EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: East Cheshire NHS Trust

Heard at: Manchester **On:** 21-30 January 2019
31 January 2019
(in Chambers)

Before: Employment Judge Slater
Ms L Atkinson
Mr S Stott

REPRESENTATION:

Claimant: Miss S George, Counsel
Respondent: Mr B Williams, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The complaint of unfair dismissal is well-founded.

2. The complaint of direct disability discrimination in relation to the dismissal is not well-founded.

3. The complaint of discrimination arising from disability in relation to the claimant's demotion to Band 5 on 5 September 2015 and requiring her to undergo a period of training is not well-founded.

4. The complaint of discrimination arising from disability in relation to requiring the claimant to take involuntary paid authorised leave between 26 October 2015 and February 2016 is well-founded.

5. The complaint of discrimination arising from disability in relation to requiring the claimant to take involuntary paid authorised leave from 4 July 2016 to 26 October 2017 is well-founded.

6. The complaint of discrimination arising from disability in relation to deciding to revert to the disciplinary panel after the alleged error of 17 May 2016 on the dispensing log is not well-founded.

7. The complaint of discrimination arising from disability in relation to the claimant's dismissal is well-founded.

8. The complaint of failure to make reasonable adjustments in relation to a provision, criterion or practice that the claimant was required, from 18 September 2015, as a condition of avoiding dismissal, to undertake a period of fully supervised practice and/or a period of retraining and supervision aligned to a period of preregistration training for six months is not well-founded.

9. The complaint of failure to make reasonable adjustments in relation to a provision, criterion or practice that, from 4 January 2016, the claimant was required, as a condition of avoiding dismissal, to undertake the NCAS Practitioner Action Plan is not well-founded.

10. The complaint of failure to make reasonable adjustments in relation to the provision, criterion or practice that, from 4 January 2016, the claimant was required, as a condition of avoiding dismissal, to agree to be bound by the behaviour impact and action agreement, is well-founded.

11. There will be a remedy hearing on 3 May 2019 with the Tribunal meeting in chambers on a further day on 13 May 2019 if required.

REASONS

Anonymisation Order

1. An anonymisation order was made on 30 January 2019 to the effect that there shall be omitted or deleted from any document entered on the register or which otherwise forms part of the public record, including the Tribunal's hearing list, any identifying matter which is likely to lead members of the public to identify the claimant as being either a party to or otherwise involved with these proceedings. Reasons for making the order were given orally at the time. The publicly available copy of this Judgment and Reasons does not, therefore, identify the claimant by name.

Claims and Issues

2. The claimant claimed unfair dismissal, direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. The issues were agreed to be as follows:

Unfair Dismissal

(1) What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

(2) Did the respondent hold the belief that the claimant was incapable of carrying out the role of Band 7 pharmacist by reason of the long-term condition of Asperger's Syndrome on reasonable grounds?

(3) Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses of a reasonable employer? The claimant's case is that no reasonable employer would have dismissed her for the reasons set out in paragraph 73 of the Particulars of Claim. The respondent's case is that the decision to dismiss was fair for the reasons set out in paragraph 34 of the Grounds of Response.

(4) Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Disability Discrimination

(5) The respondent accepts that the claimant is a disabled person within the meaning of section 6 Equality Act 2010 (hereafter the EQA) by reason of the condition of Asperger's Syndrome.

(6) The respondent's case is that it had knowledge of the claimant's disability from 11 November 2016.

Direct Discrimination – Section 13

(7) Has the respondent treated the claimant less favourably than it treated or would have treated comparable non-disabled people by dismissing her with effect from 26 October 2017?

(8) If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

(9) The claimant's case is that:

(a) Part of the reason why the respondent dismissed the claimant was that it had deemed it too hard to make the adjustments to working practices which had been recommended, because of the number of people with whom she interacted in a working day. In other words, because Asperger's Syndrome is a hidden disability and would not be obvious to work colleagues and patients the respondent did not implement the recommended adjustment of training about the condition. They would not have made that judgment in respect of a physical impairment.

(b) The claimant was dismissed because, as a person with Asperger's Syndrome, she was perceived to have impairments which she does not have or because Asperger's Syndrome was perceived to impact on her ability to carry out her role when it does not.

(c) Errors made by the claimant led to disciplinary action and ultimately to dismissal when errors by non-disabled pharmacists did not lead to this action.

