EMPLOYMENT TRIBUNALS

Claimant: Dr S McDaid

Respondent: Alder Hey Children's NHS Foundation Trust

Heard at: Liverpool **On:** 12-28 November 2018

Before: Employment Judge T Vincent Ryan
Mr A G Barker
Ms S Khan

REPRESENTATION:

Claimant: Mr R Owen-Thomas, Counsel
Respondent: Mr J Crossfill, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claims of indirect discrimination in relation to the protected characteristic of disability are dismissed upon them having been withdrawn by the claimant.

2. The claimant's claims of discrimination on 14 January 2015, (when one of the respondent's managers made an erroneous reference to the claimant having been absent from work on sick leave for seven months), and 27 May 2015, (when one of the respondent's managers asked the claimant about her reduced working pattern and commented on its effect on the service), were presented to the Tribunal out of time in circumstances where it would not be just and equitable to extend time to the date of presentation of the claimant's claim on 10 October 2017, and these claim are dismissed.

3. The claimant's claim that the respondent failed to make a reasonable adjustment in accordance with its statutory duty in the period from 1 September 2014 to 31 March 2016 was presented to the Tribunal out of time in circumstances when it would not be just and equitable to extend time to the date of presentation of the claim on 10 October 2017, and this claim is dismissed.

4. All other of the claimant's claims of direct discrimination contrary to section 13 Equality Act 2010 (“EA”), discrimination arising from disability contrary to section 15 EA, failure to make reasonable adjustments contrary to section 21 EA and harassment contrary to section 26 EA are not well-founded, fail and are dismissed.

5. The claimant made protected disclosures of information tending to show endangerment to health and safety in September 2015 regarding the provision of mental health services in schools, and 28 September 2016 regarding internal waiting lists and clinic arrangements, but the claimant's claims that she was subjected to detriment because of those disclosures were presented out of time in circumstances where it was reasonably practicable for the claimant to have presented them within the prescribed time limit. These claims are dismissed. In any event they are not well-founded and would have failed; the claimant did not suffer detriment on the ground of having made these disclosures.

6. The claimant did not make protected disclosures between September 2014 and January 2015 during the consultation on planned reorganisation of services by the respondent, or on 7 September 2016 when she made representations regarding proposed increases in workload for consultant psychiatrists.

REASONS

1. Introduction and Issues

1.1 The claimant is a consultant psychiatrist employed by the respondent. The claimant is a disabled person by reason of cancer. The working environment has been strained and the claimant, with others and for others, took up advocacy on certain matters in apparent conflict at times with the respondent’s management. The claimant says that she has made protected disclosures in relation to health and safety. The claimant alleges that she was subjected to less favourable, unfavourable and otherwise detrimental treatment (details of the actual claims are set out below in the list of issues). Her claims span several years. The claimant is currently on long-term sickness absence.

1.2 In addition to witness evidence (the claimant’s, 14 witnesses whose evidence was heard and one whose evidence was read but who did not attend the Tribunal (Ms Cain)), the parties produced:

1.2.1 a bundle of documents comprising three lever arch files, exceeding 1,047 pages (and all page references in these Reasons refer to the trial bundle unless otherwise indicated) (C1-3),

1.2.2 an agreed chronology of events (C4),

1.2.3 an agreed “list of key people” (C5),

1.2.4 an agreed amended List of Issues (C6) to which further amendments were made during the hearing, (and those amendments are incorporated in the List of Issues set out below),

1.2.5 the respondent's opening note (C7) which contained an agreed table setting out the events and claims made in respect of those events, summarising the List of Issues,

1.2.6 the claimant's written closing submissions (given to supplement oral submissions),

1.2.7 the respondent's skeleton argument (given to supplement oral submissions), and

1.2.8 an Authorities bundle comprising 379 pages of Judgments to which the respondent referred in closing submissions.

1.3 C6 set out a draft amended List of Issues which was agreed by the parties at the outset of the hearing, but further amendments and clarifications were then made and the amendments were further clarified and agreed during the hearing on 14 November 2018. They are as follows:

Direct disability discrimination (section 13 EA)

1.3.1 Did the respondent:

(1) Fail to manage the claimant's "return" (sic – it was agreed to be her commencement of work) to work in September 2014;

(2) Fail to allocate the claimant a suitable office;

(3) During the course of a meeting on 24 November 2014, did one of the respondent's managers push a table at the claimant, causing her to sustain a bruise;

(4) Behave as alleged by the claimant at paragraph 81.3 of her claim at a meeting on 14 January 2015;

(5) Fail to permit a phased return to work in February 2015;

(6) In a meeting in February 2015 impose a DCC/SPA ratio in excess of what was required contractually [where DCC stands for Direct Clinical Commitment and SPA stands for Supporting Professional Activity];

(7) Through Dr Earnshaw, tell the claimant on 9 April 2015 that he did not like the tone of her voice;

(8) Attempt to permanently reduce the claimant's hours from five hours to four hours on 30 May 2015;

(9) Between 27 May 2015 and 2 July 2015 challenge the claimant upon how long she required reduced hours;

(10) Remove the claimant from a Task and Finish Group [in circumstances where the respondent says that her role finished when the GP Hotline, which was being considered by the Task and Finish Group, was abandoned on or about 10 April 2016, and where the claimant complains that the Task and Finish Group was reactivated in August 2016; the claimant says she became aware on 4 August 2016 that she had been excluded];

(11) Through Dr Oppenheim, challenge leave booked for 16 October 2016;

(12) Through Dr Oppenheim, at an appraisal on 8 December 2015, act in a "confrontational manner", accusing the claimant of "showboating", acting in a selfish manner and stating that the claimant needed to learn respect for senior consultants.

(13) Place the claimant under pressure to maintain her full-time hours between December 2015 and April 2016;

(14) Mishandle the claimant's sickness leave [during the period 3 October 2016, being the commencement of her absence, and 23 May 2017, being the presentation by her of a formal letter of grievance to the respondent] by:

(i) Failures to communicate;

(ii) Delays in setting up Occupational Health ("OH") reviews;

(iii) Saying that the claimant had not attended welfare meetings;

(iv) Threatening formal action.

(15) Mishandle the claimant's grievance by:

(i) Delays;

(ii) Not keeping the claimant updated;

(iii) The outcome.

1.3.2 Was the treatment found proven less favourable than that afforded or which would have been afforded to an individual who was in the same material circumstances but who did not have the disability that the claimant had? The respondent relies on a hypothetical comparator. [In the claimant's written closing

submissions, the hypothetical comparator with whom the claimant contrasted herself was: "A consultant psychiatrist who had a period of sickness absence immediately before commencing her post in Child and Adolescent Mental Health, and who appears to have recovered from the illness which caused the absence".]

1.3.3 If so, was the reason for the treatment the claimant's disability?

Discrimination arising from disability (contrary to section 15 EA)

1.3.4 Did the respondent treat the claimant in the manner set out under the allegations of direct discrimination above [1.3.1 (1) – (15)]?

1.3.5 Was the reason for that treatment because of something arising in consequence of the claimant's disability?

1.3.6 The "something" relied upon by the claimant is:

(1) The claimant's inability to work at full strength while undergoing and recovering from her treatment;

(2) The sick leave the claimant took and/or the sick leave the respondent perceived her as having taken.

1.3.7 If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? [The respondent's "justification defence" is set out at paragraph 41 on page 12 of the respondent's skeleton argument].

Failure to make reasonable adjustments (contrary to section 21 EA)

1.3.8 Did the respondent apply the following PCPs which placed the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(1) PCP 1 – requiring employees to work full-time hours;

(2) PCP 2 – "requiring employees to consult with patients in a confidential manner and to conduct meetings with patients in an appropriate office so as to ensure confidentiality". [Mr Crossfill for the respondent said he did not understand the way that this was worded as confidentiality is a professional requirement, and this wording of the PCP was described as being "awkward"; the tribunal viewed the alleged PCP in terms of room allocation as that was clearly the issue between the parties];

(3) PCP 3 – "requiring a mandatory ratio of Direct Clinical Commitment (DCC) to Supporting Professional Activity (SPA) of its employees". [The respondent says this does not amount to a PCP, whereas the claimant says it was a

mandatory PCP for the claimant. The respondent says that the expectation of a new consultant is a ratio of DCC 8.5:1.5 SPA unless SPAs are identified for specific consultants and their specific activities, but that the expectational ratio is not fixed and is only a default].

1.3.9 If so, did those PCPs put the claimant at the following substantial disadvantages in comparison with people not sharing the claimant's disability:

(1) PCP1 – the claimant was recovering from cancer treatment and was therefore tired and less able to complete a full working week;

(2) PCP 2 – the claimant was allocated a room which was incompatible with the policy, it was not capable of hosting confidential consultations so the claimant had to walk up and down three flights of stairs to get to an office suitable for consultations, each time the claimant needed to see either a patient, or return to her room during a consultation to get a reference book or other resources, and had to spend time booking and arranging meeting rooms impacting upon her clinical effectiveness and adding to the time and work pressure upon her;

(3) PCP 3 – increasing the claimant's workload in a manner she was unable to cope with given her treatment and recovery, without substantial detriment to her health?

1.3.10 If so, did the respondent take such steps as were reasonable to avoid the disadvantage to the claimant, in particular:

(1) PCP 1 – following the recommendations for a phased return to work outlined by Professor Stebbings in September 2014:

(i) Allowing the claimant to return on a phased return to work in February 2015;

(ii) Reducing the claimant's workload in May 2015 in line with her reduced hours;

(2) PCP 2 – allocating the claimant an office suitable for patient consultations;

(3) PCP 3 – reducing the DCC:DPA ratio to 7.5:2.5?

<u>Harassment (contrary to section 26 EA)</u>

1.3.11 Did the respondent engage in unwanted conduct? The claimant says:

(1) At a meeting in November 2014 LM pushed a table against the claimant.

(2) At a meeting on 14 January 2015 MR tutted and laughed at the claimant; JP referred to the claimant's "seven months' sick leave";

(3) MR pretended not to understand the claimant owing to her broken jaw;

(4) During a telephone call on 29 April 2015 SE stated that he "did not like [the claimant's] tone of voice" when she expressed concerns at being allocated a new task that she felt her disability may prevent her fully undertaking;

(5) At a meeting 2 July 2015 AO asked the claimant "how long she would be on reduced hours" thereby pressurising the claimant to return to full-time hours;

(6) The claimant was removed from membership of the Task and Finish Group, or was not re-appointed to the Task and Finish Group at some time between 10 April 2016 and 4 August 2016;

(7) The claimant was challenged about booking leave for an oncology appointment on October 2015 by AO;

(8) AO was confrontational towards the claimant during her appraisal on 8 December 2015, asking inappropriate questions;

(9) The respondent failed to process the claimant's sick leave in an appropriate manner, including failures in communications, and delays in organising Occupational Health reviews.

1.3.12 Did any conduct found proven relate to the claimant's disability?

1.3.13 If so, did the unwanted conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.3.14 If so, having regard to all the circumstances of the case and her perception, was it reasonable for the conduct to have that effect?

Jurisdictional issues under section 123 Equality Act 2010

1.3.15 Can the claimant establish either –

(1) That any matter complained of falling earlier than 29 April 2017 formed part of an act extending over a period ending after that date; or

(2) That it would be just and equitable to extend time for the presentation of any claim?

<u>Detrimental treatment as a result of making protected disclosures (contrary to section 47B Employment Rights Act 1996 ("ERA")</u>

1.3.16 Did the claimant disclose the following information to the respondent?

(1) Did the claimant, between September 2014 and January 2015, inform her employer than plans to reorganise the service would have a detrimental impact on the health and safety of patients?

(2) Did the claimant inform her employer in September 2015 that the provision of mental health services in schools was being conducted in a manner which was likely to have a detrimental impact on the health and safety of service users?

(3) Did the claimant inform her employer on 7 September 2016 that the requirement to increase workload during on-call sessions was likely to have a detrimental impact on the health and safety of service users?

(4) Did the claimant inform her employer on 28 September 2016 that the internal waiting lists and clinical arrangements were such that the health and safety of patients was being put at risk?

1.3.17 In respect of any matter found –

(1) Did the claimant have a reasonable belief that the information disclosed tended to show matters related to health and safety as per section 43B(d) ERA?

(2) Did the claimant reasonably believe that any disclosures of information were in the public interest?

1.3.18 Did the claimant suffer the following detriments?

(1) At a meeting on 14 January 2015:

(i) Did MR tut and laugh at the claimant, JP refer to the claimant's "seven months' sick leave", and did MR pretend not to understand the claimant owing to her broken jaw?

(ii) At a meeting in November did LM push a table against the claimant?

(iii) At a meeting on 9 April 2015 did SE state that he "did not like the claimant's tone of voice" when she

expressed concerns at being allocated a new task that she felt her disability may prevent her fully undertaking?

(iv) At the meetings on 27 May 2015 and 2 July 2015 did JF ask the claimant how long she would be on reduced hours, thereby pressurising the claimant to return to full-time hours.

(v) The claimant was not invited to return to the Task and Finish Group on 10 April 2016, or following that date, when it was frozen and before 4 August 2016 when she notified that the Task and Finish Group had resumed.

(vi) Was the claimant challenged about booking leave for an oncology appointment on 16 October 2016 by AO?

(vii) Was AO confrontational towards the claimant during her appraisal on 8 December 2015 asking inappropriate questions?

(viii) Did the respondent fail to process the claimant's sick leave in an appropriate manner, including failures in communications and delays in organisation Occupational Health?

(ix) Did the respondent fail to progress the claimant's grievance in an appropriate manner, delaying and failing to keep the claimant informed of progress and failing to uphold the claimant's grievance?

1.3.19 Can the respondent establish the grounds for any treatment found proven?

1.3.20 Was the reason for any treatment found proven because the claimant had made a protected disclosure?

Jurisdictional issues under section 48 Employment Rights Act 1996

1.3.21 In respect of any detriment predating 29 April 2017, can the claimant show either:

(1) That the act forms part of a series of similar acts that one such act post-dated that date; or

(2) That the act(s) complained of extended over a period ending after that date; or

(3) That it was not reasonably practicable to present her claim in time, and that it was presented within a reasonable time thereafter.

2. **The Facts**

2.1 The respondent: The respondent is a large employer with an in-house professional HR team. It has professional operational managers; the senior management team also comprises some clinicians, including clinical leads for groups of consultants. It has a Child and Adolescent Mental Health Services ("CAMHS") team. Document C5 is a list of key people. The claimant has not made claims against individually named respondents other than her employer, and therefore throughout the Judgment reference will be made to key people by their initials, which may be cross referenced to document C5. The senior management team at the relevant times included, for example MR, who is a consultant in A & E, and SE, who is a consultant psychiatrist. During the course of the chronology relevant to these proceedings SE was replaced temporarily by AO and then AI acted as lead psychiatrist on an interim basis too.

2.2 The CAMHS team operated from various premises, but for our purposes the key premises were at Alder Hey and Sefton, between which the claimant split her time. Consultants' work within the respondent's Trust is split between direct clinical commitments ("DCC") and time spent supporting professional activities ("SPA"). The default apportionment of time operated by the respondent is a split of DCC:SPA in the ratio 8.5:1.5. This is negotiable. Additional sessions or time classified as SPA can be gained by undertaking specific leadership roles, research or for undergoing training. Increasing SPA time reduces the time that clinicians spend dealing directly with patients; it is time used for what SE described as "professional stuff", which could include activities necessary to ensure compliance with registration requirements. During the period in question the most generous apportionment between DCC and SPA time was 7.5:2.5 in respect of senior consultants with specific leadership roles, such as Senior Group Lead ("SGL"), in turn SE, AO, AI. The allocation of this time was subject to annual review and agreement of a work plan. The respondent allowed some flexibility in the allocation of SPA time for extraneous matters, but it was not meant to be used to secure flexible working or to comply with any statutory duty to make reasonable adjustments. The respondent operates several policies, as one would expect, such as sickness absence and management attendance policy (pages 999-1024), grievance policy (pages 953-970 and 1025-1037).

