the supportive applications but was told that it was not possible on her laptop. There was no evidence that she was at a substantial disadvantage in not having access to the respondent's guest wi-fi on her laptop. It was raised as an issue in May 2016 and that led to a meeting on 20 May 2016 with Ms Ghia, MacMillan Team Co-ordinator; Mr Michael Sanderson, Head of ICT; Mr Karim Nour, Computer Engineering Manager and Dr Taylor. The purpose of the meeting was to discuss her IT support needs and her ongoing difficulties with software. The claimant stated that she was told by Mr Nour that she could not get wi-fi access outside of the local intranet on either her mobile phone or laptop. Mr Sanderson, however, eventually resolved the issue and gave her guest wi-fi access following the meeting on both her phone and laptop.

521. In our view this is an efficiency argument and not related to either removing or lessening any disadvantages. Even if it is not an efficiency argument we are satisfied that the claimant did not suffer a substantial disadvantage as she had guest wi-fi access following the meeting on 20 May held to resolve her IT issues. This failure to make reasonable adjustment claim is not well-founded.

522. In relation to claim 18, (Table 1/18), the claimant asserts that she was not given appropriate and safe processes to prevent cross-contamination of her finger and hand braces. The reasonable step would have been for the respondent to have made reasonable adjustments correctly and not allow either her or patients to be exposed to unnecessary and increased risk of infection. It failed to acknowledge its failure or offer an apology to her.

523. Apart from the above bare assertion, this aspect of the claimant's case was not expanded upon in the written submissions. It is difficult to understand upon what basis it is put to the tribunal. If, however, it is put on the basis that non-disabled as well as disabled employees who wore finger and hand braces were not given appropriate and safe processes to prevent cross-contamination, then it is capable of being a pcp.

524. In the Further Particulars, the claimant stated that the substantial disadvantage she suffered was increased joint pain and fatigue due to the very laborious cleaning process. We acknowledge that she did suffer in that way and had suffered a substantial disadvantage.

525. We have come to the conclusion, however, that the respondent took all reasonable steps to either alleviate or to minimise the substantial disadvantage suffered by the claimant. At all stages it took professional advice from the infection control nurses and changed instructions to the claimant. As a NHS Trust it should act on professional advice and there

was nothing to suggest that the last cleaning instructions given to the claimant presented an appreciable health risk to either the claimant or to patients. There was no failure to take reasonable steps. Accordingly, this claim is not well-founded.

526. Claim 19, (Table 1/19), is "not permitting outside agencies to support by carrying out reasonable adjustments and assist in training the claimant's colleagues". As a reasonable step, the respondent should have taken advice from outside agencies on training and make reasonable adjustments to support the team and the claimant.

527. We conclude that this is not a pcp as the respondent allowed outside agencies to engage in adjustments for the benefit of the claimant, for example, ATW and Genius Within. Training was provided to the claimant's managers on dyspraxia strategy. We agreed with Ms Stout's submissions that the provision of training to colleagues relate to changes to mental processes rather than practical steps and is, therefore, not a reasonable adjustment even if the claimed pcp applied. The same would apply to the proposed role of Harrow Association for Disabled People as Ms Crasnow submitted that they were going to explain to the respondent the impact of the claimant's disability on her work. This was training to be given to others and not a reasonable adjustment. In any event, the claimant's line managers were fully aware of the issues surrounding her disabilities, likewise her work colleagues who assisted her in carrying out her duties while she was on sick leave. This failure to make reasonable adjustments claim is not well-founded.

Harassment

528. In relation to claim 20, (Table 1/20), the claimant asserted that she was subjected to belittling and dismissive behaviour by her line manager, Dr Taylor, during one to one meetings between September to November 2015.

529. She met with Dr Taylor on 7 September 2015, for an appraisal. It was reasonable for Dr Taylor to discuss her workload, her performance and the management structure. The claimant had been given a reduced workload and the same caseload as a newly qualified band 7 Nurse Specialist and was doing less work than her colleagues. She had 530 interventions in the year which was lower than her colleagues except Ms Deborah Smith, who joined in the last quarter of the year. On reviewing 20 of her patients, Dr Taylor noticed a pattern emerged of the claimant losing contact with many of them after the initial contact and was giving a significant amount of time to three or four of her patients. It was also noted that during the preceding six months, she attended many training sessions which took her away from other aspects of her role. She next met Dr Taylor on 4 November 2015, when the issue of Lone Working was discussed. Dr Taylor emphasised that working

unsocial hours overtime was not allowed without notification and approval and that the claimant had to inform security.

530. Dr Taylor did make a written record of her one to one meetings with the claimant from 7 October to 11 November 2015. During those meetings she discussed, in our view, legitimate management concerns such as annual leave; study leave; workload; training; weekly schedules; overtime; time keeping; note keeping; outstanding items; IT issues and issues raised in emails.

531. Dr Taylor recalled in evidence that during a one to one meeting with the claimant she said the word "annoying" because when she asked the claimant about a piece of software she went off on a tangent. She did not say that the claimant was annoying but that the situation was complicated and complications are annoying.