(d) If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability – section 15

(10) The unfavourable treatment which the claimant alleges amounted to discrimination arising from disability within section 15 EQA is:

(a) demoting her to Band 5 on 18 September 2015 and requiring her to undergo a period of retraining;

(b) requiring her to take involuntary paid authorised leave between 26 October 2015 and February 2016;

(c) requiring her to take involuntary paid authorised leave from 4 July 2016 to 26 October 2017;

(d) deciding to revert to the disciplinary panel after the alleged error of 17 May 2016 on the dispensing log;

(e) dismissal.

(11) If so, did the respondent act in the way alleged in paragraphs (a)-(d) above because of the alleged errors and/or behavioural issues which either did or which were perceived to arise in consequence of Asperger's Syndrome?

(12) Did the respondent dismiss the claimant because of concerns for patient safety which either arose or were presumed to arise in consequence of her disability of Asperger's Syndrome as alleged by the claimant? Alternatively, as averred by the respondent, was she dismissed because she could no longer fulfil her role because of something arising in consequence of disability?

(13) In either event, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the business aim of patient safety.

(14) Does the respondent show that, at the time of the alleged acts set out in paragraphs (a)-(d), it did not know and could not reasonably have known that the claimant was disabled by reason of Asperger's Syndrome?

(15) The respondent accepts that, at the time of the decision to dismiss, it knew that the claimant was disabled by reason of the condition of Asperger's Syndrome.

Reasonable Adjustments – section 20 and section 21

(16) The respondent does not accept that the PCPs the claimant relies on amount to a PCP.

(17) Did the respondent apply the following provision, criteria and/or practice ("the first PCP") to the claimant, namely from 18 September 2015 onwards by requiring her, as a condition of avoiding dismissal, to undertake a period of fully supervised practice and/or a period of

retraining and supervision aligned to a period of pre-registration training for six months?

(18) Did the application of the first PCP put the claimant to a substantial disadvantage compared with non-disabled people in that her impairment caused difficulty with interpersonal function inside work, she had greater difficulty than a neurotypical person with working under stress, pressure or time constraints and does not have an instinctive understanding of what is and what is not socially acceptable clothing or behaviour? The claimant's case is that, as a consequence, she was at greater risk than a neurotypical person of failing the retraining programme, behaving in a way which was regarded as socially unacceptable and triggering a return to the disciplinary process with the consequent increased risk of dismissal.

(19) Did the respondent take such steps as were reasonable to avoid the alleged disadvantage? Reasonable adjustments would have included, but not been limited to:

(a) Not criticising the claimant for social and communication errors;

(b) Having an open discussion with the claimant to help her to understand how people may view things differently from her own perspective;

(c) Creating a supportive, non-judgmental environment in order for her to further develop her skills in reading people;

(d) Ensuring that the lines of communication with her are clear and presented in a documented format;

(e) Reserving feedback until after key milestones in her retraining programme;

(f) Not criticising the claimant for petty errors which would not be criticised in a trainee – by making her do a training based upon the pre-registration training but then judging her by more stringent standards than would be applied to a pre-registration pharmacist, she was being set up to fail;

(g) Having a run in or period of grace before the first dispensing log, for example a two week observation period;

(h) Taking advice from a communications expert on what detailed adjustments to practice and/or managing of the claimant would facilitate her success in the retraining programme.

(20) Did the respondent apply the following provisions, criteria and/or practices ("the second and third PCPs"), namely from 4 January 2016 by requiring her, as a condition of avoiding dismissal, to undertake the NCAS Practitioner Action Plan and to agree to be bound by the Behaviour Impact and Action Agreement?

(21) Did the second and third PCPs (or either of them) put the claimant to a substantial disadvantage compared with non-disabled people in that her impairment caused difficulty with interpersonal function inside work, she had greater difficulty than a neurotypical person with working under stress, pressure or time constraints and does not have an instinctive understanding of what is and what is not socially acceptable clothing and behaviour? The claimant's case is that, as a consequence, she was at greater risk than a neurotypical person of failing to comply with the NCAS Practitioner Action Plan and the Behaviour Impact and Action Agreement, and triggering a return to the disciplinary process with the consequent increased risk of dismissal.

(22) Did the respondent take such steps as were reasonable to avoid the disadvantage? Reasonable adjustments would have included, but not limited to:

(a) Not imposing the Behaviour Impact and Action Agreement;

(b) Allowing the claimant to attempt three logs rather than one before requiring her to take paid authorised leave and returning her case to the disciplinary panel;

(c) Not criticising the claimant for minor errors and for issues arising from her disability and, in particular, from a misunderstanding of behavioural norms;

(d) Giving the claimant advance notice of the ways in which she was alleged to have failed to comply with the Behaviour Impact and Action Agreement so that she could prepare her defence against the allegations for the resumed hearing of 11 November 2016.