2.3 The claimant was employed during her training by the Mersey Deanery and worked at Alder Hey from August 2013 in the post of Senior Trainee in Child and Adolescent Psychiatry. She applied successfully for her first post as a consultant in Child and Adolescent Psychiatry at the respondent in August 2013, and was made an offer of a post to commence in February 2014 at the completion of her certificated training. In September 2013 the claimant was diagnosed with triple negative breast cancer, as a

consequence of which she is for our purposes a disabled person. It would be an understatement to say that the claimant has had a difficult time, and the Tribunal does not wish to either patronise the claimant or to cause her any upset by expressing their considerable sympathy, understanding and appreciation of what she has lived with in terms of her illness. Over a period that she describes as “11 very difficult months” she received treatment in the forms of chemotherapy, surgery and radiotherapy until July 2014. Throughout the chronology of the events described below the claimant had to undergo various tests and at different times received both good and bad news regarding her condition. In October 2016 the claimant was diagnosed with work related stress and has been absent from work continuously since 3 October 2016 because of the latter condition, which is not for our purposes the cause of the claimant's disability. Other than in respect of the respondent’s handling of the claimant’s sickness absence from 3 October 2016 onwards and her grievance (presented to the respondent on 23 May 2017), most of the claimant's claims relate to events between the deferred commencement of her role as a consultant psychiatrist on 1 September 2014 until the commencement of her sickness absence with stress on 3 October 2016.

2.4 Throughout the period under consideration the respondent, but specifically for our purposes the CAMHS team, was providing a service in extremely difficult circumstances. There is a general perception that services were understaffed and over-stretched. There were stark and serious differences of opinions, both between psychiatrists and psychologists, and between their joint forces and the Senior Management/Leadership Team. The respondent concedes in Mr Crossfill’s opening note:

“At the point in time when the claimant started work as a consultant there was an almost dysfunctional level of tension within and between the consultants and the Senior Leadership Team. It is common ground that there were differences of opinion between the various groups.”

2.5 The group of consultant psychiatrists were seen by some of their colleagues as being in a unique position, and they had the impression that they were viewed as wishing to be a special case. There was clear tension between different medical disciplines, each competing for limited resources and attempting to do their best for their patients. The Senior Leadership Team believed that the consultant psychiatrists group was obstructive of reform and sought to reduce their practical working and personal attendance upon patients, whilst the consultant psychiatrists group were wary of breaching guidelines as to safe working methods in the CAMHS area of work. Some at least of the consultant psychiatrist group felt that psychiatry itself was undervalued by certain colleagues in other medical disciplines. Amongst the many and varied areas of contention was the method in which the Tribunal dealt with “planned” and “unplanned” interventions, that is attendances upon patients that were either routine and/or scheduled and those that were emergency attendances. The background also involved problems with long and

growing waiting lists for patients which the respondent was anxious to address; the concern was shared by clinicians including the consultant psychiatrist group. The respondent sought to reorganise working practices in and around that differentiation between planned and unplanned work and how unplanned work could be dealt with in the A & E department, to extend services in primary healthcare in liaison with General Practitioner practices, possibly with the provision of a telephone hotline, and it wished to extend upon and improve its services for the 16-18-year-old age group. Addressing all these issues was vexed and contentious with competing interests, differing opinions, limited resources and increasing pressure.

2.6 The Tribunal adopts the chronology of events (C4) in full, and will not therefore refer specifically in these Reasons to each chronological event insofar as the events set out in the chronology are not controversial. In the hope of addressing more clearly the claimant's different claims some are dealt with separately in relation to findings of fact even where the same events are relied on as the basis for multiple claims; this necessarily involves some duplication but I have tried to minimise repetition whilst communicating clearly what facts we found that were relevant. That said, it is noted that albeit the claimant was due to commence her placement as a consultant in February 2014 in view of her medical condition and treatment there was an agreed deferral to 1 September 2014, a period of some seven months, before she commenced her post. The claimant was then absent from work between 8 December 2014 and 26 January 2015 having fractured her jaw, albeit she returned to work during that period to attend a meeting or meetings. The latter period was the only actual absence from the claimant's active service, the period from February to September 2014 being a delay of commencement. The claimant had no other absences from work until 3 October 2016 as has been described, and that absence continues to date. The claimant is employed by the respondent to date albeit she has been on long-term absence.

2.7 The claimant's appointment was to a 40 hour per week full-time permanent role, but during the first month she had an agreed phased commenced period of reduced hours. She also worked reduced hours for three months from 13 May 2015 at her request, and from 1 April 2016 onwards her five-day week was reduced to a three-day week. The perception of some of the Senior Leadership Team, and management generally, as exemplified by a comment made by JP, was that the period of deferment of commencement of the role was a period of sickness absence of seven months, and the Tribunal finds that JP referred to the claimant being absent from work for seven months on sickness leave at a meeting on 14 January 2015.

2.8 Management of the commencement of the claimant's post in September 2014: SE was the Senior Group Lead ("SGL") at this stage and therefore the claimant's first line manager. SE was aware that the claimant had deferred commencement because of cancer and its treatment; he was cognisant of the seriousness of the claimant's situation; the Tribunal is not

convinced by SE's evidence that he gave active consideration, or had any technical knowledge, to the effect that a diagnosis of cancer automatically attracts protection under the Equality Act 2010 (EA) in relation to the protected characteristic of disability. He was aware of the claimant's deferment of commencement and that this was officially referred to as a "grace period", and that the post had been advertised as a 40-hour week full-time permanent role. At the commencement of the claimant's engagement SE produced for her the 40 hour a week job plan or timetable applicable to the advertised substantive role to which the claimant had been appointed. He did not require her to work it or say that it was his expectation. The claimant queried with SE the possibility of a phased return to work. SE invited the claimant to submit her proposals upon the advice of her General Practitioner, and she did so. SE approved the claimant's proposal without question or condition. A phased return to work was discussed between them and during that conversation SE had reassured the claimant that he would allow her flexibility in her hours, such as by arriving into work late and going home early if that assisted her; he believed that this was feasible because she would have control over the appointments that she booked or had booked for her. He did not oppose either the idea of a phased commencement or the details put forward by the claimant in her email to him of 1 September that appears at pages 111-113. SE considered that he was allowing the claimant "carte blanche" and the Tribunal finds that is in fact the hands-off way he managed this situation. The claimant felt surprised and disadvantaged by having been presented with a 40-hour job plan, but the Tribunal finds that this was merely an indication of the general expectation for the role and that at no time did SE indicate he expected the claimant to work to it, and neither did he apply pressure on her to do so. In any event the issue was resolved by 2.30pm on 1 September in the email correspondence in the trial bundle, such that for the month of September 2014 the claimant would work in accordance with the proposal that she put forward. SE did not propose that the claimant should work for 40 hours per week, and his presentation of the standard job plan for the role to which the claimant had been appointed was not because she was a disabled person; it was because that was the basic role which had been advertised and to which she had been appointed. Because of the claimant's illness and the effects of treatment she was fatigued and unable to work a full 40-hour week from 1 September 2014; that situation arose in consequence of her disability. Discussing a phased commencement against the background of the 40-hour job plan was not unfavourable treatment as the only treatment from SE was to suggest that the claimant put forward a proposal on her GP's advice and then to accept that proposal at face value once it was sent to him, adding that the claimant could also arrive late to work and go early. Whilst the phased commencement did not come about as the claimant had anticipated, the Tribunal has not found in fact that there was any unfavourable treatment of her in these circumstances, and finds as a fact that a non-disabled new recruit who had answered an advertisement making an application for a job commensurate with the plan in SE's possession at the time would also have had a conversation or discussion

with that as the basis for any discussion about what would actually happen at commencement.

2.9 Allocation of office premises at Sefton: CAMHS occupied rented premises in Sefton and the respondent was not the tenant of the entire building. The CAMHS consultants occupied offices on the first floor where there were also clinic rooms in which patients were seen. Upon the claimant's appointment the only vacant office was on the fourth floor, and that was an office that had been occupied until then by AW (social worker and psychotherapist Director of CAMHS since October 2016, and lead for Sefton CAMHS 2012 until October 2016). The room was not soundproofed. Patients were not generally allowed in the building beyond the first floor, and it would be exceptional to allow patients to attend offices for assessment or examination by psychiatrists on the fourth floor; the tribunal understands that the issue would not have arisen prior to the claimant's commencement in post. Generally, sessions with patients were booked for one hour but in any daily session it was possible that 1-5 patients would be seen. The fourth floor was served by a small lift; the lift was slow and was much used and therefore often full. Consultants would keep in their rooms their personal library, reference books and the like, such as leaflets that were particularly useful to them and upon which they relied along with any stethoscope and thermometer or other such equipment. A consultant attending upon a patient in one of the clinic rooms would take with them whatever equipment and literature they required. On 13 May 2015 the claimant raised with MU (Operational Manager, Sefton CAMHS), that the office accommodation was inadequate and inappropriate as she ought not to bring patients to the fourth floor, and yet seeing patients in the clinic rooms on the first floor necessitated her carrying with her equipment, prescription pads and the like, or leaving patients unattended in the first floor clinic room while she went back to her room to get whatever she needed as she needed it; this would more often than not involve the claimant having to descend/ascend stairs if the lift was not available to her, as was often the case, and she found this physically tiring because of her medical condition. The respondent's initial stance was that the lift was an adequate alternative and there was a view that as the claimant kept fit by running in her private life she was probably fit enough to use the stairs, but this did not take account of the frequency of the ascents and descents, and then the return to her room and the disruption and inconvenience caused during appointments (and for example she could not leave a patient alone in a clinic room while she returned to her own room with access to prescription pads and the like, which she have to then take with her again). MU offered to install a cabinet on the first floor for the claimant to store such things adjacent to the clinic rooms to avoid her having to transport them, however no cabinet was installed and even if one had been the claimant would have had to have a supply of some literature and equipment in her own room and in the cabinet, and the arrangement would still necessitate her having to ascend and descend three flights of stairs, which would still have been tiring). The respondent did not make a request of any of the consultants who had offices on the first floor for them to consider swapping with the

fourth-floor office accommodation occupied by the claimant. Eventually, the respondent commissioned building work to divide a first-floor clinic room to create office space for the claimant on the first floor. Whilst the issue was raised by the claimant with the appropriate manager in May 2015 the new office accommodation was not available to the claimant until March 2016 (and the Tribunal has assumed 31 March 2016 from the evidence). MU's business case for the construction work did not include reference to the respondent's statutory duty to make reasonable adjustments or that the office space was required for an employee living with a disability, and such a reference would more than likely have expedited the provision. The work was not undertaken with a view to compliance with a statutory duty, as, whilst MU was aware the claimant had had cancer the Tribunal is not satisfied that he gave due consideration to the fact that she was a disabled person. The allocation of offices was a practice that put the claimant at the substantial disadvantage of physical and mental fatigue and unsettling disruption as described due to her disability, and for the period from 13 May 2015 to 31 March 2016 the respondent did not make an adjustment to remove the substantial disadvantage encountered by the claimant.

2.10 Meeting 24 November 2014 – "the table incident": The respondent's senior leadership team considered that there was a need to reorganise its services owing to adverse feedback alleging inefficiency; this led to several reviews being undertaken, including into the development of an Acute Care Team. This related to what is referred to as a single point of access (referred to also as an SPA in documentation and witness statements, but as that abbreviation is used more often in this Judgment for Supporting Professional Activity I will not use the abbreviation in this instance). The single point of access was to carry out triage and initial assessment of patients who would then be referred to whichever part of the service was felt appropriate. Patients, however, fed back to the respondent that they found this unhelpful as they would have to see another person and have to repeat their case history, such that there was a break in continuity and there was unnecessary repetition. Furthermore, patients "in crisis" such as those attending through the Accident & Emergency Department with a need to be seen urgently would require the person responsible for the single point of access to cancel appointments to see them, and there was an issue over the lack of staff. The senior leadership team proposed a reorganisation whereby the single point of access would still provide triage but that there would be a "crisis response facility". To make this work, teams based at Alder Hey and at Sefton would reorganise to absorb some of the planned work by way of appointments, such as initial assessments. This planned reorganisation was the subject of consultation with staff, the majority of whom were in favour of the new model but the minority, predominantly consultant psychiatrists, felt that their views had not been taken into account and they felt that the proposal fell outside guidelines given by the Royal College of Psychiatrists such that the system could be unsafe and unsatisfactory. This will be referred to throughout the Judgment as the "planned reorganisation" as it forms a major part of the background to

issues faced by the claimant. The senior leadership team took on board the concerns raised by, amongst others, the claimant and AI, but suspected that the consultant psychiatrists group was being obstructive and this led to frustration. The claimant raised concerns based on guidelines and her opinions (shared by the consultants' group) as to a better way of operating the single of point of access, and they did so during a consultation exercise, arguing for an alternative method of delivery. The Royal College of Psychiatrists prepared a report. The proposed reorganisation was halted, the plan amended, and ultimately a revised format was adopted to address concerns raised generally during consultation. The claimant did not disclose specific information of a breach of health and safety regulations/requirements or of information tending to show that health and safety had been, was being or was going to be endangered, other than in terms of voicing opinions as to differing management models. Against that background there were several meetings, some of which were tense and in many of which those present evidenced their frustration with each other. At the end of a meeting in November 2014 LM, a community manager for CAMHS, stood up to leave, pushing herself away from the table at which she had been sitting, and the table moved forwards towards those sitting opposite her, namely the claimant and AI. The table made contact with the claimant and caused bruising. Only the claimant and AI were conscious of the table having moved, and the claimant mentioned to others at around that time that she had sustained bruising but she did not make a formal complaint, and LM was unaware that there had been any contact or impact. The Tribunal finds that LM did not lift and push the table at the claimant, and that in her frustration whilst getting up to leave at the end of the meeting she inadvertently caused the table to move; it was not a deliberate act. The movement of the table was in no way related to the claimant being a disabled person, and as it was not deliberate cannot be said to have related to the consultant psychiatrist group's opposition to the planned reorganisation. LM's moving the table into contact with the claimant was unwanted conduct that upset the claimant and created a hostile or intimidating environment, even though that was not its purpose. It was reasonable for the claimant to feel as she did about the incident, which was unpleasant for her, but the incident was not related to her disability.

2.11 Meeting 14 January 2015: The claimant attended a meeting whilst she was absent for reasons of ill health related to an accident that she suffered in which she broke her jaw; she fell while out running; her jaw was wired at the time that she attended the meeting on 14 January 2015. The claimant came into work despite being on sick leave to address the meeting with AI, as they both wanted to make a presentation on behalf of the consultant psychiatrists regarding the planned reorganisation. They had prepared 30 slides and they wanted to address the meeting upon this presentation, albeit it was not an agenda item. The claimant had not been expected to attend, and neither she nor AI had indicated their intention to make this presentation. The meeting was held during working hours and in that respect interrupted the clinical work of the clinicians who were in attendance, such as MR. Certain members of the senior leadership team

present, including MR, felt that this additional item being raised in a routine meeting was somewhat of an imposition. The claimant and AI distributed hard copies of 30 slides that formed part of the presentation. MR was frustrated. The claimant commenced her address in opposition to the planned reorganisation in which she was taking a lead, albeit she had the support of the consultant psychiatrist group. MR tutted during the presentation, as she felt that there was constant repetition that the proposed reorganisation would be unsafe but there were no concrete proposals and there was insufficient information of a concrete nature. The claimant was stating her opinion, shared with some colleagues, in opposition to the proposed re-organisation and this was part of a consultative exercise. MR did not understand the claimant's argument and said so. MR's reaction in tutting and saying that she did not understand the claimant's argument was because of what she thought was an imposition by disruption of a general meeting to consider a detailed presentation that had not been expected on a subject on which she fundamentally disagreed with the claimant, and did not understand the claimant's point of view. MR's conduct was unwanted by the respondent, and whilst its purpose was not to harass the claimant, the claimant felt a harassing effect and was particularly sensitive to MR saying she did not understand the claimant when her jaw was at that time wired and she was having some difficulty speaking. The claimant misunderstood what was meant. She knew that MR did not agree with her, and did not appear to her to follow the consultant psychiatrist's reasoning; notwithstanding this the claimant interpreted MR's comment of not understanding as being a reference to the difficulty she had in speaking. The Tribunal finds that the comment was made but that it did not relate to the claimant's disability and did not even relate to the fact of the claimant's jaw being wired, which may or may not be related to a weakening of the bones caused by disability related treatment. (This has not been established). During the same meeting JP referred to the claimant having been absent from work for seven months owing to illness. This was an incorrect reference. The claimant had a period of grace of seven months deferring the commencement of her contract, and she had been absent at that stage for some weeks owing to her fractured jaw. The Tribunal finds that JP was referring to the period of grace. This was an unwanted comment as far as the claimant was concerned, and it upset her as it was inaccurate and seemed to imply that the claimant had been absent from her duties for a long time. It was reasonable for the claimant to be sensitive in all the circumstances so described. The claimant took no action regarding this comment and let it pass for the time being because she wanted to get on with work, and did not wish to take a stand on personal affronts to her while she was taking a stand with and on behalf of the consultant psychiatrist group regarding other issues.