532. Having taken into account the above matters, we have not come to the conclusion that the claimant was subjected to belittling and dismissive behaviour by Dr Taylor. The conduct alleged was not unwanted. Even if it was unwanted, it was not related to the claimant's disabilities as Dr Taylor discussed relevant work-related issues. The claim of harassment related to disability is not well-founded.

533. In claim 21, (Table 2/21), the claimant alleges that the capability procedure was instigated against her due to some minor grammatical and spelling errors without any previous discussion and/or warning. This covered the period from 2009 to 3 March 2016.

534. We have already found that the respondent was not concerned about grammar but the content of the GCIS entries which were not always comprehensible. It was reasonable for the respondent, namely Dr Taylor, to have raised this issue with the claimant in order to improve her performance. The claimant accepted that it was a requirement of the professional nursing body that accurate notes be kept. We also found that the issues in relation to the accuracy of her GCIS entries were raised previously because she had failed to check her entries and those of the Support Worker's. She was able to identify the spelling errors on Dr Taylor's GCIS entries but unable to amend her own GCIS entry errors. The errors were not related to her disabilities, such as dyspraxia or dyslexia. Even members of her team were concerned about the poor quality of her entries.

535. Although the claimant referred to the spelling errors in Dr Taylor's GCIS entries, we have found and do conclude that her entries were understandable whereas most of the claimant's were incomprehensible. The formal capability procedure was not instigated against her but it was an informal process. The monitor error and printer issues did not impact on her writing ability and some of the entries were made by the Support Worker which the claimant should have checked in any event.

536. Whilst we acknowledge the claimant's difficulties in relation to her dyspraxia and dyslexia, we do not find that an employer raising a legitimate management concern, such as incorrect GCIS entries could be regarded as unwanted conduct. If we are wrong and that the conduct alleged was unwanted, we have come to the conclusion that the conduct was related to the claimant's disabilities. That causal link had not been established. The claimant's disabilities did not prevent her from identifying Dr Taylor's spelling errors. She was and is capable of expressing herself clearly as her emails have shown.

537. Further, the conduct did not have the effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her because she admitted that accurate GCIS entries were important and it was reasonable for the respondent to require that they are accurate and comprehensible in order to ensure patients' safety. Even if we are wrong, we would conclude that the conduct did not have the purpose of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her because, as she stated in evidence, accurate notes are very important for patients' safety. This harassment related to disability claim is not well-founded.

538. In claim 22, (Table2/22), the claimant referred to being sent threatening and bullying emails from her line manager to resume full time working hours. She referred to the period from January 2016 onwards and to emails in January and February 2016 between her and Dr Taylor about her working hours and her rota. She wanted to continue to work at 50% following her doctor's advice due to stress. The respondent wanted her to go up to 75% because of pressure on the team. The claimant was unwilling to do this.

539. We found that the 75% of the claimant's working hours was extended by Dr Taylor up to 8 April 2016. This was well after the date she was due to return to full time duties. Having considered the email chain, we have come to the conclusion that Dr Taylor conducted herself in a reasonable manner with the claimant and that, on occasions, the claimant did fail to respond to her requests for her to give a return to work date. (2163 to 2169 and 2172 to 2179). The requests to work 50% and 75% were due to the claimant's stress and not to her disabilities. We also bear in mind that at the team meeting held on 25 February 2016, concerns were expressed by the team members about how her absence was affecting the team. Notwithstanding those concerns the claimant was allowed to work part-time for an extended period up to 8 April 2016. We have come to the conclusion that the respondent had not engaged in unwanted conduct related to the claimant's disabilities. Even if the conduct was unwanted, there was nothing intimidating, hostile, degrading, humiliating or offensive in the emails and that Dr Taylor conducted herself in a reasonable manner towards the claimant. Accordingly, this harassment related to disability claim is not well-founded.

540. In relation to claim 23, (Table 2/23), the claimant alleges that she was repeatedly sent emails by her line manager over the weekends to her private email address regarding her whereabouts without any attempts to contact her during working hours via her bleep. She stated that the conduct commenced from April 2015 onwards.

541. Although no examples of these emails were provided by the claimant during the hearing, Dr Taylor accepted that, on occasions, she did contact the claimant at weekends on her private email address because the claimant gave her permission to do so as she was having issues with her work email address. The reason why Dr Taylor contacted the claimant via her private email address, was that she found it difficult to keep track of the claimant's movements on a daily basis during working hours. As her line manager, she was entitled to know the whereabouts of her staff. In a hospital environment using the bleeper is confined to urgent cases and emergency matters. It was not appropriate to use it to contact the claimant in non-urgent cases. Dr Taylor's conduct was unrelated to the claimant's disabilities. This harassment related to disability claim is not well-founded.

542. In relation to claim 24, (Table 2/24), it is the claimant's case that she would receive messages written on post-it notes and pieces of paper left on the floor in front of the locked office door and other private correspondence would be left in unsealed envelopes on her desk. The period in question being, "Since 2013 onwards and January 2016".