(23) In relation to each of the alleged PCPs, did the respondent not know, or could the respondent nor be reasonably expected to know, that the claimant had a disability, namely Asperger's Syndrome, or was likely to be placed at the disadvantage set out above?

The Facts

3. The claimant began employment with the respondent on 2 August 2010 as a Band 7 clinical pharmacist. The respondent concedes that the claimant is disabled by reason of a mental impairment, being Asperger's Syndrome. The claimant was not diagnosed as having this condition until a late stage in her employment with the respondent although, as we note, differences in her behaviour were noted from a much earlier stage. Of considerable significance in this case is the issue of what the respondent knew about the claimant's mental impairment and when.

4. On 18 October 2011, the claimant had a review of unsatisfactory performance. Areas identified as needing improvement included ensuring clear communication. A suggestion was made of a reference to Occupational Health but this was rejected by the claimant.

5. On 8 December 2011, there was the outcome of a first stage formal review meeting held on 6 December. The claimant was noted as failing to meet all of the objectives. Her performance was to be monitored under the second stage review procedure of the Trust's capability policy over the following two months.

6. On 25 January 2012, the claimant was given a 12 month written warning under the disciplinary policy. Of the three matters in respect of which the warning was given, two related to drugs errors and one related to inappropriate use of Trust telephones for personal use.

7. On 3 February 2012, the claimant was removed from the second stage of the capability procedure because of improvements made. It was noted that, if standards were not sustained during the following 12 month period, they would revert back to stage two of the process. It was agreed there should be a reference to Occupational Health to support the claimant during a stressful period. Following this, there were no incidents serious enough to trigger either capability or disciplinary processes until the disciplinary process started in September 2014.

8. On 30 September 2014, the claimant had an appraisal with her line manager, Jabeen Razzaq-Sheikh. The claimant scored the highest mark possible for health, safety and security. Her lowest mark, which was indicated to be partly achieved, related to communication.

9. In September 2014, a disciplinary process started which led to a two year warning in November 2014.

10. Around the end of September 2014, Elizabeth Street, the Deputy Chief Pharmacist, made a reference to the National Clinical Assessment Service ("NCAS"). This noted that the claimant had been involved in a previous disciplinary and capability process and there had been a temporary improvement but further incidents had been identified and they had begun a new disciplinary process. Elizabeth Street wrote:

> "[The claimant] is a friendly and helpful member of the team but unfortunately, despite attendance at a communication course, discussions re prioritising work and clear communication with the pharmacy ward based technician, [the claimant] still appears to lack some basic understanding of reading others verbal and non-verbal communication. She appears disorganised and a little muddled at times. Her responses may be inappropriate to the situation she is in. I am not sure how to help her further in integrating herself into the ward teams where she works and working in an organised and effective way to try and prevent incidents and errors from occurring. I am hoping that by NCAS reviewing her practices at ward level, they may be able to identify any further learning needs/development opportunities and also give guidance on [the claimant's] fitness to practice as a Band 7 pharmacist on a busy clinical ward."

11. An incident when Elizabeth Street saw the claimant riding her bike into oncoming traffic led to Elizabeth Street making a referral to Occupational Health on 11 November 2014. She wrote:

> "I am concerned for her safety if she fails to even follow those simple rules such as those set out in the Highway Code and would like a OH review to

> ensure her behaviour and reasoning are appropriate for her Band 7 pharmacist duties, if this is possible. I also have concerns in general about [the claimant's] inability to pick up on non-verbal language i.e. walking into a meeting and starting to hold a conversation with apparent regardlessness [sic] that a private meeting is taking place."

12. On 12 November 2014, Elizabeth Street had some email exchanges with Kashif Haque, the Chief Pharmacist, about the referral to Occupational Health. In one of these emails Elizabeth Street wrote:

> "At least the appointment is with a doc. Wonder if he is a psychiatrist???"

13. On 25 November 2014, the claimant was given a two year final written warning. The allegations upheld against her related in the main to errors relating to clinical work as a pharmacist. However, one allegation was failure to adhere to the dress code policy, which was about having a low waistband showing her underwear. However, it was noted that the claimant had since made changes to her appearance to ensure she complied with the dress code policy.

14. On 26 November 2014, Elizabeth Street sent an email to NCAS. She advised them that the claimant had received a final written warning and asked whether NCAS would now be able to support her in a review of the claimant's fitness to practice.