2.12 Return to work – February 2015: The claimant was absent in total for two months owing her broken jaw, and on her return to work in February 2015 she met with SE who was still at that time the Senior Group Lead. They held a return to work meeting. SE had partially completed the return to work form in anticipation of the meeting, albeit he was amenable to

making amendments or adjustments to the partially completed form if required. He did not suggest to the claimant that she return to work with reduced hours over a phased period. The claimant did not ask for a phased return to work. The claimant wished to return to work and was certified as fit to work. There is no medical evidence to suggest that the claimant's fractured jaw was in any way related to disability, other than the claimant's suggestion that someone had said to her that it was possible her treatment had caused weakening of the bone, making it more likely than when she fell she would have suffered a fracture. SE was not aware that the fractured jaw caused in a fall whilst the claimant was out running was in any sense related to the claimant's cancer or any other disability. Because of administrative convenience and he expected that business would continue as normal upon the claimant's return certified as fit to work, he partially completed the return to work form; he did not give consideration to the claimant being a disabled person or that the absence had been disability related, and he did not give any consideration to offering a phased return to work, which at that stage it seemed neither party felt relevant. It was open to the claimant to request a phased return to work, but she did not like to draw attention to herself. It was within SE’s powers to grant a phased return to work had he thought it was relevant and might assist. The claimant returned to work without adjustment of hours and appeared to do so willingly.

2.13 February 2015 – apportionment of DCC:SPA time: In the claimant's initial contract a DCC:SPA split of 7.5:2.5 was indicated at clause 7.3 (page 119). The contractual provision states that subject to certain matters a job plan “will typically include an average of 7.5 programmed activities for direct clinical activities and 2.5 programmed activities for support and professional activities. Where your agreed level of duties in relation to supporting professional activities, additional responsibilities and other duties are significantly greater or lower than 2.5 programmed activities there will be a local agreement as to the appropriate balance between activities. The precise balance will be agreed as part of job plan reviews and may vary to take account of circumstances where the agreed level of duties in relation to supporting professional activities, additional NHS responsibilities and external duties are significantly greater or lower than two programmed activities. Responsibilities as a medical director or clinical director may be reflected by substitution for other whole of part programmed activities or by additional remuneration agreed locally”. At all material times the claimant was neither a medical director nor clinical director, and she did not have specific leadership roles or training requirements. She was fully active in a Task and Finish Group, was undertaking some research, suggested areas where she could be trained such as in respect of rapid eye movement research, and these were matters that were properly raised and could be discussed as part of the negotiation and annual review. The policy adopted by the respondent at the material time was that the default for a newly appointed psychiatrist, that is one without directorship or leadership responsibilities or specific training needs, would be an allocation of 8.5:1.5 DCC:SPA. The indication of what was typical for an established consultant set out in the claimant's

contract was only an indication and was not set in stone. Each session is of four hours' duration. 8.5 DCC represents 8½ clinical sessions of four hours each. 1.5 SPA was to cover matters such as revalidation and what SE referred to as "the professional stuff". SE started the conversation with the claimant indicating that her allocation would be the default of 8.5:1.5. The claimant sought additional SPA time to get to grips with her workload as she was tending to attend upon between seven and nine new patients each week, and she was physically tired partially in consequence of the treatment but also the hard work that she was undertaking. SE indicated that the claimant ought to identify for him leadership roles that she could undertake and that would merit additional allocation of SPA time. The claimant needed some rest time, which she could usefully use on "professional stuff" but she particularly needed to reduce her hours of DCC because she was physically tired. Allowing flexibility in this way was not the purpose of the apportionment of DCC and SPA time. Notwithstanding that, SE agreed to increase the claimant's SPA during the annual review and negotiation, as anticipated in the contract, and he did so from 1.5 SPA which was the default to 2 SPA, which was bespoke for the claimant in her particular circumstances. SE was not obliged to do this and it is noted that he, as a senior consultant and SGL, had an apportionment, as did his established colleagues, of 7.5:2.5. The claimant was a newly appointed psychiatrist at the outset of her career as a consultant. It was favourable to the claimant to have an increase in her SPA from 1.5 to 2 without leadership and training considerations as part of the review, and this was a concession made by SE. SE followed the contract, the policy and the applicable procedures at the time in apportioning SPA and DCC, albeit with a concession to the claimant which he felt he could justify. The practice of the respondent was to work with an allocation of 8.5:1.5 subject to negotiation, and increase of SPAs with justification. The disadvantage faced by the claimant in general was that she was physically struggling as regards her energy levels to cope with the workload. The respondent through SE adjusted the claimant's SPA by increasing it, but not to the level of a consultant with leadership responsibilities and training requirements which the claimant did not have.

2.14 Telephone conversation – SE and the claimant 9 April 2015: On 9 April 2015 whilst in the administration office a call came through for the claimant from SE, and the claimant took the call in the office amongst the administrative staff. During that conversation SE told the claimant that there was a requirement to provide a service for 16-18-year olds within CAMHS and to develop that service. SE wished the claimant to do it, and this would be an increase in her areas of responsibility. The Tribunal understands that this could have led to an additional allocation of SPA, but that was not discussed in the conversation on 9 April. The Tribunal finds that SE's expectation of the claimant to undertake this additional role would have been an increase in responsibility. The claimant refused to undertake the additional role and she explained cogently and clearly why she could not do it, as it would have been a considerable extension of her work commitments when she was fully stretched at the time. There is no doubt that the claimant was a conscientious and diligent consultant within

the CAMHS team who took her role and responsibilities very seriously, and the Tribunal also finds that she was in fact at the time seeing more new patients on a regular basis than some of her colleagues; she was probably undertaking more than her fair share of clinical work. Against this background the claimant refused what she considered to be an instruction from SE. Whilst the Tribunal does not find that there was an argument, nevertheless voices were raised and at times SE and the claimant were talking across each other with raised emotions. SE considered that the claimant was challenging him and his authority. The Tribunal finds on the balance of probabilities that SE did say he did not like the tone adopted by the claimant, and that he said it because he did not like her tone and the challenge to him. His comment was unwanted by the claimant, and its purpose was to effectively stop her speaking and to correct her attitude. In effect the claimant felt she had been spoken down to. This was specific to the relatively heated or agitated nature of the conversation, and was not by reference to or in any sense related to the claimant's disability but rather the tone of voice adopted by each of the parties to the conversation where SE was in a senior position and did not like the way he was being addressed. Shortly after this incident SE stepped down from the role of SGL and was replaced by AO. AO became the claimant's line manager and she was in time replaced by AI, who was in turn in due course replaced by CMcL.

2.15 The reduction in the claimant’s hours (5 to 4 days per week) – 30 May 2015: The claimant was seeing her GP regarding her illness and treatment. Her GP suggested to her that she should reduce her working week by two days to a three-day working week because the effect of the claimant’s disability and treatment was to cause her fatigue. The claimant did not wish to do this. As the Tribunal has already found and observed, the claimant was diligent and conscientious; she was new to her role as a consultant and she wished to fulfil it for the good of her patients. She was fully aware of the pressures on the service and how short-staffed the service was at that time, which was creating pressures for those others working within it and impacting on waiting lists of patients, and the patients themselves of course. She agreed with her GP, however, that she would request a reduction by one day per week. On 6 May 2015 the claimant sent an email to LM requesting an urgent meeting to discuss the proposal that she reduce her working week to four days in accordance with GP advice (pages 194-195). She also said that she would arrange an appointment with Occupational Health, but she wished LM to agree an adjustment to the job plan. LM was the Community Manager for CAMHS. She referred the matter to MR as Clinical Director. MR queried the DCC/SPA split and said it too would have to be adjusted to reflect any reduction in hours worked during the week, and said that she would approve the request as requested and that she would complete the necessary forms. By email of 6 May 2015 (page 193) MR approved the claimant’s request. The claimant then realised that it may not have been clear from her request that she sought only a temporary reduction in her time. On 12 May 2015 (pages 192-193) she clarified to MR that this was only a temporary request, and she thanked MR for her help. In response

on 13 May 2015 (page 192) MR confirmed approval of a revised job plan for a four-day week, Mondays to Thursdays, with two sessions per day, making a total of 8 PA with a division of 6.5 DCC and 1.5 SPA to start on 25 May. MR said that she hoped that this arrangement was satisfactory to the claimant, and asked whether it was so, giving her options as to when this could commence if the claimant wanted to remain on full-time hours for a little bit longer, but in any event, she concluded by saying to the claimant that the claimant need only let her know when she wanted to return to full-time working and it would be sorted out for her. The Tribunal finds that initially there had been a misunderstanding as to whether the reduction in hours was to be temporary or permanent; that MR was content to accept the claimant's request on the basis that it was either temporary or permanent; that the reduction would commence whenever the claimant wanted, would be to a level that the claimant wanted, and that the claimant could return to full-time work whenever she wanted. The Tribunal does not consider this to be unfavourable treatment; there was a misunderstanding which the claimant herself acknowledged was owing to her original request not being clear. The misunderstanding was not related to the claimant's disability, her absence or perceived absence from work or any issues raised by the claimant regarding the proposed reorganisation.

2.16 27 May 2015 to 2 July 2015 – the claimant's requirement to work reduced hours: At a meeting on 27 May 2015 JF (CAMHS General Manager) said to the claimant "do you know how long you're going to be on reduced hours for, because this is going to have a significant impact on the service?". JF was not the claimant's line manager, albeit she had an interest in staffing levels as General Manager. It was not JF's remit to challenge the claimant. The claimant felt that she had been put under pressure by JF and felt guilty and under scrutiny, not only because she was asked about timing but because of the comment "…this is going to have a significant impact on the service". The Tribunal finds that the reason for the question as to whether the claimant knew how long she was going to be on reduced hours was that as General Manager of CAMHS JF wanted to know how the respondent could best plan its resources for its needs and accommodate the claimant's absence. The Tribunal finds that the additional comment that the absence was having a significant impact on the service was intended to apply pressure to the claimant to return to full-time working despite the effects of her disability and treatment, and it was reasonable for the claimant to feel that these unwanted words had that purpose; it had that effect. JF's comment was related to the claimant's disability-related reduction in hours; it was not. AO was the claimant's line manager at this time. AO had a conversation in similar terms with the claimant on 2 July 2015 when she asked about the claimant's reduced hours. This was in the context of a discussion around the provision of psychiatric services and the needs of the service for 16-18-year olds. There was general concern about reduced capacity to provide the service, particularly on a Friday of each week. AO and the claimant were likeminded regarding objections to the planned reorganisation, and shared views as to the onerous nature of the

expectations placed upon consultant psychiatrists because of the workload and the waiting list issues. These were all live and current issues. In that context, and in the light of the words used by AO, the Tribunal finds that the reason for her request was related to the planning needs of the service and that it was a straightforward innocent query for managerial reasons, asked by AO in her capacity as interim SGL. The Tribunal finds that it was not reasonable for the claimant to consider such a question in this context from her line manager as having the harassing effect. It was not disability related and any matters raised by the claimant with management had no bearing or influence on AO when she asked the question.

2.17 The respondent wished to consider the provision of its services in the field of primary healthcare, that is how it interacted with General Practitioners. It had a Task and Finish Group. The claimant joined the Task and Finish Group in September 2015. The Task and Finish Group had two strands, namely GP liaison and GP hotline. The claimant initially led on the GP hotline. In April 2016 it was agreed that the hotline should be held in abeyance or frozen and by that date the claimant's line manager was now AI, who was the then interim SGL. AI informed the claimant that no further action was being taken for the time being on the GP hotline. In August 2016 the Task and Finish Group was resurrected and there was some brief consideration of the hotline being made operational, and at that stage the psychiatrist representative on the Task and Finish Group was AO. The issue of the hotline was quickly resolved because it was decided it would not work and it was not pursued. The claimant heard of this, but wondered why she had not been restored to the Task and Finish Group. She raised this with AO, who invited her to take the lead and said that she would be delighted for her to do so. AO described her position as the psychiatrist representative on the Task and Finish Group as being "serendipitous", suggesting that she was just in the wrong place at the wrong time. In any event the hotline was not being pursued and that strand had come to an end. The reason that the claimant was not part of the Task and Finish Group from April to August 2016 was that the hotline was frozen. The reason the claimant was not leading on the hotline in August 2016 was that the hotline was quickly abandoned and insofar as the psychiatrists had a say in the matter on the Task and Finish Group, that say was had by AO who offered the role to the claimant with alacrity. The claimant queried a lack of transparency of leadership and on making the request was offered it. None of these considerations related either to the claimant's cancer, her treatment, her absence from work at any period, the respondent's perception of her absence or any matters that she had raised with management.

2.18 The claimant's leave booked for Friday 16 October 2016: As already alluded to, the respondent found it difficult to cover its services on a Friday of each week. AO for one did not work on a Friday and people would also take leave on a Friday. On this Friday DW was ill, SE took leave but gave short notice (in circumstances where six weeks' notice was generally required). The claimant also took leave at short notice, and this was

approved by AI. The claimant wished to use her leave to attend her oncologist in the morning and a job interview in the afternoon. It was generally known that every three months she would have an oncology appointment on a Friday morning. The request for time off in the afternoon was of a different nature and related to a job interview. The combined effect of AO never working on a Friday and the absences of DW, SE and the claimant caused staffing issues which AO sought to resolve. AO did not know who had approved the claimant's leave out of policy, that is on short notice, that is whether it was MR or AI. At this time AO was SGL, and it is clear from emails that she was concerned principally about staffing levels. Convincingly in evidence she stated that she felt it was wholly inappropriate for patients to attend at the hospital at 9.00am on a Friday with no realistic prospect of being seen before 5.00pm. The Tribunal finds this was a genuine concern and that genuine circumstances gave rise to the concern. On 12 October 2015 (page 309) AO emailed her colleagues about cover generally, inviting someone to volunteer to cover for DW's illness absence. On 13 October 2015 (page 308) AO again emailed indicating that they were clearly going to be short-staffed and that she did not know who was covering the claimant's absence or who had approved her leave, both of which were factually correct statements. AO's general expectation was that if anyone was absent for either a morning or an afternoon because of a medical appointment they would otherwise be at work, particularly in a situation where the respondent was short-staffed. AO was aware that leave had been granted in circumstances outside the policy, that is with short notice, at a time when cover was required, and the authorising manager would have been expected to clarify the position of cover and the appropriate staffing levels before granting short notice leave and either to refuse the request or to make alternative cover arrangements. The Tribunal finds that AO was trying to martial cover and at the same time make a point that people should follow the appropriate policy in requesting leave in time, but more particularly the authorising manager ought in those circumstances to take appropriate measures so that there was no shortage of staff for the needs of the service. AO was making a point mostly to the approving manager. Her email was unwanted as far as the claimant was concerned as she felt that she had been singled out for criticism. The purpose was not to create a harassing effect but rather to deal with a crisis regarding staff levels. It was unreasonable for the claimant to feel a harassing effect at comments principally aimed at the unknown manager who had approved the leave in all the circumstances (which AO believed to be either MR or AI); in any event AO's comments were not related to the claimant's disability but rather to the needs of the service on that day, the shortage of staff and the way leave had been granted by a manager, without making due checks and arrangements.