543. We made findings that Dr Taylor found it necessary to leave post-it messages as the claimant was more difficult to contact than her colleagues. The messages were not urgent and it was a convenient way of letting the claimant know that Dr Taylor wanted to speak to her. We also found that Dr Taylor would try to contact the claimant by telephone or mobile phone first. The colorectal service was always very busy and Dr Taylor had many calls upon her time which meant that she would leave messages for the claimant and other members of her team. This practice was not confined solely to the claimant.

544. The content of the post-it notes which we have seen in the bundle, can be described as normal day to day contacts between work colleagues and were of a friendly and sometime helpful nature. For example, Dr Taylor wrote in one of her post-it notes that she came to see the claimant but the claimant was unavailable and informed her that Ms Tanvi Ghia had been doing a lot of work to help organise matters for her and advised her to contact Ms Ghia as she had been trying to arrange some, unspecified, IT matters. (1907).

545. The post-it notes would be placed on the locked door and would eventually become loose and fall to the floor. They were not of a confidential nature. In relation to the information contained in any of the unsealed envelopes placed on the claimant's desk, evidence was not

disclosed that they were of a confidential nature. We have come to the conclusion that the conduct complained of was unrelated to the claimant's disabilities. This harassment related to disability claim is not well- founded.

546. As regards claim 25, (Table2/25), the claimant alleged that Ms Manju Khanna, contacted patients' family members apologising on her behalf, implying that she had done something wrong. The allegation is that this took place in the office in front of the claimant's colleagues. The claimant referred to 17th, 20th and 23rd May 2016.

547. We have made findings of fact in relation to this claim. There had been a complaint by a patient's daughter about the claimant's attitude towards her mother. The complaint was made on 16 May 2016 and Ms Khanna followed it up on 18 May having been assured by the claimant that the matter had been resolved. Ms Khanna contacted the patient's daughter on that day and the daughter made it clear to her that they did not want the claimant to be the key worker. We accepted Ms Khanna's evidence that the claimant's name was not mentioned during the conversation and she did not say anything to suggest that the claimant had done anything wrong. It is not unusual for patients to request a change in their key worker. Our conclusion is that Ms Khanna's conduct was unrelated to the claimant's disabilities and was the appropriate action of a team leader. This harassment related to disability claim is not well-founded.

548. In claim 26, (Table2/26), the claimant's case is that there had been an ongoing failure to ensure confidentiality of her health and medical conditions. She was repeatedly asked questions about her health and the nature of her medical appointments relating to her condition in front of her colleagues on 14 May 2015, 3 and 4 September 2015 and in November 2015.

549. We have checked the documentary evidence in relation to the dates given in support of this claim. We could find no evidence referable to it. The page numbers referred to are, 2413 to 2414 and they relate to claim 25. The claimant also referred to paragraph 40 of her claim form which is unrelated to this particular claim and also seem to relate to claim 25 above.

550. During the course of Ms Stout's submissions to us, she stated that she first became aware on the day she was due to give her submissions, that this claim is referable to Ms Khanna'a conduct. She reminded the tribunal what Ms Khanna said in evidence that she did not talk in front of colleagues about confidential matters. Certainly, that was Ms Khanna's evidence to us and we accepted her evidence that the discussions did not take place with the claimant in the presence of her colleagues.

551. Insofar as this claim relates to the claimant being questioned at all about her medical appointments, as many of these took place within working hours, we find that it was reasonable for the respondent to find out the nature of the appointments whether medical or otherwise. If an employer asks an employee questions probing into personal medical matters, such conduct could be considered unwanted. We have not made findings of fact that the questioning was unnecessarily intrusive and, as such, we do not conclude that it is unwanted conduct. Ms Khanna, as the claimant's team leader responsible for staff roster, was entitled to know whether an appointment was either medical or for some other reason and the proximate time that person may be absent from work. Further, there was no evidence that in so doing, she breached confidentiality. From a health and safety point of view, the respondent has a duty to the claimant as well as to its staff to ascertain their medical conditions and their whereabouts, particularly when considering making reasonable adjustments. This harassment related to disability claim is not well-founded.

552. Claim 27, (Table2/27), is the assertion on the part of the claimant that her pre-agreed study leave between May to June 2016, was cancelled at short notice. She made specific reference to an email dated 19 May 2016 from Dr Taylor to her. (2549).

553. The training or study leave was on dyspraxia and the claimant was invited to reschedule it as she had only given Dr Taylor one day's notice. Dr Taylor left it to Ms Khanna to decide whether there was enough clinical cover. The claimant was advised by Dr Taylor that going forward when she booked her two outstanding dyspraxia training sessions she must ensure that the dates and times were agreed with Ms Khanna before confirming them with her trainer. (2549).