2.19 The claimant's appraisal – 8 December 2015: The appraisal year ran from 1 April 2014 to 31 March 2015, but the claimant commenced her employment with the respondent on 1 September 2014, which therefore led to a delay in her appraisal. The appraisal took place on 8 December 2015 and the appropriate appraiser at the time was AO. The claimant had

in fact tendered her resignation to the respondent on 23 October 2015 (page 335). The claimant and her colleague, SW, had obtained employment at a private hospital. As it happens, the same private hospital at which the claimant and SW had been offered employment on a job share basis had approached AO directly asking her to consider applying. AO had declined the private hospital's approach and had concerns about that organisation. AO was further concerned at the loss to the respondent of two of its ten consultants and the effect that this would have on the workload of the remaining eight consultants (including her) pending replacement, the effects on rotas and waiting lists. AO also had concern for the claimant and SW, but particularly the claimant so early in her employment in the NHS as a consultant, that it was not a wise move to go to such a private hospital. The claimant had not stated in her letter of resignation why she was resigning, but she resigned on notice. Against that background, the appraisal was somewhat problematic. Part at least of the purpose of the appraisal was to consider the future and to set goals and objectives whilst talking about what support the respondent could give for the achievement of those goals and objectives, all of which was irrelevant in the light of the claimant's imminent departure because of her resignation. Furthermore, AO had been put out by the way the claimant had told her colleague consultants about the resignation. At a regular consultants' meeting, when time was generally taken by the consultants to discuss their many and varied problems in delivering their service (in circumstances where they did not get along very well as a group and were trying to fit in a meeting during the working day), the claimant announced that she was resigning. It had not been expected by her colleagues at that time. The announcement took them by surprise and discussion of the resignation effectively pre-occupied a meeting that would otherwise have been spent in discussing practical issues and solutions which were then deferred. AO felt the claimant had acted inappropriately as this was not the right time or forum for her to make such a dramatic announcement (and we are not saying it was made in a dramatic way). AO therefore went into the appraisal of the claimant with a few matters on her mind, none of which she had previously raised with the claimant directly. Notwithstanding that background, she gave the claimant a constructive, supportive and excellent appraisal as a clinician. AO did not and does not fault the claimant's professionalism generally, her clinical work and care for patients. She wished the claimant to remain at Alder Hey. She wished the claimant to make wise career decisions and to conduct herself in a way that would lead to a successful career. During the appraisal which, as stated, was a very positive formal exercise, AO took the opportunity to raise her personal concerns and effectively to coach the claimant. This came across to the claimant as criticism, but it was intended as constructive criticism. Whilst the Tribunal is unable to make a direct finding as to the exact words used by AO, the words used were interpreted by the claimant as amounting to a criticism of her for showboating when she resigned and of being selfish for resigning. The Tribunal finds that whatever exact words were spoken that was the impression given by AO of her view. AO gave robust advice as a senior consultant to a new consultant, which she hoped would be for her benefit;

it was coaching but put in an uncompromising way (save in that the overall context was that of a positive and encouraging appraisal). She wanted the claimant to act in a manner that she, AO, considered appropriate. In the same vein, she was critical of the claimant's written submission to the appraisal as part of her “reflective writing”. Having been given an opportunity to reflect on practice and to make this submission as part of the appraisal process, the claimant took the opportunity to rehearse her difficulties with the respondent and certain colleagues that she had encountered from September 2014 to 8 December 2015. Once again AO, whilst accepting that the claimant was perfectly entitled to produce reflective writing on anything she felt appropriate, AO did not think this was the appropriate forum, and that it was unhelpful in the appraisal process. The attitude displayed and words spoken by AO relating to the manner of the resignation and submission of the reflective writing were unwanted criticisms on the part of the claimant. The Tribunal finds their purpose was not to create a harassing environment but it was just AO’s way of trying to get across constructive criticism in a situation where she felt personal frustrations, disappointments and concerns. The effect was, however, to undermine the claimant but nothing said or done by AO during the appraisal was because of or was related to the claimant’s disability, her absence or perceived absence from work, or her having made any disclosures tending to show issues related to health and safety. The claimant chose not to add her comment on the appraisal form where provision was allowed at page 395W; rather she signified her acceptance of the statements made by AO in the appraisal form, which is not surprising as it was a constructive and exemplary appraisal. On 14 December 2015 the claimant withdrew her resignation, and she remains employed by the respondent to date.

2.20 The claimant's full-time hours between December 2015 and April 2016: The respondent accepted the claimant’s withdrawal of her resignation in a meeting between the claimant and MR on 14 December 2015. In that meeting MR asked the claimant “what your ideal job would look like?”. The claimant then agreed with MR that she would reduce her working week to three days per week from the commencement of the next financial year on 1 April 2016. On 7 April 2016 that agreed amendment was confirmed in amended terms and conditions of employment (page 423); the claimant’s ten sessions were reduced to six sessions, which is equivalent to a three-day working week. This was what the claimant put forward as her ideal, and it was accepted by MR on behalf of the respondent. At a meeting on 13 January 2016 MU discussed with the claimant internal waiting lists and problems facing the respondent. He commented that it was a responsibility of consultants to address the waiting lists and to plan to do so. The Senior Leadership Team also asked the Consultants’ Group to do what it could to address the issues over the expanding and continuing waiting lists. The claimant felt pressure notwithstanding the respondent’s agreement to her reduction from a five-day working week to a three-day working week. In response to pressure placed on the Consultants’ Group at large, the claimant referred the respondent to the Royal College of Psychiatrists’ Guidance. All the

respondent's consultants were under pressure to get the lists down to a reasonable level. Whilst the claimant gave convincing evidence that she felt pressure, there was no evidence that any comments regarding the waiting lists and the responsibilities of consultants was aimed at her personally, but there were well documented problems facing the service at large. Notwithstanding the knowledge of the Senior Leadership Team and the concerns expressed by everybody regarding the pressure of work, the respondent had never opposed the claimant's request for a reduction in hours, either on a temporary or permanent basis. There was no expressed or implied pressure on the claimant to do anything other than work the hours that she proposed, either at the outset of her employment in September 2014, subsequently when she requested a temporary reduction by one day per week, or when she requested a permanent reduction to three days a week. The claimant felt a pressure because she was conscientious and diligent.

2.21 The claimant's sickness absence – 3 October 2016 to 23 May 2017:

2.21.1 The claimant was signed off work, certified by her doctor as unfitness due to work related stress. This was at about the time that both AI and AO had stepped down as interim Senior Group Leaders. In those circumstances the claimant notified MU and AW formally of her absence as the appropriate managers. She did not, however, submit her sick notes to MU and AW, albeit she correctly realised that she should notify management. On 6 October 2016 an invitation was sent to the claimant for an Occupational Health appointment arranged for 12 October 2016. Unfortunately, the claimant did not see that letter in time and did not attend an Occupational Health meeting on 12 October. Her absence automatically triggered the arrangement of another meeting which was to be held on 20 October 2017. The claimant received notification in good time, but knowing she was unable to attend she re-arranged that meeting. The claimant's absence continued. The respondent did not inform the claimant of her new direct line manager. The claimant did not submit sick notes to MU, AW or any other manager for some months.

2.21.2 On 22 November 2016 KB, who was newly appointed, introduced herself to the claimant on the telephone as the person now managing the claimant's absence and providing support. KB asked the claimant when she was likely to return to work. She asked this so that she could consider the requirements of the service and what support the claimant would require. The claimant said that she was undergoing further tests, but that the telephone call had not been made at a good time and the claimant was not able to have a detailed conversation about her situation. KB asked whether it was likely the claimant would return to work before Christmas if the test results were favourable. There was then some confusion as to who was to make the next call, but the claimant indicated that she expected to have test results on or about 28 November 2016. The claimant's recollection is that she said she would contact KB upon receipt of the results. KB's recollection is

that the results were due and so she had made a diary note to telephone the claimant on 30 November, that is the day after the results are said to have been due. At this stage KB knew that the claimant had been absent since October and that she had a history of a diagnosis of cancer. She was aware that the claimant had not attended the Occupational Health appointment that had been arranged for 12 October; she did not have a full file of papers because the CAMHS team had been relocated and a lot of documentation was in storage; KB devised her own mini-file of basic information only. At this stage her remit was to introduce herself, to offer support, to ascertain a likely return to work date and to agree a plan and a support package to assist the claimant during her absence; she was to support the claimant's safe return to work. As the claimant had been absent for more than two weeks "wheels were in motion" with regard to contracting an agency worker to cover the claimant's continued absence, but these arrangements had to be kept under review and the respondent needed to have some idea of the claimant's plans so that it could in turn plan future cover.

2.21.3 Prompted by her diary note, KB telephoned the claimant on 30 November to enquire how she was, and she left an answerphone message for the claimant only with that question, "how are you?". The claimant had received her results on 29 November but was upset by this approach by KB, with whom she had no personal relationship. The claimant did not return KB's call. The claimant instead complained to SW that she felt she was being harassed and asked SW to tell KB not to call her. SW passed on that message. KB took advice from her HR adviser and it was agreed that in the circumstances they would await receipt of sick notes from the claimant, (which were due), as those fit notes/sick notes would officially confirm the claimant's diagnosis without KB having to ask the claimant. KB was then reluctant to approach the claimant in the run-up to Christmas and was generally wary in view of what SW had told her. She was also offended at the accusation that she had harassed the claimant. She was cross at the way her approaches had been interpreted. In the absence of any further contact from the claimant, and having allowed matters to rest for a while, KB wrote to the claimant on 1 February 2017 inviting her to attend a welfare meeting and asking her to provide an update to the respondent by the provision of the outstanding fit notes as none had been provided since the absence commenced on 3 October 2016. The claimant contacted KB on 8 February 2017 to confirm that she would not be available to attend the arranged welfare meeting of 10 February 2017 because of a conflicting medical appointment. KB rearranged the welfare meeting to 17 February and in accordance with usual practice where meetings were deferred asked the claimant to provide confirmation of the conflicting appointment that made her unavailable to attend the previously arranged welfare meeting. KB wrote to the claimant on 10 February inviting her to a welfare meeting on 17 February. The claimant was not available but gave evidence to the effect that her husband telephoned KB and left an answerphone

message for her saying that the claimant would not be able to attend the welfare meeting on 17 February. We did not hear evidence directly from the claimant's husband, but we accept KB's evidence that whether he telephoned or not she did not receive the message and she genuinely believed that the claimant's non-attendance on 17 February 2017 was unexplained and unexcused.

2.21.4 Owing to the continued lack of constructive dialogue and the accusation of harassment KB considered stepping-down as the support manager and suggested that the role be undertaken by SA, a consultant psychiatrist. KB was struggling to have any rapport with the claimant. On 22 February 2017 the claimant sent to KB the outstanding fit notes for the period from October to February. Once again KB held back on further action for some time as she now had the evidence that had been requested, but she wrote to the claimant on 29 March 2017 questioning the claimant's availability for a rearranged welfare meeting. On 6 April 2017 the claimant's GP wrote an explanation regarding the claimant's situation, and it was sent to SA. SA passed it on to KB on 10 May 2017, but unfortunately on 9 May 2017 KB had written to the claimant to arrange the welfare meeting in a letter that she refers to as the "third and final attempt". In that letter (pages 484-485) KB reminded the claimant of her duty to keep in touch. The welfare meeting was arranged for 18 May 2017. KB confirmed to the claimant that if she did not attend or notify KB in advance that she was unable to attend then KB would seek advice on how best to proceed with formal action, which may include ceasing payment of salary or pursuing investigatory measures due to persistent breaches of the applicable policy. The claimant had not maintained regular contact with KB. KB asked the claimant to contact her and offered any further assistance or information that the claimant may need. She again offered to support the claimant. The tribunal noted that the claimant's absence was in relation to stress and not certified as being related to her disabling condition. This letter was drafted by a HR adviser and was compliant with the respondent's policies in that it reminded the claimant of her duties and responsibilities, and whilst indicating formal action may be taken it also offered appropriate information, contact and support.

2.21.5 The Tribunal finds that the respondent, through KB, on HR advice, maintained reasonably regular and appropriate communication with the claimant, taking into account her requests at various times that the respondent not make contact. The Tribunal also took into account that the claimant had informal lines of communication throughout this period with AI and SW.

2.21.6 The respondent attempted to arrange Occupational Health and supportive welfare meetings, and the arrangements did not always suit the claimant.

2.22 The claimant's grievance:

2.22.1 Facts relating to the allegation of delay –The claimant raised a grievance on 23 May 2017 (pages 490-514). It is a lengthy and detailed 24-page grievance covering the period from September 2013 to 9 May 2017. In her grievance the claimant not only set out details of various issues but also identified a considerable number of her colleagues and managers whom she either criticised or who were supportive of her, but in any event, were involved in the incidents over that four-year period.

2.22.2 On 30 May 2017 (page 517) the respondent's HR department acknowledged the claimant's grievance, which it confirmed would be dealt with in accordance with the respondent's grievance policy. The respondent confirmed that it was in the process of appointing an investing officer, and it requested submission by the claimant of documentation by 8 June 2017.

2.22.3 On 12 June 2017 RG (Associate Chief of Operations) wrote to the claimant (page 520) confirming her appointment as Commissioning Manager and the appointment of CU (Associate Director of Nursing and Governors) as investigating officer. That letter confirmed that arrangements had been made for the grievance to be heard on 22 June 2017, that is within one calendar month of the date on the grievance letter. By 12 June the claimant had submitted some additional documents during the week commencing 5 June 2017.

2.22.4 On 15 June 2017 the claimant confirmed to the respondent that she would not be able to attend the meeting that had been arranged for 22 June. It was also noted that the respondent had failed to take on board that the claimant did not wish to meet on site.

2.22.5 On 16 June 2017 RG apologised to the claimant for having inadvertently missed the fact that the meeting had been arranged on site, and suggested an alternative date for an off-site meeting, namely Tuesday 27 June 2017, with the venue to be confirmed.

2.22.6 On 27 June 2917 the claimant attended an investigatory meeting, the minutes of which are at pages 525-534. At the conclusion of that meeting it was agreed at the claimant's request that efforts would be made to conclude the matter within three months (that is the end of September 2017) and that the claimant would receive fortnightly updates in respect of progress.

2.22.7 On 6 July 2017 the respondent sent the claimant the minutes of the investigatory meeting of 27 June, and on 11 July the claimant replied, approving the minutes.

2.22.8 On 11 July 2017 CU confirmed that she had started the interview process, but indicated to the claimant that the whole investigation was likely to take longer than had initially been thought, but that the target was mid-August. The claimant was reassured that she could telephone the respondent to keep in touch with progress if she wished.

2.22.9 On 25 July 2017 CU provided the claimant with an update and confirmed that there would be some delay owing to the need to conduct additional witness interviews and her own holiday commitments.

2.22.10 On 28 July 2017 the claimant thanked CU for her correspondence and indicated that she would like the matter to be resolved before the end of August (that is sooner than she had originally indicated would be acceptable but closer to the respondent's revised target), not least because her pay would be affected from that period onwards where she was absent on sick leave.

2.22.11 On 7 August 2017 CU again contacted the claimant with a progress report.

2.22.12 Two weeks later, on 21 August 2017, the claimant contacted CU requesting an update, and CU confirmed that owing to certain personal circumstances there was unfortunately a delay. In her evidence the claimant was entirely understanding of CU's personal circumstances but no detail was given to the Tribunal about them. The claimant accepted the genuineness of CU's predicament.

2.22.13 There then followed a delay of one month before the next contact on 26 September 2017 when RG wrote to the claimant (page 662). RG confirmed, "the reason that this report is not yet ready is due to the large amount of information provided by yourself, the requirements to seek further information from others and the complexity of the issues raised, to compile a robust review of the facts". RG confirmed it was then anticipated that the report would not be completed until mid-October, and she sought to reassure the claimant that the grievance was being given due care and attention.

2.22.14 There then followed a three-week delay until 20 October 2017 when RG wrote to the claimant again (page 669). RG confirmed that CU had been ill and this had delayed finalisation of her report for a further two weeks. The claimant accepted CU's indisposition and said in evidence that she does not criticise CU.