554. It was apparent from Dr Taylor's email on 18 May 2016, to the claimant, that she informed the claimant that training must be authorised first and that the claimant knew of this requirement. Dr Taylor then wrote that she had asked the claimant for a dyspraxia training schedule several times in the recent weeks but the claimant did not give her the dates. (2416).

555. Ms Khanna did instruct the claimant to rearrange the training. (2407).

556. We accept that the instructions by Ms Khanna to the claimant to rearrange the dyspraxia training was unwanted conduct which related to the claimant's disability as it was training to do with her disability. We do not, however, conclude that it had either the purpose or the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose was for the respondent to know in advance when she would be attending training in order to make the necessary staff cover. In relation to the effect, we take into account that the claimant might have viewed this as harassment but viewed objectively, it was not reasonable for her to take that view as she had

created the set of circumstances which ultimately led to Ms Khanna having to give her instructions to rearrange the training. She had been repeatedly instructed to give advanced notice of future dyspraxia training so that the busy Colorectal Unit could be properly managed and she failed to do so. Having regard to these findings, we have concluded that this harassment related to disability claim is not well-founded.

Victimisation

557. It is accepted by the respondent that the claimant made protected acts in her letter to Ms Small dated 26 July 2010; in her informal grievance dated 24 November 2015 and in relation to the formal grievance dated 10 December 2015.

558. The issue is whether or not the detriments alleged by her were materially influenced by either one or more of the protected acts?

559. In relation to claim 28, in the claimant's Further and Better Particulars alleging harassment because her managers repeatedly told her that she could not do her job and suggested she should take ill health retirement, this is not in the Amended List of Issues. Claim 28 is now Table 3/29 in the Amended List of Issues in which the claimant made reference to weekly one to one meetings with Dr Taylor when her concerns about lack of reasonable adjustments were dismissed, generally unsupported, or not followed up. She alleged that she was "belittled and given unreasonable deadlines and that her line manager would criticise her by stating that the supportive software requested was very complicated and unnecessary." She referred to these events having occurred from September 2015 onwards. The protected act relied upon by her is the letter to Ms Small dated 26 July 2010.

560. We bear in mind that Dr Taylor commenced employment with the respondent in September 2012 on a part-time basis and became the claimant's line manager following the departure of Ms Small in June 2014.

561. We have made findings of fact that the weekly one to one meetings conducted by Dr Taylor related to legitimate management matters and were conducted reasonably and professionally by her. There was no evidence that she was, in anyway, influenced by the claimant's letter to Ms Small dated 26 July 2010 which was five years prior to the events the claimant relies on. No causal connection has been established between that protected act and the alleged detriments. This victimisation claim is not well-founded.

562. In relation to the instigation of the capability procedure against the claimant at a time when reasonable adjustments were not in place, the claimant made reference to 3 March 2016. The protected act being the informal grievance in November 2015, claim 29, (Table 3/30).

563. There were ongoing concerns from March 2013 about the quality of the claimant's GCIS entries. (1348). These were not abated over the following three years. Issues were raised by team members at the meeting on 25 February 2016. The meeting on 3 March 2016 was called following dyspraxia training to management. It was a clean feedback meeting but thereafter moved on to the respondent considering an informal capability meeting which did not, in any event, take place due to the objections raised by the claimant's trade union representative.

564. Having regard to our findings of fact, we have come to the conclusion that the instigation of the informal capability procedure was not materially influenced by the claimant's grievance in November 2015. There were clearly ongoing legitimate issues about the quality of her GCIS entries which, from a responsible management point of view, had to be raised with her and dealt with. In addition, there was an issue regarding the lateness of the entries. The respondent's target was a week after seeing a patient. In the claimant's case, some of her entries were made a month after seeing her patients. Accordingly, this victimisation claim is not well-founded.

565. Claim 30, (Table 3/31), is the allegation that the claimant received threatening and bullying emails from Dr Taylor to resume full working hours. She referred to Dr Taylor's conduct from January 2016 onwards and she relies on the informal grievance in November 2015.

566. We have already made findings and have concluded in respect of Dr Taylor's conduct in relation to requesting the claimant to work her full hours. There was no evidence that the requests by Dr Taylor were materially influenced by the grievance in November 2015, rather they relate to the need in the unit to have the claimant resume her full duties due to the pressure of work. The tone of the emails and content were reasonable and Dr Taylor was quite accommodating in respecting the claimant's needs to extend the period of her reduced hours before resuming full time duties. Our conclusion is that this victimisation claim is not well-founded.

567. As regards "repeatedly being sent emails by her line manager over weekends to her private email address and receiving work emails after working hours or on days off asking about her whereabouts on the day before", the claimant made reference to these events having occurred from January 2016 onwards and relies on the November 2015 informal grievance, claim 31, (Table 3/32).

568. Claim 32, (Table 3/33), this is receiving post-it notes, pieces of paper left on the floor and private correspondence left on the claimant's desk in unsealed envelopes. We have covered this already under harassment. We address claims 31 and 32 together. There is no evidence that Dr Taylor contacted the claimant in the various ways alleged for any other reason other than the fact that it was difficult, on

occasions, for her to speak to the claimant at work. This was Dr Taylor's way of contacting all staff prior to and after November 2015 and was not specific to the claimant nor was it targeted at her. We have come to the conclusion that Dr Taylor's conduct was not materially influenced by the informal grievance in November 2015. Accordingly, these victimisation claims are not well-founded.

569. In relation to claim 33, (Table 3/34), the claimant alleges that there had been an ongoing failure to ensure confidentiality of her health and medical conditions. She alleged that she was repeatedly asked questions about health and the nature of her medical appointments in front of colleagues. She made reference to events having occurred from November 2015, after her informal grievance.

570. We rely and adopt our conclusions in respect of claim 26 in relation to allegations of harassment. There was no evidence that the behaviour or conduct challenged by the claimant was materially influenced by her informal grievance in November 2015. The claimant referred to this allegation in paragraph 214 of her witness statement in which she stated "there was a failure to keep my health concerns confidential and despite raising concerns, I continue to be asked about my health and reasons for my hospital appointments in front of my colleagues."

571. Insofar as it concerns Ms Khanna, she, Ms Khanna, denied disclosing or discussing confidential information about the claimant in front of her work colleagues.

572. There was no evidence that the respondent behaved in the way alleged by the claimant. We conclude that this victimisation claim is not well-founded.

573. Claim 34, (Table 3/35), the claimant alleges that the respondent's absence procedures were incorrectly applied in a discriminatory fashion in her case and made reference to events from 2010 onwards and relies on the 26 July 2010 letter to Ms Small.

574. The sickness absence policy of 2010 defines long term absence as one calendar month of continuous absence. The 2015 policy provides a timeline taking an employee through to stage 3 after 21 weeks. If the respondent had applied either of the two policies strictly in the claimant's case, it is likely that she would have been dismissed. It follows from this that the respondent did not strictly adhere to its policies but acted in the claimant's favour. The 2010 policy was followed by the respondent and the claimant remained at stage 2 monitoring. There could have been a referral to stage 3 at any point after a period of further sickness absence during the monitoring period. A disabled person can be managed under the respondent's sickness absence policy and monitoring is permissible under it. The respondent's practice is that if an employee comes under a particular policy, they would remain on that policy even if the policy is

subsequently updated. We have come to the conclusion that there is no evidence that the application of the 2010 policy was materially influenced by the protected act of 26 July 2010 or any of the subsequent protected acts. With the high level of the claimant's sickness absence she had to be managed under the respondent's sickness absence policy. Accordingly, this victimisation claim is not well-founded.

Discrimination arising from disability

575. In claim 35, (Table 3/36) the claimant alleged that the respondent's practice of leaving it to the employee's discretion whether to apply for a "promoted role" put her at a disadvantage because of her disability. The dates here are 2012, 2014 and two occasions in 2015.

576. The evidence we have heard covers two occasions, 2012 and 2015. We were not referred to an occasion in 2014 and to another occasion in 2015.

577. Ms Crasnow submitted that the respondent left it to the claimant's discretion whether to apply for a promotional role which put her at a disadvantage because of her disabilities. She invited us to refer to our notes of the claimant's evidence mid-day on 6 October 2017. We recorded on that day that the claimant said that she did not feel able to apply for the role in 2012 because the reasonable adjustments were not in place. In relation to the 2015 position, she did not speak to Dr Taylor about the post because she was not encouraged to do so. The something arising in consequence of the claimant's disability, she alleged, was the lack of confidence in applying for the posts in the absence of all reasonable adjustments being implemented.

578. We have made findings of fact and have concluded that all reasonable adjustments were in place at all material times. The claimant was not treated unfavourably because of something arising in consequence of her disabilities. Although she has some difficulty with writing and a general difficulty with organisation, such as thought and work schedules, we have come to the conclusion that they would not have prevented her from making an initial enquiry about applying for the posts nor did they prevented her from applying. We remind ourselves that she has been educated to a Masters Degree level and was quite able to articulate her views and opinions. Indeed, we have observed her to be an assertive person capable of expressing herself to experts in various fields, such as medicine, Access to Work, dyspraxia training, Occupational Psychologists and Occupational Health Consultants as well as support agencies such as Harrow Association for Disabled People. She advocated for a care worker, five hours a day to her local authority. We have concluded that she chose not to discuss both positions but did have a discussion in relation to the 2015 position with Ms Khanna and supported Ms Khanna in her application and

presentation. On both occasions the claimant made the conscious decision not to apply for the positions.

579. Contrary to the claimant's assertions, the respondent by 2012 and 2015, had shown itself to be fully supportive of her disabilities and her other health conditions.

580. Alternatively, even if she was unfavourably treated and was put to a disadvantage, we conclude that the treatment was justified. The legitimate aim being the respondent had to have a transparent equal opportunities compliant recruitment process and it acted proportionately. It was fully open to potential candidates to discuss the role with the managers involved but the managers could not appear to be in any way biased towards any one applicant.