2.22.15 A further three weeks elapsed until the completion of the report on 10 November 2017. The report is at pages 680-721, and to that report were appended 47 appendices including notes of 11 interviews, demonstrating the comprehensive nature of the investigation of what was a lengthy and detailed grievance both in terms of the number of matters raised and the chronology. The Tribunal noted that in her evidence the claimant did not blame or criticise CU but rather RG and "the management that was running the grievance"; she felt that management did not prioritise her grievance over the period of five months from 23 May 2017 to the report on 10 November 2017. The Tribunal finds that the reasons for the extended period were the length and complexity of the grievance, the amount of documentation, the number of witnesses involved, the complexity of the matter and

difficulty in timetabling the investigation, aggravated by CU's "personal circumstances", illness and holiday (and the holidays of others intervening at the time, which included the summer period). The Tribunal has not found any evidence to support the allegation that the investigation was not prioritised or that there was any deliberate delay imposed on CU by RG or any other members of the respondent's management. The report was of an investigation to find facts, and CU did not make any recommendations. Following its publication, a grievance hearing date was agreed with the claimant for 28 November 2017, and the minutes are at pages 741-752.

2.22.16 The Tribunal finds that there was frequent contact with the claimant throughout the period of the investigation, albeit there was some slippage in the two-week provision of reports. That said, any delay more than two weeks was for the reasons stated above, and in particular regarding CU's personal circumstances and the complexity of the matter; throughout the time it was evident to the Tribunal that RG, CU and the respondent's HR department were amenable to and accessible to the claimant for her to make enquiries.

2.22.17 Outcome – Following the grievance hearing that had been set up by agreement on 28 November 2017 RG provided the claimant with a formal written outcome letter on 5 December 2017. The Tribunal finds that the reason for the time taken between 28 November 2017 hearing and the 5 December outcome is that the time was required by RG to consider the grievance evidence and details of the grievance hearing, and to prepare the outcome letter with advice from HR.

2.22.18 In the outcome letter RG explained her findings in respect of 20 discrete items of grievance and she provided an overall summary. The Tribunal notes that in respect of some of RG's findings they corollate with the Tribunal's own findings in respect of events that occurred in the period from 2014 to the submission of the grievance letter. The Tribunal finds that RG did her conscientious best to thoroughly analyse and consider the investigation report with its various statements and appendices, viewed in the light of the claimant's representations at the grievance hearing. RG accepted some of the claimant's points and specified action points in consequence of her findings. Some matters were so old owing to changes, including of personnel, that no further action could be taken or was required. Some of the grievances were not upheld because there was no evidence to corroborate the allegation, and in some it was one word against another without supporting evidence, such that RG felt unable to conclude one way or another.

2.22.19 The Tribunal considers that RG's treatment of the grievance and preparation of the outcome was a thorough and genuine attempt to deal with the matter appropriately, and that the stated findings are genuine in that they reflect RG's objective conclusions, and those

conclusions were reached for the reasons that she states based on the evidence and investigation report.

2.23 Facts relating to the alleged failures on the part of the respondent to make reasonable adjustments in accordance with a statutory duty:

2.23.1 Hours –

2.23.1.1 The claimant was offered an appointment as a consultant on a 40-hour working week, which she accepted. At her request and by agreement she had a phased commencement of employment over the first month, namely September 2013. During the period of the claimant's employment to date she has worked reduced hours on a temporary basis by agreement, and she reduced her hours from a five-day working week to a three-day working week on a permanent basis.

2.23.1.2 It was said that several staff did not work full-time and that this created difficulties on a Friday particularly, and the Tribunal accepts that this is the case as it seemed not to be in dispute. Specifically, the Tribunal has found that AO did not work full-time hours in that she did not work on any Friday other than as an exception to provide cover for absent colleagues. There was no provision, criterion or practice operated by the respondent that required its employees to work full-time hours.

2.23.2 Suitable consulting room –

2.23.2.1 The respondent operated a standard professional PCP with regard to clinicians and nursing staff that they would treat patients in a confidential manner, and in order to do so part of its relevant PCP was that employees would consult with patients in appropriate rooms suitably soundproofed. This gave rise to an expectation on the claimant's part that when she was working at Sefton and her office was based on the fourth floor that she would generally see her patients in clinic rooms on the first floor. The Provision was of a fourth-floor office and first-floor consulting room. This PCP required the claimant to move between the floors using the lift when it was available, but more often than not for the reasons explained above to use the stairs to go up and down between the clinic room and her room, both to initially see any patient and during the course of any consultation to obtain necessary documentation, literature and relevant equipment; this was the Practice. This was not only professionally inconvenient but the claimant was at the substantial disadvantage that she found it tiring because of her

disability, and not just tiring but significantly fatiguing and draining of energy.

2.23.2.2 Owing to her disabling condition and its treatment she found this practice caused her fatigue. Notwithstanding that she kept herself fit, on top of everything else, including her considerable workload, she found the additional physical exertion to be a substantial disadvantage.

2.23.2.3 The claimant raised this issue with the appropriate manager (MU) on 13 May 2015, and the matter was not resolved until 31 March 2016, some ten months later, when a first-floor clinic room was divided to create office space for her. The respondent did not investigate the possibility of moving the claimant to the first floor, including by way of consulting other Consultants over a room swap. When MU put forward a business case to convert a clinic room on the first room into partial office space he did not mention the need to do so for the sake of the claimant as a disabled person in need of a reasonable adjustment of the above PCPs because of the substantial disadvantage described. MU accepted in evidence that had he done so, more than likely, the building work would have been expedited, or at least the approval of his business case would have been.

2.23.2.4 The Tribunal finds, therefore, on the basis of the evidence it heard that a business case based upon the claimant's need in the context of her disabling condition would have resulted in the completion of the creation of first floor office space for her sooner than the ten months it actually took. The Tribunal finds that there was an unoccupied room on the first floor which was not rented by the respondent from the private landlord and no evidence was adduced by the respondent to indicate that any enquiry had been made of the landlord as to the availability of that toom for rental purposes as an office for the claimant.

2.23.3 Ratio DCC:SPA –

2.23.3.1 The default for newly appointed consultants was an apportionment of time between DCC and SPA at 8.5:1.5. This default or starting point apportionment was, however, always negotiable. Additional SPAs could be gained in respect of leadership and training time. The maximum SPA was 2.5 (DCC 7.5:SPA 2.5). Through negotiation and agreement the claimant was set a DCC:SPA ratio of 8:2. There was no PCP to the effect

that there was a mandatory ratio of DCC:SPA. There was a permissible range with a default and a maximum. The range as found did not put the claimant at a substantial disadvantage, and indeed she initially sought an apportionment at the top of that range, namely 7.5:2.5, as being beneficial. She agreed to an apportionment of 8:2.

2.23.3.2 Insofar as there was any disadvantage to the claimant in the default apportionment of 8.5:1.5 it was not substantial in that the claimant requested some flexibility to accommodate her tiredness, whereas in fact the apportionment was specific in that it was to relate to leadership and training time, and the claimant was given the opportunity to put herself forward for leadership roles. Insofar as there was any disadvantage to the claimant the respondent made an adjustment by agreeing to the 8:2 apportionment.

2.24 Facts relating to the claimant's allegation of detriment with regard to having made public interest disclosures:

2.24.1 September 2014 to January 2015:

2.24.1.1 The Tribunal has made findings of fact above regarding a proposed reorganisation of the service with which the consultant psychiatrist group as a body disagreed. The claimant and AI, in particular, took up this argument with the senior leadership team. In consequence of the views and opinions expressed by the consultants group as a whole, and particularly vocalised by the claimant and AI, the senior leadership team invited the Royal College of Psychiatrists to prepare a report, which it did. In consequence of the results of the consultation and the RCP report the reorganisation was initially put on hold, some changes were made, it was subsequently revised and the reorganisation was substantially put in place as originally planned.

2.24.1.2 The respondent's view of the matters raised by the psychiatrists was that the consultants' group was being obstructive to change, and that it repeated that the changes were unsafe but without making alternative proposals to address the problems facing the service at the time. The claimant and AI prepared a presentation explaining how the then current situation had been reached, emphasising why the consultant psychiatrists felt that any proposed reorganisation along the lines suggested by the senior leadership team would not be safe, and by reference to the national CAMHS guidelines and reviews.

2.24.1.3 The claimant's position and what she said to the respondent is summarised in the slides to accompany her proposed presentation of 14 January 2015 at page 395ZL. The claimant thought the current proposal was not safe, that it would create a risk of folding due to increasing demand and ongoing problems with capacity, and risked the service becoming unsafe due to poor staffing levels which if not addressed may lead the consultant psychiatrists' group to take the matter further. During consultation, the claimant made known her objection to a proposed reorganisation where she felt matters could be better managed in line with guidance specific to psychiatry and CAMHS. That was the purpose of the consultation. The claimant made known her opinion. Opinions differed. The guidance quoted was capable of interpretation; all parties to the consultation were concerned to ensure the provision of a safe service providing for the better health of patients, and there were various camps with different views as to how this could be achieved. Other than expressing the opinions of the consultants' group the claimant did not provide or disclose to the respondent information showing that the health or safety of any individual had been, was being or was likely to be endangered, but rather it was her view that that could happen if the proposals were pursued regardless of the consultation.

2.24.1.4 The Tribunal finds that during the period September 2014 to January 2015 the claimant, along with her psychiatric consultant colleagues, were viewed as being obstructive and resistant to change, which caused the senior leadership team some frustration. The Tribunal has found no evidence to support any of the claimant's allegations that she was subjected to detriment in consequence of her having voiced her opinion as described, the alleged detriments being set out in the List of Issues above at paragraphs 1.3.18. The Tribunal finds as a fact that the events and/or comments referred to by the claimant as detriments were matters that occurred or comments that were made for the reasons found above and were not because of or related to the claimant's objections to the proposed reorganisation as voiced by her between September 2014 and January 2015.

2.24.2 September 2015 – school provision:

2.24.2.1 The claimant highlighted to the respondent that there was currently a lack of clarity in respect of the school provision regarding whose care patients fell under, and that this caused some confusion between clinicians, patients and

other involved with the patients. The claimant made known to the respondent that there was a failure to comply with Government provisions and hospital policies regarding documentation relating to safeguarding of children and young people, as detailed by the claimant in paragraphs 48-50 of her witness statement.

2.24.2.2 The Tribunal finds that this was a disclosure of information tending to show that the health or safety of any individual had been, was being and was likely to be endangered unless the practice was improved. In response MR effected the changes that the claimant advocated. Once again, the Tribunal finds that the claimant was not subjected to any detriment for having made this disclosure, but that the matters alleged by her as being detriments were issues, treatments and words spoken because of the reasons found above, which were not because of or related to the school's health and safety disclosure in or about September 2015.

2.24.3 7 September 2016 – increases in workload:

2.24.3.1 The claimant met with members of the senior leadership team including JF, CMcL and AW on 7 September 2016. The service was under pressure to improve its performance and to reduce waiting lists. The implication of the respondent's efforts was that there would be an increase in workload for clinicians. The claimant voiced her concern about the "potential negative impact upon patient safety" of any increased workload. She expressed her "concerns at the most potentially serious outcome of increasing workloads for us as consultant psychiatrists could be the death of a service user". The claimant voiced an opinion as to potential outcomes of necessary consideration as to how to address growing and outstanding waiting lists. Everybody perceived the need to address those waiting lists. The consultant psychiatrists felt they were understaffed. There was no evidence that there was active consideration of increased recruitment.

2.24.3.2 The claimant highlighted potential impacts of increasing workloads. She did not disclose information that the health and safety of any individual had been, was being or was likely to be endangered, but rather voiced her concern that she would not wish that to happen because of pressure of work. She was stating a view in the context of a management discussion about the needs of the service.

2.24.3.3 In any event the Tribunal further finds that none of the alleged detrimental treatment was because of the claimant having raised her concern on 7 September 2016 about the possibility of increased workloads and the risks she thought were inherent. As before, the alleged treatment was because of the reasons found above in respect of each of the incidents of which the claimant complains.

2.24.4 28 September 2016:

2.24.4.1 On 28 September 2016 the claimant met MU (Operations Manager) for a further discussion regarding internal waiting lists and clinic arrangements within Sefton. The claimant made it known to MU that the Royal College of Psychiatrists gave detailed guidance including recommendations as to the number of new referrals that ought to be seen by a CAMHS consultant in any week, namely 1-2 new referrals. The guidance takes into account that new cases and urgent cases create a significant workload. The claimant was regularly being referred five or more, even up to nine, new patients per week, in contravention of the guidance. MU was not aware of this information. The reason for the guidance and recommendations is to ensure the provision of a safe service. The claimant's disclosure was of information that the health or safety or an individual had been, was being and was likely to continue to be endangered if the respondent persisted in acting in breach of the RCP guidance.

2.24.4.2 The Tribunal finds that none of the alleged detrimental treatment was because of this disclosure. The treatment alleged, being words or actions, acts or omissions, were caused by the reasons stated above in respect of each one of those allegations and not for any reason related to or because of the disclosure on 28 September 2016 to MU.

2.25 Time issues:

2.25.1 In respect of allegations relating to 14 January 2015 and 27 May 2015:

2.25.1.1 The comments made by JP on 14 January 2015 and JF on 27 May 2015 are of a similar nature and related to the claimant's disability related absences from work or, more accurately in respect of JP, they related to her unavailability for work before September 2013. The claimant felt a harassing effect from those comments. The three-month primary time limit for the

commencement of Tribunal proceedings expiring three months from the last of those dates would have expired on 26 August 2015. The claimant commenced her claim on 10 October 2017. The matters are only now coming to trial for the first time. The claimant resigned from her employment on 23 October 2015, that is some five months after the second of these incidents, but on reflection over a period of some two months she withdrew her resignation in December 2015 and continued to work for the respondent. She remains in the respondent's employment. The allegations are of comments made by two managers whose recollection is not as clear as the claimant's recollection appears to be, owing at least in part to the effluxion of time.

2.25.1.2 The Tribunal has found as facts that the words alleged were spoken, or words to that effect if they are not in fact direct quotations.

2.25.2 The claimant's office accommodation:

2.25.2.1 The claimant was provided with a soundproofed office adjacent to first-floor clinic rooms by no later than 31 March 2016, by which time she did not suffer from any disadvantage in respect of the PCPs of occupying fourth-floor offices and having to see patients on occasion in first-floor rooms (or of maintaining confidentiality of patients by, amongst other things, seeing them in appropriate premises).

2.25.2.2 The primary time limit for the commencement of Tribunal proceedings in respect of this matter, where there was a delay of ten months in making an adjustment, would have expired on 30 June 2016. The claimant commenced Tribunal action on 10 October 2017. The claimant raised a grievance on 23 May 2017, some 14 months after she had been satisfactorily accommodated.

3. **The Law**

3.1 Direct disability discrimination –

3.1.1 Section 39 EA provides that an employer must not discriminate against an employee as to terms of employment, access to opportunities for promotion, transfer or training, or for receiving any other benefit, facility or service, or by subjecting an employee to any other detriment.

3.1.2 Section 13 EA proscribes direct discrimination, which is where an employer treats another person, such as an employee, less favourably than it treats or would treat others, and does so

"because of a protected characteristic"; in this case the claimant's protected characteristic is disability. The application of section 13 requires there to be a comparator against whom it is said the treatment of a claimant is less favourable, and that comparator may be a named person or a hypothetical comparator, being someone whose circumstances are not materially different save in respect of the protected characteristic. To avoid overcomplicating matters in circumstances where a hypothetical comparator is relied upon, Tribunals are urged to concentrate on the question of causation and answering the question posed by the word "because" in section 13 EA, as this may mean that there is no need to spend considerable time identifying a comparator; this is the approach urged upon us by Mr Owen-Thomas. That said, he did define a hypothetical comparator.

3.1.3 Having made findings of fact as to how a respondent treated a claimant, the Tribunal must consider the reason for that treatment. If the reason for the treatment is in any sense related to the claimant's protected characteristic relied upon, then the Tribunal ought to give careful consideration to the identification of a comparator and consideration of the question as to whether the treatment was less favourable than that encountered or experienced by the comparator or hypothetical comparator. In this particular case Mr Owen-Thomas did provide us with a description of a comparator in his written submissions at paragraph 5(1), being "a consultant psychiatrist who had a period of sickness absence immediately before commencing her post in Child and Adolescent Mental Health, and who appears to have recovered from the illness which caused the absence". The Tribunal was therefore able to address "the reason why" question and consider matters related to the suggested hypothetical comparator.