581. We acknowledge that in certain circumstances an employer has a duty to proactively encourage a disabled person to apply for a vacant post. In the context of this case, however, the claimant was aware of the support her managers were offering her and was quite capable of making an enquiry or submitting an application of her own volition for the vacant positions. We have come to the conclusion that this discrimination arising from disability claim is not well-founded.

582. In relation to claim 36, (Table 4/37), the failure on the part of the respondent to discount the claimant's disability related sickness absences, the claimant made reference to events in 2009 and onwards. Ms Crasnow, in her written submissions, asserted that at every stage 2 meeting the claimant's disability related absences were ignored and was treated like a non-disabled worker.

583. Although the claimant was put on the respondent's stage 2 monitoring because of the level of sickness absences, not all of those absences were disability related. There was no clear medical evidence that her foot injury was directly caused by her disabilities only that her EDS predisposes her to the dislocation of her joints or an increased risk of fractures. There was no medical evidence that her alleged Lyme disease or Cellulitis was caused by her disabilities and it had not been articulated that these two conditions were in themselves disabilities. Insofar as the absence management monitoring were about the claimant's disability related absences, applying Griffiths, we accept that the stage 2 monitoring was unfavourable treatment and put her at a disadvantage.

584. However, even if the claimant was unfavourably treated for reasons arising in consequence of her disabilities, the treatment was justified. The legitimate aim was to have a functioning and capable work force. The proportionate means of achieving that aim was for the respondent to monitor all sickness absences regardless of the causes. In the claimant's case the application of the 2010 sickness absence policy and with regard to her disabilities, the trigger points were increased and the

respondent at no stage held a stage 3 meeting with the prospect of terminating her employment. We remind ourselves that from 2009 to 2016, she was absent from work for approximately 42% of her available working time and was not dismissed and for the vast majority of that time was paid in full. We have come to the conclusion that this discrimination arising from disability claim is not well-founded.

585. In relation to claim 37, (Table 4/38), the claimant asserts that the respondent instigated its capability procedure against her due to minor grammatical and spelling errors in in-patient records after she raised an informal grievance. She referred to 3 March 2016.

586. On 3 March 2016, she attended a clean feedback meeting, notes of which were taken and she was given the opportunity to make comments. (2184 to 2186).

587. We have already referred to this meeting in our earlier conclusions. It followed on from the dyspraxia training given to the respondent's managers. The informal capability meeting was held on 1 April 2016.

588. Some of the claimant's GCIS entries were made late and she was making errors. The informal capability procedure was not implemented in respect of anything arising in consequence of her disabilities but with the poor quality of her GCIS entries. The purpose was to improve the quality of her notes. There was no medical evidence to show that there was a direct correlation between the apparently poor quality of her GCIS entries and her disabilities. We also bear in mind that she was able to identify spelling errors made by Dr Taylor but was not able to correct her own mistakes on her GCIS entries and her emails were well constructed and comprehensible.

589. Even if she was treated unfavourably because of something arising in consequence of her disabilities, the unfavourable treatment was justified. The legitimate aim was to ensure compliance with the professional Code of Conduct, maintaining patient safety and the professional standing of the team. In so doing it was proportionate to monitor her GCIS entries and where there was a failure to improve to then instigate the capability procedure. In this case to arrange an informal capability meeting with her. We have also found that at this point the respondent had made all reasonable adjustments to assist her with accurate recording, such as training, computer software and equipment, dictation devices and a reduced workload which meant that she was seeing fewer patients. Accordingly, we have concluded that this discrimination arising from disability claim is not well- founded.

<u>Direct disability discrimination</u>

590. In claim 38, (Table 5/39), the claimant asserted that she "was discriminated against because of her disabilities by being the only member of the team to have two and later three managers to report to. This caused her increased stress as often information was misinterpreted or misunderstood as she needed to update three different managers. She had

asked Human Resources on several occasions to change the structure as it was very difficult for her to follow." The claimant stated that in November 2014, she had two managers and three managers from September 2015. We were not referred to an actual comparator. The hypothetical comparator would be someone with the claimant's job title, her level of sickness absences with similar capability issues and non-disabled or without her disabilities.

591. Ms Crasnow submitted that the claimant's managers frequently overlapped with regard to their stance on adjustments, absence and support but the confusion and stress caused by this was never taken on board. If the claimant reached agreement with one manager, for example, Ms Khanna, about training during a period of phased return to work, Dr Taylor would criticise her for her absence from the department and for her paying insufficient time to her clinical work. The same could be made in respect of study leave or taking time for medical appointments. The detriment to the claimant arose from crossed wires and additional communication whether between the managers or the claimant with more than one manager. The claimant was blamed for not seeking permission in relation to her movements or not communicating her whereabouts. In reality, she was viewed very impatiently and lost the trust of her managers because there was more than one of them. The system was made harder by this process and the claimant justifiably felt unfairly singled out. She had to wait four months to get Dr Taylor's appraisal.

592. We agree with Ms Stout's submissions that the claimant was not given three managers because she was disabled. She was given three managers because she was the only person in the team on sickness absence monitoring; the only person in the team who required substantial levels of support following sickness absences; and she was the only member of the team whose seniority made it inappropriate for her appraisals to be carried out by Ms Khanna. Ms Khanna was in charge of the day to day running of the clinic ensuring that it was properly staffed. Dr Taylor had clinical overview of the unit and Ms Klein managed the claimant's sickness absence.

593. For the reasons given by Ms Stout we accept that it was reasonable for the claimant to have three managers to supervise various aspects of her work and performance. A disproportionate amount of their working time was taken up in addressing the claimant's work issues. Ms Small spent three quarters of a day a week, possibly more, attending to the claimant's issues. Ms Klein, by autumn 2014, would spend about half a day a week on the claimant's issues. Although this diminished over time, this was only because Ms Tanvi Ghia had become more involved. Dr Taylor and Ms Khanna did spend a significant amount of their time dealing with the claimant. From this evidence, cumulatively, it would have taken one manager about two days a week to address solely the claimant's issues. In comparison with the hypothetical comparator, we have come to the conclusion that that person would not have been

treated any differently as the respondent would have been required to distribute various aspects of responsibilities for that person to more than one manager otherwise the time would be disproportionately applied by the manager on one person each week. Accordingly, the claimant was not treated less favourably. This direct disability discrimination claim is not well-founded.

594. In claim 39, (Table 5/40), the claimant alleged that she was discriminated against when the "capability process commenced against her. Patient database GCIS, had very simple word processing application - does not highlight spelling errors. Input information is required in complex form and text input is in a small window. Commencement of the capability process was the first time this issue was discussed with claimant and there had been no previous warnings." We were not referred to an actual comparator and the claimant confirmed in evidence that she was relying on a hypothetical comparator. This would be someone of the claimant's position who made errors in their GCIS entries and was not a disabled person or did not have her disabilities.

595. We have already concluded that the informal capability process did not commence in March 2016 but on 1 April 2016. In March 2016, a clean feedback meeting was held following the dyspraxia training to managers during which the claimant's GCIS entries were discussed. She had the benefit of a Support Worker and yet failed to monitor their entries. Her colleagues had concerns about the poor quality of her entries and raised them with Dr Taylor on 26 February 2016. The informal capability process did not commence because the claimant is disabled. It commenced because her GCIS entries were of a poor quality and incomprehensible unrelated to her disabilities. There was a requirement that they should be clear and should conform to the standards of the professional body which, in many respects, they failed to do.

596. The hypothetical comparator would have been treated no differently, in that concerns would have been raised from 2013 and if not improved, would have led the respondent to invoke its informal capability procedure. Accordingly, there was no less favourable treatment. Even if the treatment was less favourable, we accept the respondent's explanation that it was not because of the claimant's disabilities as the entries were of poor quality and incomprehensible. Accordingly, this direct disability discrimination claim is not well-founded.

Out of time

597. The issue here is whether or not the claimant brought her claims within three months of the relevant acts or events and, if not, have they been brought within such other period as the employment tribunal thinks just and equitable, section 123 (1) Equality Act 2010.

598. The claimant's last day at work was 25 May 2016. No specific incident of discrimination is alleged to have occurred on that day. If there was a continuing act, applying the normal time limit, it would have expired on 24 August 2016. On 12 August 2016, the claimant complied with the requirement to contact ACAS and was issued with a conciliation certificate on 26 September 2016. The claim form was presented to the tribunal on 25 October 2016. The respondent's case is that any claims in respect of any acts ongoing as at 25 May, is in time. Prior to that date they are out of time. The claimant had several previous significant absences including six months between 25 March 2009 and 7 September 2009; 32 days in June/July 2011 and then 38 days in November/December 2011; four months between 6 August to 16 December 2012; nine months between 4 March 2013 and 2 December 2013 in respect of an ankle injury following a fall at home; and 11 months between 17 March 2014 and 14 February 2015, following a foot injury as a result of an insect bite while on holiday in Brazil.

596. Ms Stout submitted that there were intermittent contacts between the parties during each of the absences. Given the length of them, the fact that they were on each occasion caused by some health issues and were not work related, and given the fact that most of the claimant's claims concern reasonable adjustments which, when viewed objectively, can only relate to actions taken or not taken when she was at work, it meant that each of these breaks is sufficient to break any act of discrimination that is alleged to have been continuing.

597. Ms Crasnow submitted that the claimant's complaints took place prior to 26 July 2016 and formed either continuing acts or ongoing situations or a continuing state of affairs which are to be treated as done at the end of the period. The continuing acts relied upon include the application of the sickness absence policy to the claimant; keeping her under threat of stage 3; the launching of the capability procedure; the requirement to work under three managers; and the failure to make all reasonable adjustments with particular emphasis on providing the claimant with a quiet working environment where her voice recognition software would operate satisfactorily. These acts continued up to and beyond the date when the claimant went on sick leave. If they are deemed to have stopped on the claimant's last day at work, namely 25 May 2016, she submitted that they brought her claim in time as the claimant started early conciliation with a certificate being issued on 26 September 2016.