3.1.4 That said, we were reminded and bore in mind the need to look beyond the immediate cause for any conduct in question on the part of the respondent (**Rees v Apollo Watch Repairs PLC EAT/23/93, [1996] ICR 466, EAT**); a Tribunal had to consider the underlying reason for the respondent's treatment of the claimant and whether or not that related to the protected characteristic. This in turn made it incumbent upon us, as we were reminded, that we had to consider "subconscious or unconscious discrimination" and therefore to consider the mental processes of the respondent's managers who were alleged to be discriminators (**Geller v Yeshurun Hebrew Congregation [2016] ICR 1028 EAT**). The Tribunal could conclude that general circumstances gave rise to an appearance of subconscious bias. More is needed than the fact of the protected characteristic and a difference in treatment, albeit that may indicate a possibility of discrimination. Mr Owen-Thomas submitted that something more required to create a claim need not be a great deal in reliance on **Deman v Commission for Equality and Human Rights [2010] EWCA Civ**

1279. Furthermore, **Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865** is authority for the proposition that it would be to “put the hurdle too high” to say that to establish a case there must always be positive evidence that the reason for any difference in treatment was a protected characteristic; this is so because of the difficulties in establishing discrimination, which are obvious.

3.1.5 With these reminders to the forefront the Tribunal ought to not only consider each individual allegation in isolation but also cumulatively, in the general context of the relationship between the parties. Whilst an individual act may not appear to form unfavourable or less favourable treatment, or to be related to a protected characteristic, nevertheless it is possible that one or more acts taken together create an impression that there is no innocent explanation, and the Tribunal may draw an inference of discriminatory conduct.

3.1.6 In the light of those principles we had to consider whether or not the respondent was operating a discriminatory regime in general. We were reminded that it would not be appropriate to consider this concept too literally as amounting to a policy, rule, practice, scheme or regime (**Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 [2003] IRLR 96**).

3.1.7 Mr Crossfill submitted that the proper approach in deciding the “reason why”/“because of” question is to ask what the reason was for the treatment, and if the protected characteristic had a significant influence on the outcome then discrimination would be made out (**Nagarajan v London Regional Transport [1999] UKHL 36; [1999] IRLR 572**). Furthermore, when considering whether treatment is unfavourable or less favourable and amounts to a detriment an unjustified sense of grievance has been found not to amount to a detriment (**Deer v University of Oxford [2015] IRLR 481**). Clarification of what amounts to a detriment was given in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**:

“The court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.”

3.1.8 Just as with the potential issue of identifying a comparator, Mr Crossfill emphasised the case of **Laing v Manchester City Council [2006] ICR 1519** when Mr Justice Elias (as he then was) commented:

“The focus of the Tribunal’s analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the

employer is a genuine one and does disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'."

If a Tribunal is in a position to make clear findings of fact then it ought to do so, failing which it ought to adopt the approach suggested in **Igen Limited v Wong [2005] ICR 931 CA**, and address the shifting burden of proof set out in section 136 EA.

3.1.9 Section 136 EA provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person has contravened the provisions of the EA, then the court must hold that the contravention has occurred. This is addressed by the Tribunal considering whether the claimant has proved the primary facts which could found a finding of unlawful discrimination; if the claimant succeeds in this exercise the Tribunal has to consider whether the respondent has proved a non-discriminatory reason for its actions.

3.1.10 Section 136 EA does not talk about the shifting burden, and the Tribunal must therefore take into account and apply the wording of the statute as is set out at section 136(1)-(6), most importantly section 136(2):

"If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned the court must hold that the contravention occurred."

3.1.11 By virtue of subsection (3), the subsection quoted above does not apply if the respondent can show that it did not contravene the provisions of the Equality Act relied upon by the claimant.

3.1.12 A Tribunal cannot draw inferences of discrimination unless there are findings of fact capable of supporting an inference, and a difference in treatment in the context of a claimant having a protected characteristic does not give grounds for inferring discrimination, as that is a matter of correlation rather than causation.

3.1.13 Finally, as submitted on this point by Mr Crossfill and as stated during the course of the hearing, this is not a matter related to reasonableness or unreasonableness of the respondent's management of the claimant; unreasonable conduct is not sufficient to support an inference of discrimination. The key is the "reason why" question, and if that is because of the protected characteristic then discrimination is made out.

3.2 Discrimination arising from disability –

3.2.1 Section 15 EA provides that where A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim, that too is unlawful discrimination. This cannot apply where A shows that it did not know and could not reasonably have been expected to know that B had the disability in question. It is essential, therefore, for the Tribunal to consider and find what was the "something arising in consequence of…disability" and to make findings as to the respondent's treatment of the claimant and whether it was both unfavourable and "because of" the "something" that arose.

3.2.2 The same issues regarding burden of proof, shifting of burden and the drawing of inferences apply with regard to section 15 EA claims as with section 13, and indeed sections 20-21 EA (failure to comply with a duty to make reasonable adjustments claim). Primacy is given to the statutory wording however in each case.

3.2.3 A respondent may attempt to justify its treatment claimed to be unfavourable under section 15 EA, that is by showing that the treatment was a proportionate means of achieving a legitimate aim. The respondent's purported justification in this case is set out at paragraph 41 of its submissions at page 12. As pointed out, the issue of justification would only arise if the claimant's allegations amount to "improper conduct", by which the Tribunal understands that the respondent was referring to the allegations amounting to unfavourable treatment because of something arising in consequence of her disability.

3.3 Harassment –

3.3.1 Harassment is defined in section 26 EA, and again is a form of discrimination prohibited by section 39 EA. The Tribunal must consider whether there was unwanted conduct (including words or actions) related to a relevant protected characteristic, in this case disability, that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her ("harassing effect").

3.3.2 In deciding the effect of conduct the Tribunal must take into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have the effect claimed. There are three elements that must be established, namely whether the alleged conduct took place; whether it had the proscribed purpose of effect and whether it related to the protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**). The Tribunal was reminded at paragraph 22 of that case that we ought not "encourage a culture of hypersensitivity or the imposition of legal liability in respect of

every unfortunate phrase", and in that regard we must also take into account context (**Grant v HM Land Registry [2011] IRLR 748**).

3.3.3 **Timothy James Consulting Limited v Wilton UKEAT/0082/14** provides a reminder to the Tribunal that a key component to the section 26 EA definition of harassment is that the conduct in question must relate to the protected characteristic. It is not sufficient that a claimant happens to have a protected characteristic and treatment happens to have occurred which causes offense or is degrading, etc. In some senses it is easier to make findings of fact with regard to the treatment that occurred and its effect than it is to relate it to the protected characteristic. Once again, the same issues with regard to drawing inferences and the shifting burden of proof as previously cited apply.

3.4 Reasonable Adjustments –

3.4.1 The combined effects of sections 20-21 EA are to place upon an employer a statutory duty to make reasonable adjustments in circumstances including where they have a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; where the duty arises then an employer must take such steps as it is reasonable to have to take to avoid the disadvantage. A PCP is often described as "something the employer does or requires at work" but we are concerned with matters that can properly be found to be actual PCPs of the employer in this context.

3.4.2 It is therefore essential for the Tribunal to make findings of fact as to what was or were the PCPs, whether they caused the claimant a "substantial disadvantage", that is more than inconvenience, and that disadvantage must be in relation to a relevant matter at work in comparison with persons who are not disabled, and then the Tribunal must consider whether the respondent has taken such steps as it is reasonable to have to take to avoid the said disadvantage.

3.4.3 It was submitted that the proper approach to take was that suggested in **Environment Agency v Rowan [2008] IRLR 20** whereby the Tribunal should have regard to the PCP or physical feature, the identity of non-disabled comparators where appropriate and the nature and extent of the substantial disadvantage suffered by the claimant.

3.5 Jurisdictional Issues – section 123 Equality Act 2010 –

3.5.1 Section 123 EA provides that proceedings on a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the

complaint relates, or such other period as the Employment Tribunal thinks just and equitable, in circumstances where conduct extending over a period is to be treated as done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.

3.5.2 Section 123(4) sets out what ought to be done in the absence of evidence to the contrary in deciding when a person has decided to act on failure to do something. In other words, there is a three-month time limit from the last act or last in a series of acts unless a Tribunal considers it would be just and equitable to extend time. Extension of time is the exception rather than the rule. The Tribunal must weigh up appropriate considerations in the interests of justice.

3.5.3 **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 CA** poses the applicable question with regard to acts extending over a period as:

"The test is easier to state than it can be to apply. Where there is a series of disparate acts where disparate acts are spread over time then the following will be material –

(i) The nature of the alleged act;

(ii) The identity of the alleged perpetrators

(iii) The period of periods in which the acts are said to have taken place, and in particular whether they can properly be said to be discrete periods."

3.5.4 It would therefore be material to consider the chronology and the identity and roles of the respective alleged perpetrators of discriminatory conduct. The fact that acts were carried out by a variety of actors whilst being relevant is not a conclusive factor. The question to answer is whether there was "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed (**Hendrick v Metropolitan Police Commissioner** – see above). A claimant does not have to prove the existence of a general policy or practice, but only that, as Mr Owen-Thomas put it, "the incidents are interlinking, are discriminatory, and that the employer is responsible for this continuing state of affairs"; he placed reliance on his submission that there was "a continuing state of affairs" which would be sufficient to extend time linking the many and varied acts of discrimination alleged.

3.5.5 The Tribunal has the widest possible discretion as to the exercise of the just and equitable extension. That said, it was submitted that the burden of showing that there should be a departure from

the general rule (commencement of claims within three months of the last act complained of) falls on the claimant in a case.

3.5.6 The Tribunal is required to consider a number of factors in exercising any discretion to extend time. Those factors include prejudice to each party, being not only the loss of a claim or loss of a defence but also any effect on the preparation of and cogency of evidence, including in relation to the recollections of witnesses after the effluxion of time. This was referred to in **Miller v Ministry of Justice UKEAT/0003/15** as “forensic prejudice”. Furthermore, parties who are potentially parties to litigation are entitled to some certainty and to at least in part rely upon the relatively short limitation period prescribed by Parliament for public policy reasons.

3.5.7 In weighing up the various factors to take into account a Tribunal ought to consider the length of and reasons for any delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the respondent has cooperated with any request for information (not relevant in this case), the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action, and steps taken by a claimant to obtain appropriate professional advice (**British Coal Corporation v Keeble [1997] IRLR 336**).

3.5.8 Mr Crossfill submitted, relying upon **Kingston-upon-Hull Council v Matuszowicz [2009] ICR 1170 CA**, that the Tribunal ought not take an “all or nothing approach” but must treat each allegation separately, applying the applicable factors in their consideration of each claim in ascertaining when time started to run and the justice and equity of extending time in respect of each such claim.

3.6 Whistle-blowing – section 37B Employment Rights Act 1996 (“ERA”) –

3.6.1 Section 37B Employment Rights Act 1996 (“ERA”) declares that a worker has a right not to be subjected to any detriment by any act or any deliberate failure to act by the employer done on the ground that the worker has made a protected disclosure, in circumstances where protected disclosures are defined in section 43A to 43KA. For our purposes section 43A ERA provides that a protected disclosure means a qualifying disclosure, where qualifying disclosures (that is qualifying for protection) include in section 43B the disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

3.6.2 In raising a matter such as health and safety and disclosing information in the public interest an employee need not be correct about the information; it may be inaccurate (**Darnton v University of Surry [2003] IRLR 133 EAT**).

3.6.3 For the respondent it was submitted that there needs to be "information" (which is the wording of the Act), and that must be a specific factual statement tending to show some failure; mere assertions of a particular position will not usually suffice.

3.6.4 At the time the disclosure was made the employee in question must have a reasonable belief that the matter was in the public interest (**Chesterton Global Limited & another v Nuromohamed [2017] IRLR 837**).

3.6.5 It is necessary to look at each protected disclosure and scrutinise it in the light of the definition in section 43B rather than to take a "rolled up approach", as we were cautioned against by the respondent.

3.6.6 The respondent must prove the reason or grounds for any treatment of the claimant, but the statutory provision must be applied properly rather than the Tribunal assuming in the absence of a satisfactory explanation from the respondent that the reason for the treatment was that a disclosure had been made; a Tribunal may so conclude but it does not have to do so.

3.6.7 It was submitted that in a similar vein to the discrimination claims it would not be enough for a Tribunal to consider that any treatment of the claimant happened to be in circumstances where there was a background of disclosures having been made; the key question is once again the "because of" / "reason why" question. The key words in section 47B ERA are "done on the ground that…".

3.6.8 Once again, the primary time limit for the commencement of a claim under section 47B ERA is three months from the final act or last in a series of acts extending over a period of time. With regard to the extension of acts over a period of time the same considerations apply as above in respect of the discrimination claims. The difference, however, between the ERA and the EA claims is that a stricter time limit applies with regard to the section 40B ERA claim in that if the claim is late the Tribunal does not have the "widest possible discretion" applicable in discrimination claims to extend time. A Tribunal may accept a whistle-blowing claim that is late, but only in a situation where it was not reasonably practicable for the claimant to have brought the claim in time, and even then the claimant must have brought the claim within a reasonable time after the applicable time limit; that is far different from the just and equitable extension powers granted in respect of discrimination claims. Evidence and findings of fact are required with regard to reasonable practicability, and the "within a reasonable time thereafter" consideration.

4. **Application of Law to Facts –** by reference to the agreed list of issues (which I repeat below italicised) the Tribunal finds:

4.1 *Did the respondent:*

(1) *Fail to manage the claimant's "return" (sic – it was agreed to be her commencement of work) to work in September 2014;* No, not as alleged by the claimant. SE could have managed the claimant's start better by opening any discussion with the possibility of a phased start. He presumed the claimant would want to know the full-time job plan and work to it if she could; he had no problem with or objection to the claimant working a phased start and he both invited proposals and accepted them without demur; he even added flexibility about diary/appointment management with the claimant coming and going as she wished at the beginning and end of the day to accommodate her following her treatment and health-related grace period. That does not amount to a failure to manage although it was relaxed and laissez-faire. He managed the claimant as she proposed.

(2) *Fail to allocate the claimant a suitable office;* Yes, but it was the only available vacant office at the time of the claimant's commencement; it was allocated to her because it was the only unoccupied office. It was unsuitable given the arrangements, expectations as to where patients would be seen and would not be usually allowed, the requirements of effective and confidential attendance on patients and the claimant's disability related difficulties managing the stairs when the lift was unavailable as was often the case.

(3) *During the course of a meeting on 24 November 2014, did one of the respondent's managers push a table at the claimant, causing her to sustain a bruise;* Yes, but inadvertently and without realisation that it moved towards both the claimant and AI and that it touched the claimant causing any injury or discomfort.

(4) *Behave as alleged by the claimant at paragraph 81.3 of her claim at a meeting on 14 January 2015;* Yes, but not in each instance as alleged. MR genuinely did not understand the point that the claimant was making and said so, although she could make out and hear properly the words spoken; MR tutted at what she considered to be repeated and unsubstantiated assertions which she felt were obstructive to reform. JP did refer to the claimant's grace period at the commencement of employment as a sickness absence of 7 months in a way that indicated it was problematic; she was referring to the claimant's disability related grace period.

(5) *Fail to permit a phased return to work in February 2015;* No. The claimant did not appear on medical advice (her fit note) to require one and nothing said at the time indicated either that she wanted a phased return or felt it would help in circumstances where she had

recovered from a broken jaw and was, to all appearances, anxious to get back to work. Permission was not sought; there was no refusal or objection from the respondent. SE's management was such that we find he was not likely to consider a phased return to work in these circumstances of his own initiative but that it is highly likely he would have approved of one if any indication had been given that it was in any way relevant.

(6) *In a meeting in February 2015 impose a DCC/SPA ratio in excess of what was required contractually [where DCC stands for Direct Clinical Commitment and SPA stands for Supporting Professional Activity];* No. There was no contractual requirement of a specific ratio. SE proposed the default ratio for new consultants without leadership roles etc which justified increased SPAs. Having heard from the claimant and without the usual justification for an increased SPA but to assist her he allocated an additional element of SPA as a compromise but could not justify 7.5:2.5 as requested. The contractual terms allowed negotiable flexibility. SE negotiated and allocated flexibly and the claimant was allocated SPA in excess of the default due.

(7) *Through Dr Earnshaw, tell the claimant on 9 April 2015 that he did not like the tone of her voice;* Yes. He was irritated at the claimant's tone used to him and he said so.

(8) *Attempt to permanently reduce the claimant's hours from five hours to four hours on 30 May 2015;* No. There is no evidence to support such an allegation. The respondent attempted to grant to the claimant what she asked for. Her initial request for a reduction by one day per week was unclear as she conceded, in that MR believed she wanted a permanent reduction. A reduction was granted. Once the temporary nature of the request was made clear MR accepted that, and she allowed the claimant complete latitude as to the start and end of the temporary period. The respondent was answering the claimant's requests; it did not attempt to alter her hours either way.

(9) *Between 27 May 2015 and 2 July 2015 challenge the claimant upon how long she required reduced hours;* JF queried how long the claimant would be working a reduced pattern; in doing so she added challenging words to the effect that the claimant's hours were impacting on the service. This was a challenge to return to full-time working and went beyond an innocent and reasonable management enquiry; or rather the enquiry was fair and reasonable but the explanation and stated implication that the claimant's reduced hours were deleterious to the provision of the service was unreasonable and uncalled for. The claimant was well aware of her professional duties, did not need reminding by JF, and was not remiss in them. She knew that the service was under pressure. She felt all of this keenly.

(10) *Remove the claimant from a Task and Finish Group [in circumstances where the respondent says that her role finished when the GP Hotline, which was being considered by the Task and Finish Group, was abandoned on or about 10 April 2016, and where the claimant complains that the Task and Finish Group was reactivated in August 2016; the claimant says she became aware on 4 August 2016 that she had been excluded];* No; the claimant was not actively removed as alleged. The claimant's appointment was held in abeyance as was the GP Hotline, and it fell away, as did the Hotline. Her role was effectively redundant in the Task & Finish Group with the cessation of consideration of the Hotline, although AO, as the psychiatric lead in August offered her role as such to the claimant with relish as soon as the claimant queried her position. The claimant could then have been restored to the Group had she wanted, in place of AO but she said she only wanted clearer lines of communication about management responsibility in the future. She chose not to take up AO's offer hence the end of her involvement in the Group.

(11) *Through Dr Oppenheim, challenge leave booked for 16 October 2016;* AO did not challenge the claimant's leave. She made it known that she was concerned that due process had not been followed, that there was a lack of cover and she was making a point about line management's approval of leave requests. AO did not withdraw approval of the leave that had been booked or say that the claimant was not entitled to take it. She emphasised to managers and managed that there was a lack of cover on a particular Friday and late requests with permissions granted when no alternative arrangements were then made created difficulties for the service. The leave was not her issue; the process and cover were her issues.

(12) *Through Dr Oppenheim, at an appraisal on 8 December 2015, act in a "confrontational manner", accusing the claimant of "showboating", acting in a selfish manner and stating that the claimant needed to learn respect for senior consultants.* No and yes. AO was not confrontational; she was robust in her constructive criticism which was well-meant, if rather more direct than the claimant appreciated. AO did at very least infer that the claimant had been "showboating" and had put herself before the service; she did effectively instruct the claimant that there was a better way, more respectful to colleagues and their use of time at meetings, to raise matters such as her resignation in the circumstances that pertained.

(13) *Place the claimant under pressure to maintain her full-time hours between December 2015 and April 2016;* The claimant's claim concerning JP and the "seven months" sickness absence comment fell outside this period (it was made on 14 January 2015); JF's comments about the pressure caused by the claimant's reduced

working hours also fall outside this period being made in May and July 2015. The tribunal finds that there was pressure on the consultants' group and indeed all the clinicians working for the respondent at this time. Waiting lists were a growing problem. The tribunal finds that the respondent was accommodating of the claimant's situation and need for reduced hours and did not, during the period in question place the claimant under pressure to maintain her full-time hours. The claimant was always conscientious and felt pressure. There was no such treatment or conduct of placing her under pressure however because of or related to the claimant's disability.

(14) *Mishandle the claimant's sickness leave [during the period 3 October 2016, being the commencement of her absence, and 23 May 2017, being the presentation by her of a formal letter of grievance to the respondent] by:*

(i) *Failures to communicate;* No. The respondent communicated with the claimant appropriately. When the claimant complained about that communication it backed off for a reasonable period, after which management considerations dictated that further contact had to be made. The respondent attempted to keep in touch without hounding the claimant although some of that communication was, understandably but subjectively, seen by the claimant at the time as insensitive and intrusive. We find that was not the respondent's, specifically KB's, intention; she was attempting a fine balancing act between the needs of management to plan for the claimant's absence and the claimant's stated desire for space and privacy.

(ii) *Delays in setting up Occupational Health ("OH") reviews;* No. The first mention of OH was when the claimant said that she would arrange an appointment. Subsequently KB tried to do so but no dates were convenient to the claimant. They did not manage to secure any working rapport and events overtook them.

(iii) *Saying that the claimant had not attended welfare meetings;* As far as the respondent was aware the claimant did miss welfare meetings notwithstanding its attempts to organise them. That is not to criticise the claimant but is a statement of fact. When the respondent stated that the claimant had not attended such meetings it is true that none had taken place despite dates having been proposed by the respondent.

(iv) *Threatening formal action.* In the absence of progress in providing support and managing the claimant's absence because she was not, for a variety of reasons, communicating effectively with KB, the respondent wrote to the claimant a

standard HR letter which indicated what might happen in given circumstances. In the absence of contact, enquiry and then attendance at the next meeting the respondent would consider formal action in line with its policies. All that was stated by the respondent was conditional, contingent and allowed for informal contact and effective communication including at a meeting. It was not so much a threat as confirmation that policies were being appropriately applied. Only an intention not to attend, respond or contact with any query would render what was said to be threatening.

(15) *Mishandle the claimant's grievance by:*

(i) *Delays:* There was slippage with the timetable indicated by both parties; the delays were explained by the respondent in so far as they related to CU's personal circumstances and the claimant accepts that. Otherwise there is no evidence of delay in dealing with matters raised by the claimant. Those matters took time to investigate, consider and adjudicate. That is not delay in handling; the time was required for effective management of the grievance. CU's indisposition apart, had the respondent dealt with the matter more quickly it is likely it could be criticised for failing to deal with the matters raised thoroughly. There is no evidence to suggest that the duration of the process was due in any degree to the alleged lack of priority on the part of the respondent; similarly, there is no evidence of deliberate, negligent or malicious procrastination. The duration of the process does not illustrate "mishandling" as alleged.

(ii) *Not keeping the claimant updated:* There were some gaps in updating where more than two weeks elapsed. Our findings are the same as in 15 (i) above. The slippage was explained and whilst it is unfortunate we do not find that it is evidence of mishandling.

(iii) *The outcome.* The Tribunal finds that CU and RG did their conscientious best in relation to the claimant's grievance. Both the investigation and deliberation was thorough and thoughtful. The outcome genuinely reflects RG's reasoned conclusion which she based on the available evidence from all sources. That is not to say it is perfect; CU/RG could have considered further witness evidence, could have interviewed or re-interviewed witnesses and interpreted matters differently but that does not in our view indicate mishandling. They both acted fairly and reasonably and did their best with a difficult grievance in sensitive circumstances.

4.1.1 *Was the treatment found proven less favourable than that afforded or which would have been afforded to an individual who*

was in the same material circumstances but who did not have the disability that the claimant had? The respondent relies on a hypothetical comparator. [In the claimant's written closing submissions, the hypothetical comparator with whom the claimant contrasted herself was: "A consultant psychiatrist who had a period of sickness absence immediately before commencing her post in Child and Adolescent Mental Health, and who appears to have recovered from the illness which caused the absence".] No. Remarks such as those of JF and JP did relate to the claimant's unavailability for full-time duties owing to the effects of her disabling condition and treatment but we find that any comparator as identified above would have been spoken to similarly; the service was under pressure and the absence or non-availability of any consultant had an impact on that service; their concern was being short-staffed howsoever that was caused. In all other instances the reason for the treatment was in no way related to the claimant's disability. Some treatment seemed harsh to the claimant but in each case it was a response to circumstances, communications and events that happen in daily working life and relate to every day and usual concerns other than disability. Indeed, as can be seen the tribunal does not accept that alleged "less favourable" treatment was in any sense unfavourable in itself and some of the allegations are just not made out. The important point however is that none was less favourable than a comparator would receive because of disability. The claimant's disability was irrelevant to each of the alleged forms of treatment, save that it led to the claimant's absences which absences were the causes of concern to JF and JP; they would have been as concerned and voiced similar questions and comments in respect of any consultant affected by a non-disabling absence or period of unavailability for work.

4.1.2 *If so, was the reason for the treatment the claimant's disability?* In view of our finding above, No.

<u>*Discrimination arising from disability (contrary to section 15 EA)*</u>

4.1.3 *Did the respondent treat the claimant in the manner set out under the allegations of direct discrimination above [1.3.1 (1) – (15)]?* The respondent treated the claimant as, and for the reasons, set out in our findings above. The comments of JP and JF were unfavourable. The claimant had gone to lengths to avoid disrupting the commencement and initial stages of her job by deferring it; she was sensitive about it and fully appreciated the needs of the service; she did not have subsequent absences related to her disability but she did reduce her hours; JP's reference to a seven-months absence was inaccurate and related to the grace period leading up to September 2014; it showed that the grace period had been registered at least in her mind as a disability related non-availability for work impacting the service,

which was unfair to the claimant. JF's question as to how long the claimant would be working reduced hours was a reasonable management enquiry relating to managing staffing requirements but her additional reference to the impact of the claimant's reduced working pattern was unfavourable in that it was a pointed remark creating undue pressure on the claimant. The claimant did not require a reminder of the potential impact of her non-availability at times; she was doing her best in difficult circumstances and she was working diligently.

4.1.4 *Was the reason for that treatment because of something arising in consequence of the claimant's disability (namely the claimant's inability to work at full strength while undergoing and recovering from her treatment, and/or the sick leave the claimant took and/or the sick leave the respondent perceived her as having taken):* The claimant's said "inability" and the said "perception" of the respondent was only relevant to the words spoken by JF and JP referred to in our above findings when they respectively emphasised to the claimant the effect of her reduced hours and commented on a seven month "absence"; those examples of treatment by the respondent were unfavourable None of the other treatment found was because of anything arising from the claimant's disability; the reasons for the respondent's other treatment, related to operational and managerial considerations, comments and requests by the claimant and matters that arose in the ordinary run of the approaching-dysfunctional mill that was the respondent's service at the time.

4.1.5 *If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?* The respondent's "justification defence" is set out at paragraph 41 on page 12 of its skeleton argument. The remarks of JP and JF fell outside any legitimate aim the respondent's. JP's comment was inaccurate and related to the past such that it was of no practical application to present or future staff management; in any event it is difficult to say that an erroneous comment was proportionate. JP was not in command of the facts and had formed an impression which was unfair and unfavourable to the claimant. JF's question about returning to full-time hours was of practical management value and would fall within a legitimate aim to manage staff to better provide an efficient service; her subsequent comment was however unnecessary and pointed such that it fell outside any legitimate aim and was disproportionate; it was designed to create pressure which was unwarranted.

<u>*Failure to make reasonable adjustments (contrary to section 21 EA)*</u>

4.1.6 *Did the respondent apply the following PCPs which placed the claimant at a substantial disadvantage in comparison with persons who are not disabled?*

(1) *PCP 1 – requiring employees to work full-time hours;* There was no such PCP. Employees could work various work patterns with variable numbers of days per week and hours per day as agreed with management. The claimant varied her hours at her request and with agreement on more than one occasion and was never required to work full-time hours.

(2) *PCP 2 – "requiring employees to consult with patients in a confidential manner and to conduct meetings with patients in an appropriate office so as to ensure confidentiality".* Clinicians have a professional duty to respect patient confidentiality, which is a practice, condition and provision. That much is not contentious. It is clear that the claimant's case is more nuanced in that it relates to the allocation of a particular office distant from appropriate clinical rooms which vitiated that confidentiality or required her to ascend and descend three flights of stairs repeatedly throughout the day, when the lift was unavailable, each time she saw up to nine patients. Until March 2016 the respondent's relevant practice and provision was for the claimant to occupy unsuitable office accommodation on the fourth floor at Sefton.

(3) *PCP 3 – "requiring a mandatory ratio of Direct Clinical Commitment (DCC) to Supporting Professional Activity (SPA) of its employees". [The respondent says this does not amount to a PCP, whereas the claimant says it was a mandatory PCP for the claimant. The respondent says that the expectation of a new consultant is a ratio of DCC 8.5:1.5 SPA unless SPAs are identified for specific consultants and their specific activities, but that the expectational ratio is not fixed and is only a default].* There was no such PCP. The ratio in question falls within a negotiable range, the upper end of which was acceptable to the claimant. It is not accurate to say therefore that what the claimant found unsatisfactory was a "mandatory ratio". The claimant had two different allocations at different times as a result of negotiation and compromise.

4.1.7 If so, did those PCPs put the claimant at the following substantial disadvantages in comparison with people not sharing the claimant's disability:

(1) *PCP1 – the claimant was recovering from cancer treatment and was therefore tired and less able to complete a full working week;* In the light of the above this is no longer relevant.

(2) *PCP 2 – the claimant was allocated a room which was incompatible with the policy, it was not capable of hosting confidential consultations so the claimant had to walk up and*

down three flights of stairs to get to an office suitable for consultations, each time the claimant needed to see either a patient, or return to her room during a consultation to get a reference book or other resources, and had to spend time booking and arranging meeting rooms impacting upon her clinical effectiveness and adding to the time and work pressure upon her; The claimant has established to our satisfaction that she was put to the substantial disadvantage claimed until the end of March 2016 when office space was made for her on the 1st Floor at Sefton adjacent to clinical rooms. The claimant found the lift inconvenient and often unavailable and taking the stairs was not just inconvenient but contributed to and exacerbated fatigue caused by her disabling condition and treatment. The disadvantage was substantial. The claimant’s workload in itself was onerous and tiring; in those circumstances the additional requirement for her to ascend and descend the stair as often as she did was a substantial disadvantage.

(4) PCP 3 – increasing the claimant's workload in a manner she was unable to cope with given her treatment and recovery, without substantial detriment to her health? In the light of the finding above this is no longer relevant.

4.1.8 If so, did the respondent take such steps as were reasonable to avoid the disadvantage to the claimant, in particular:

(1) PCP 1 – following the recommendations for a phased return to work outlined by Professor Stebbings in September 2014. In the light of the above findings this is no longer relevant.

(2) PCP 2 – allocating the claimant an office suitable for patient consultations; The respondent eventually, in March 2016, provide the claimant with suitable office premises adjacent to the clinical rooms which removed the substantial disadvantage found from the initial room allocation PCP. The respondent did not take the reasonable steps that could have sooner removed that disadvantage by swopping consultant’s offices, consulting on such swops including inviting someone to make way for the claimant and it did not expedite the consideration of the business case for or the building of the suitable office. There was a failure to make adjustments for the period from when the claimant made known the substantial disadvantage she faced on 13th May 2015, until 31st March 2016.

(3) PCP 3 – reducing the DCC:DPA ratio to 7.5:2.5? In the light of the above findings this is no longer relevant.

<u>Harassment (contrary to section 26 EA)</u>

4.1.9 *Did the respondent engage in unwanted conduct? The claimant says:*

4.1.9.1 *At a meeting in November 2014 LM pushed a table against the claimant.* Yes, albeit inadvertently and without realisation that the table made contact with the claimant causing a bruise.

4.1.9.2 *At a meeting on 14 January 2015 MR tutted and laughed at the claimant; JP referred to the claimant's "seven months' sick leave";* Yes, MR tutted albeit the claimant misunderstood what MR meant by her reactions to the claimant's presentation. MR did not laugh at the claimant. JP did comment as alleged.

4.1.9.3 *MR pretended not to understand the claimant owing to her broken jaw;* No. MR did not so pretend. She did not understand the claimant's argument; she did not refer to not being able to understand the claimant's speech or pretend as alleged.

4.1.9.4 *During a telephone call on 29 April 2015 SE stated that he "did not like [the claimant's] tone of voice" when she expressed concerns at being allocated a new task that she felt her disability may prevent her fully undertaking;* Yes.

4.1.9.5 *At a meeting 2 July 2015 AO asked the claimant "how long she would be on reduced hours" thereby pressurising the claimant to return to full-time hours;* AO asked the question. She did not ask it to create pressure on the claimant to return to full-time working hours. The claimant felt it amounted to pressure as she was conscientious and aware of the staffing problems within CAMHS.