598. Once conciliation ended, the claimant had at least one calendar month to present her claim form. She presented her claim on 25 October 2016 and was thus in time.

599. Alternatively, it would be just and equitable to extend time because the claimant referred to her serious illness after 18 May 2016, stress; she was too ill to attend the grievance hearings after May 2016; the respondent kept good notes and records of meetings and events going back several years and would suffer no prejudice in defending the

claims. The claimant was too unwell to put in a claim for substantial periods when she was absent from work and upon return to work it was reasonable for her to focus on constructive steps to enable her to work effectively. Finally, the respondent was well aware of the claimant's complaints long before they were formalised in a claim form having regard to meetings, correspondence and grievances.

600. Ms Crasnow did not accept that by March 2016, all reasonable adjustments were in place because there were other matters of concern like people in the office; the support worker being removed in March 2016; issues in relation to laptop, handsfree and software not considered until May 2016. The respondent was not interested in the claimant's attempts to arrange training for her team.

601. For the reasons given by Ms Crasnow we have come to the conclusion that the matters relied upon by the claimant do form either a series of acts of a continuing nature or conduct extending over a period under section 123(3)(a) EqA 2010. Either way, this would bring the last act in time with the earlier acts relied upon by the claimant. If we are in error, for the reasons given in respect of extending time on just and equitable grounds, we adopt the submissions of Ms Crasnow.

Credibility

599. Having considered our findings of fact and having observed the claimant in giving evidence, we have decided to address the issue of credibility in our conclusions.

600. We have taken into account our findings in paragraph 76 of our judgment, that the claimant stated in the London Borough of Harrow Re-enablement assessment form that she was not involved in the care of patients but was more an advisor. We found that such a statement was misleading as she was involved in the care of patients.

601. We also found that she had misrepresented the position to various medical practitioners regarding the adjustments already made or in the process of being made, resulting on several occasions in them writing to the respondent asking that her requirements or adjustments be implemented when they already had been. For example, Professor Grahame, paragraphs 122, 126 and 127 of our judgment. The claimant told Dr Moody in November 2015 that she did not have a cognitive assessment and had not received specialist help when in fact she had been assessed by Dr Tim Harper on 26 February 2010 and had received a substantial amount of dyspraxia training as well as frequent Access to Work assessments. She conveyed to Dr Pattani, as noted in her report dated 8 January 2013, that her work was "largely sedentary". We found that that was not the case as her work is largely clinical requiring her to move around the hospital. We also noted that reference to "largely sedentary" appeared again in a further report by Dr Pattani dated 16 October 2013. (1391-1393)

602. The claimant stated during the sickness absence review meeting on 18 June 2014, that she had a confirmed diagnosis of Lyme disease following her holiday in Brazil. A fit note was issued on 24 June 2014, which made no mention of this diagnosis but referred to "temperature symptoms". We checked the fit notes and other medical evidence covering the period of absence and there is no reference to Lyme disease. The fit notes referred to "temperature symptoms". On 12 August 2014, Dr Alan J Hakim, wrote to the claimant's GP copying the claimant and Dr Pattani, stating that he had consulted Dr Buckley, Consultant in Infectious Disease and Intensive Care Medicine, and had received a letter from Dr Buckley who confirmed that following the claimant's return from Brazil, he had investigated her extensively and concluded that the claimant did not have Lyme disease or any infectious diseases as all the antibodies were negative. In her letter to the claimant dated 26 June 2014, Ms Field, following the meeting on 18 June, stated that the claimant updated her and confirmed a new diagnosis of Lyme disease following blood tests results. The claimant was sent a copy of Dr Hakim's report dated 12 August 2014 and wrote the following day to Ms Field trying to explain that there may have been "confusion" over the diagnosis because at the time of the meeting on the 18 June 2014, she stated that it was her understanding that the "test results for Lyme disease had been completed." We do not accept that an experienced nurse, such as the claimant, would confuse completion of the blood tests with a confirmed diagnosis.

603. The claimant maintained during her evidence that her workload had not been reduced but we have found that she dealt with fewer cases than her colleagues and was working reduced hours following on from her recent return to work. The more complex cases were dealt with by Dr Taylor. The claimant told the tribunal upon her reflection that she spent 50% and not what she said initially was 8% of her time engaged in non-clinical work. We also found it difficult to accept her evidence that her workload had not been reduced.

604. Where the claimant's evidence came into conflict with that of the respondent's witnesses, we preferred the evidence of the respondent's witnesses.

605. It follows from our conclusions that all of the claimant's claims are not well-founded and are dismissed. The provisional remedy hearing listed for 2 and 3 May 2018, will now be vacated.

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Employment Judge Bedeau

Date:……05/04/2017……..

Sent to the parties on:

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For the Tribunal Office