4.1.9.6 *The claimant was removed from* membership *of the Task and Finish Group, or was not re-appointed to the Task and Finish Group at some time between 10 April 2016 and 4 August 2016;* No; The claimant was not removed but her role in relation to the GP Hotline lapsed; when she asked about her role she was offered, but did not take up, the role of psychiatrist representative on a reformed Task & Finish Group that no longer needed to consider the Hotline in respect of which she had previously led.

4.1.9.7 *The claimant was challenged about booking leave for an oncology appointment on October 2015 by AO;* No, AO did not challenge the claimant as alleged. AO queried the procedure adopted by the claimant in securing and her approving manager in granting leave at short notice without alternative cover being arranged at a time when the service was short staffed. AO never challenged leave booked for

oncology appointments; she did make a point, aimed more at the approving manager than the claimant, about leave granted that was in excess of the time required for essential medical appointments.

4.1.9.8 *AO was confrontational towards the claimant during her appraisal on 8 December 2015, asking inappropriate questions;* No; AO was not confrontational as alleged and did not ask inappropriate questions.

4.1.9.9 *The respondent failed to process the claimant's sick leave in an appropriate manner, including failures in communications, and delays in organising Occupational Health reviews.* No. There were difficulties with communication and in arranging both welfare and OH meetings but the tribunal does not find that this amounted to failures on the part of the respondent.

4.1.10 *Did any conduct found proven relate to the claimant's disability?*

4.1.10.1 LM's exasperated and sudden gesture in standing up from having been sitting at a desk (during what she considered to be a fruitless meeting) caused the table to move towards AI and the claimant; it was not deliberate, and any contact with AI or the claimant was accidental such that it cannot have related specifically to the claimant or to her disability.

4.1.10.2 MR's reaction to the claimant at the meeting on 14 January 2015 related to her not understanding the essence of the claimant's objections to proposed re-organisation, and her being frustrated; she felt that the claimant was repeating that there were risks without being specific or coming up with practical proposals on how to improve the service. MR's reactions (and we have not found that she laughed, but she tutted) and her comment that she did not understand may have seemed dismissive but only in terms of management and the business of the service. Any frustration, or even derision, so expressed did not relate to the claimant's disability.

4.1.10.3 JP had characterised the grace period delaying the claimant's commencement in her role as a sickness absence; it was due to the claimant's disability; JP was making an inaccurate reference to the claimant's disability and its effect on her availability to take up her new appointment in 2014.

4.1.10.4 SE's comment on 29 April 2015 related to how he perceived the claimant had adopted a certain tone with him in the conversation; he did not like it and said so. The claimant's disability was irrelevant to SE's request or instruction, and to his comment when the claimant appeared to rebuff him. He

was in a senior position. He expected the claimant to accede to his request or instruction that she take on certain additional work; he was taken aback by the way in which she refused. This conduct was not disability related.

4.1.10.5 AO's question was a reasonable and due managerial question related to availability to work in the context of staff shortages, a service under pressure to perform, and growing waiting lists; she was the appropriate person to ask that appropriate question; AO was open to the claimant answering as she wished as it was purely a request for information within the control of the claimant that impacted upon the service being managed by AO at that time. This conduct was not related to the claimant's disability. It was in the general context of the claimant having deferred commencement of employment and subsequently needing to reduce her hours on medical advice because of disability but the question did not relate to disability.

4.1.11 If so, did the unwanted conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The claimant felt unwanted pressure from management and that she was being targeted, in part, because she is disabled and at various times was either not available for work or she worked reduced hours; she felt self-conscious because of this; she felt a harassing effect when comments, questions or actions made her uncomfortable, and she related them back to her disability. The conduct of her colleagues towards her as described above upset her. Only JP's conduct was disability related. The claimant was in a terribly difficult situation when appointed to her role and she did not want to have a disrupted start but rather to await what she hoped would be the end of significant treatment; she deferred commencement for the grace period to minimise disruption to the service and so that she could have a good start. The claimant invested a great deal in all those deliberations. Against that background she felt intimidated and singled out for criticism when JP referred to a seven-month absence. The claimant felt that despite her best endeavours the grace period was held against her such that she was being viewed as not being dependable. She was perturbed at the inaccurate description of the grace period and upset at the implications. This appeared to the claimant to be hostile. She was offended and intimidated. The claimant has not included JF's comment of 27 May 2015 about the impact of her working reduced hours as an allegation of harassment. Applying the same reasoning as with JP's comment, save for the inaccuracy but taking into account the unnecessary pressure, we would have found that it too amounted to harassment. The same considerations apply to both comments. We are not hind-bound by the list of issues. We do consider that

JF harassed the claimant on 27 May 2015 when she added her said comment to a legitimate question.

4.1.12 *If so, having regard to all the circumstances of the case and her perception, was it reasonable for the conduct to have that effect?* Given the lengths that the claimant had gone to minimise disruption to CAMHS and her dedication to providing a good and professional service to her patients, the fact that JP and JF were not the claimant's line managers, and the inaccuracy of the comment by JP and the nature of the comment by JF, it was reasonable for the conduct to have a harassing effect as claimed. We have taken into account not only the claimant's sensitivity but all of the circumstances. The question of commitment and time spent at work was a serious issue for the claimant personally as she sought to pursue her professional vocation notwithstanding her disability. In general terms those same issues exercised the respondent in so far as they affected staff levels and attempts to address growing waiting lists. It was not a subject that either side could address dispassionately. JP's and JF's comments therefore hit a nerve that was not surprisingly raw.

Jurisdictional issues under section 123 Equality Act 2010

4.1.13 *Can the claimant establish either –*

4.1.13.1 *That any matter complained of falling earlier than 29 April 2017 formed part of an act extending over a period ending after that date;* The tribunal has found that JP's reference to seven months absence, made on 14 January 2015 amounted to harassment. JF's comment on 27 May 2015 ("... because this [continued reduced hours of working] is going to have a significant impact on the service") amounted to unfavourable treatment arising from disability and harassment. Albeit different managers were involved nevertheless the comments are on the same or related topics of availability for work and impact on the service; both show a view held by management potentially affecting perception of the claimant and as such they are of the same ilk. It is a short series of similar conduct ending on 27 May 2015. The only later discriminatory act found was a failure to make reasonable adjustments in respect of the claimant's room allocation. This is of an entirely different nature to, and is wholly unconnected to, the remarks of JP and JF. There is no evidence to indicate an actual link with MU or that he shared their misconceptions or other views about the claimant. He clearly had concerns about the service and the consultants having to do their bit. The inappropriate room was the only one available when the claimant went to Sefton. There were management shortcomings regarding adjustments but the room was not allocated maliciously. MU

thought he was addressing the claimant's needs but did so piecemeal and without urgency, and without taking a few steps that would have been reasonable to avoid the substantial disadvantage facing the claimant. This situation is not comparable or related in any way to the earlier claims relating to JP and JF; it does not form part of a series of acts with those comments. The failure to make reasonable adjustments itself however extended from May 2015 to 31 March 2016 when it ended. These acts were all finished and claims crystallised long before 29 April 2017. There were no discriminatory acts after that date.

4.1.13.2 *That it would be just and equitable to extend time for the presentation of any claim?* The claimant's claim was presented on 10th October 2017, late in respect of the above claims. The primary time limit in respect of the series of acts ending with JP's comment on 27 May 2015 expired on 26 August 2015; that in respect of the reasonable adjustment claim on 30 June 2016. The claims were presented over twelve months out of time. Since those events the claimant provided good professional service, resigned, withdrew her resignation, accepted (in fact proposed) her "ideal job" and carried on working. She is clearly very able, well-motivated, articulate, accomplished and able to speak up for herself. She has professional support and referred at some stage to, I think, Medical Defence Union (or similar). Her recollections came across as being clear because of the personal nature of things however even the claimant displayed some inconsistencies and vagueness in respect of certain dates; she did not follow through entirely consistently raising all the same complaints for example in her grievances, resignation, claim and statement. Where what was in issue was words spoken, and many were over time, at numerous meetings, and there were very many difficult meetings, the passing of time adversely affects witnesses. They will not all have attached the same weight to certain words as the claimant; they will have forgotten nuances and expressions. Some of those matters have been subjectively interpreted by the claimant to the point of being unrecognisable to some witnesses over time. The claimant complained about her office accommodation; MU suggested ineffective alternatives and considered the lift sufficient until eventually putting everything right to the claimant's satisfaction; that matter was clearly resolved entirely to the claimant's requirements and it would be reasonable to expect that there was no longer any lingering effective resentment on her part, although maybe residual churlishness about the delay. The respondent can have reasonably concluded that it was not at risk of litigation about the 2015 and 2016 matters such as these. Considering justice and equity, acting always in the

interests of justice and weighing up the balance of prejudice to the parties (and we felt the weight of prejudice is against the respondent) we do not consider that we should extend time. The claimant could have brought her claims at or about the time of her resignation but chose not to. We feel that she effectively wiped the slate clean by withdrawing her resignation, at least in respect of simple comments made (which is not to resile from our findings but they had no practical bearing such as say a discriminatory instruction, pay review or appraisal), and the room issue which had been long since resolved entirely to her satisfaction. The resignation and its withdrawal may not have prevented the claimant relying on earlier issues in making a claim presented in time, but we feel those matters are relevant when the question is one of justice and equity in extending time.

Detrimental treatment as a result of making protected disclosures (contrary to section 47B Employment Rights Act 1996 ("ERA")

4.1.14 Did the claimant disclose the following information to the respondent?

4.1.14.1 Did the claimant, between September 2014 and January 2015, inform her employer than plans to reorganise the service would have a detrimental impact on the health and safety of patients? No; she stated that opinion. During the course of consultation, she said that she foresaw risks with the plans. She genuinely believed that the respondent's proposal was not the best plan. She feared it could go wrong and that if it did there might be the risk of harm to patients. The claimant opposed the proposal conscientiously. She did not impart information tending to show health and safety issues; what she said fell short of that.

4.1.14.2 Did the claimant inform her employer in September 2015 that the provision of mental health services in schools was being conducted in a manner which was likely to have a detrimental impact on the health and safety of service users? Yes. There were active concerns about current practices and the claimant informed management of those facts. The current practices put patients' health and safety at risk. The claimant explained how that was so. That was information and not a viewpoint or opinion.

4.1.14.3 Did the claimant inform her employer on 7 September 2016 that the requirement to increase workload during on-call sessions was likely to have a detrimental impact on the health and safety of service users? The claimant stated this opinion. She did not disclose facts but indicated potential

risks in given hypothetical circumstances as she foresaw them. That does not amount to a disclosure of information.

4.1.14.4 *Did the claimant inform her employer on 28 September 2016 that the internal waiting lists and clinical arrangements were such that the health and safety of patients was being put at risk?* Yes. By reference to published guidance the claimant informed the respondent that certain said arrangements risked the health and safety of patients. The facts around the practices could then be compared with safe guidelines. The claimant informed management that it was at the time conducting the service in beach of those guidelines. That was a factual disclosure, beyond opinion or hypothetical conjecture and fears.

4.1.15 In respect of any matter found –

4.1.15.1 *Did the claimant have a reasonable belief that the information disclosed tended to show matters related to health and safety as per section 43B(d) ERA?* Yes. In the two instances found the claimant relied on her knowledge and experience as informed and guided by RCP and her clinical training. She was right to be concerned on the basis of what she knew was happening and how she had been trained. Her belief was rationale, thought through and based on facts and best practice, hence reasonable.

4.1.15.2 *Did the claimant reasonably believe that any disclosures of information were in the public interest?* The respondent's hospital at Alder Hay, and its satellite/out-reach services are nationally recognised (perhaps internationally) as a centre of excellence. It is a specialist provider. We have heard concerning evidence of dysfunction and near-crisis but nevertheless the respondent has a good reputation. It treats many thousands of patients annually to the knowledge of the tribunal although no evidence was given about that. It expends public money and is an integral part of National Health Service provision in the north west of England and to north Wales. The CAMHS team does invaluable work for vulnerable patients in great and often urgent need and crisis. The fact that such patients and such a service could be at risk of harm through poor practice, practice falling outside safe guidelines, must be in the public interest. Based on such factors the claimant formed a belief that her disclosures were in the public interest; it was a reasonable belief.

4.1.16 Did the claimant suffer the following detriments?

4.1.16.1 At a meeting on 14 January 2015:

(i) *Did MR tut and laugh at the claimant, JP refer to the claimant's "seven months' sick leave", and did MR pretend not to understand the claimant owing to her broken jaw?* No. None of this conduct was on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. This allegation pre-dates the first disclosure that we found to have been made, in September 2015.

(ii) *At a meeting in November 2014 did LM push a table against the claimant?* No. This conduct was not on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. This allegation pre-dates the first disclosure that we found to have been made, in September 2015.

(iii) *At a meeting on 9 April 2015 did SE state that he "did not like the claimant's tone of voice" when she expressed concerns at being allocated a new task that she felt her disability may prevent her fully undertaking?* No. This conduct was not on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. The disclosures were irrelevant. This allegation pre-dates the first disclosure that we found to have been made, in September 2015. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 was irrelevant to SE's comment and had no bearing on it.

(iv) *At the meetings on 27 May 2015 and 2 July 2015 did JF ask the claimant how long she would be on reduced hours, thereby pressurising the claimant to return to full-time hours.* No. This conduct was not on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. This allegation pre-dates the first disclosure that we found to have been made, in September 2015. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 was irrelevant to JF's question and comment.

(v) *The claimant was not invited to return to the Task and Finish Group on 10 April 2016, or following that date, when it was frozen and before 4 August 2016 when she notified that the Task and Finish Group had*

resumed. No. None of this conduct was on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. The disclosure of September 2015 was irrelevant. The allegation pre-dates the second disclosure, that of 7 September 2016. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 was irrelevant to what happened over the composition of the Task and Finish Group.

(vi) *Was the claimant challenged about booking leave for an oncology appointment on 16 October 2016 by AO?* No. This conduct was not on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. The disclosures were irrelevant. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 and her representations about consultants' workload on 7 September 2016 were irrelevant to AO's emails about and treatment of the leave request and leave of 16 October 2016.

(vii) *Was AO confrontational towards the claimant during her appraisal on 8 December 2015 asking inappropriate questions?* No. This conduct was not on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. The disclosure of September 2015 was irrelevant. This allegation pre-dates the disclosure of 7 September 2016. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 was irrelevant to AO's handling of, and conduct in, the said appraisal..

(viii) *Did the respondent fail to process the claimant's sick leave in an appropriate manner, including failures in communications and delays in organisation Occupational Health?* No. None of this conduct was on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. The disclosures were irrelevant. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 and her representations about consultants' workload on 7

September 2016 were irrelevant to the respondent's handling of the claimant during her sick leave.

(ix) *Did the respondent fail to progress the claimant's grievance in an appropriate manner, delaying and failing to keep the claimant informed of progress and failing to uphold the claimant's grievance?* No. None of this conduct was on the ground of or related to the claimant having made protected disclosures. The conduct and the reason for it has already been explained. The disclosures were irrelevant. In any event we find that the claimant's input to the consultation on the re-organisation between September 2014 and January 2015 and her representations about consultants' workload on 7 September 2016 were irrelevant to the respondent's handling of the claimant's grievance.

4.1.17 Can the respondent establish the grounds for any treatment found proven? Yes. The respondent has explained its treatment of the claimant and the tribunal has found facts that support the finding that none of it was because of or on the grounds of or in any sense related to the disclosures made.

4.1.18 Was the reason for any treatment found proven because the claimant had made a protected disclosure? No, for all of the reasons stated above.

Jurisdictional issues under section 48 Employment Rights Act 1996

4.1.19 *In respect of any detriment predating 29 April 2017, can the claimant show either (1)That the act forms part of a series of similar acts that one such act post-dated that date; (2) That the act(s) complained of extended over a period ending after that date; or (3) that it was not reasonably practicable to present her claim in time, and that it was presented within a reasonable time thereafter:* As the tribunal does not find there to have been detrimental treatment as alleged this matter need not be considered.

Employment Judge T Vincent Ryan

Date: 19.12.18

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 January 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.