15. Following a referral to Occupational Health on 1 December 2014, there was an Occupational Health report from Dr Dagens. The report noted that the Consultant Occupational Physician had been asked to meet with the claimant as there were some concerns regarding her behaviour and performance at work. He recorded that, amongst matters discussed, the claimant expressed the view that various written policies within the Trust were ambiguous which led to her recent difficulties. The doctor gave the view that, on the basis of his assessment of the claimant, there was no evidence of any significant medical issue of either a physical or psychological nature and that he considered her medically fit for work. He wrote that Ms Street's concerns regarding the claimant's behaviour and performance were a managerial issue, and he recommended she be kept under appropriate close supervision until such time that she demonstrated the appropriate level of performance and associated competency.

16. The outcome of the disciplinary hearing on 24 November 2014 was confirmed by an outcome letter on 4 December 2014.

17. Following the Occupational Health report, Elizabeth Street wrote to HR, copied to Mr Haque. Elizabeth Street raised concerns about the Occupational Health report and an email she had received from the claimant in response to the report. She wrote:

> "My concerns for her logic, reasoning and emotional intelligence are heightened by a review of this email. Her thought process appears random and nonsensical. Not the attributes I would expect of a safe practising clinical pharmacist, but if OH do not recognise her having mental or behavioural issues as being inappropriate, then my understanding is that I have no evidence in which to suspend her form her current duties."

18. Ms Street wrote that she had spoken to NCAS who had informed her that they were unlikely to pursue this case and that she was awaiting email confirmation of this. She wrote that she felt it necessary to challenge their decision "as my concerns for her ability to function as a safe Band 7 pharmacist". She asked HR for advice. She also noted that the claimant had made two further errors whilst the primary disciplinary investigation was under review, and she was, therefore, unclear whether they were planning a further disciplinary process or, as the claimant had breached the final written warning, whether she was to be dismissed.

19. Later the same day, Elizabeth Street sent to Mr Haque a reply she was sending to NCAS. This included expressed concern at the claimant's alleged random logic and rather chaotic rationale which Elizabeth Street wrote was "not what I would expect of a safely practising pharmacist". She wrote that she felt that the claimant would benefit from a behavioural assessment and a review to identify if there were any underlying issues which were resulting in her poor performance at work.

20. Elizabeth Street sent a further email to HR on 17 December, having not had any response to her previous email. She mentioned again the two further errors made by the claimant, asking what was to happen now.

21. A decision was taken that no further disciplinary action would be taken in relation to the two further alleged errors.

22. Mr Haque and Elizabeth Street met with the claimant on 7 January 2015. Mr Haque wrote to the claimant the same day referring to the two further alleged errors relating to the claimant's practice as a pharmacist. He wrote:

> "Lis and I have discussed this issue. We have decided that as you have made a noticeable improvement in your working practice, we will not investigate them further at this time. However, if any further incidents are reported, then these two incidents will be reviewed as part of a second disciplinary investigation."

23. On 13 January 2015, Elizabeth Street was informed that the NCAS panel had rejected her request and that they were still suggesting that an action plan with a behavioural psychology component would be the best option. Elizabeth Street replied, expressing her disappointment. She reiterated that she was hoping that a psychological assessment would be the best way forward and reiterating concerns:

> "[The claimant] is sometimes a little random in conversation/sounding confused and muddled and not organised when she is discussing issues/presenting a problem. [The claimant] often fails to pick up on body language/non-verbal clues [sic] which has led to her irritating other members of staff. She has been on two communications skills. Is there anything further we can do to help her?".

24. Ms Street also wrote about incidents involving the claimant "bending the rules" as the claimant saw fit. She wrote:

> "In work related incidents she believes she is acting in a patient's best interest and this appears to override her understanding of her roles and responsibilities and acceptable practice."

25. Elizabeth Street asked for the help of NCAS experts to solve the issues.

26. Elizabeth Street's contact at NCAS forwarded this email to someone in NCAS' "Bank on Track" service. He replied that he thought the areas of concern were mostly behavioural in nature and could be included in a behavioural contract but, if the difficulties were due to development issues in the pharmacist's skills or knowledge, that would not solve the issue. He gave some advice on an action plan but wrote:

> "However, we usually only build action plans based on agreed areas of concern identified by the evidence."

27. Elizabeth Street met with another NCAS representative on 27 January 2015 who suggested that a clinical psychological/psychiatric assessment was required and suggested this could be obtained via the respondent's Occupational Health service. In a letter dated 28 January 2015, the NCAS adviser confirmed this advice, writing that the information received by NCAS pointed to the need for a specialist health assessment and suggesting that Elizabeth Street speak to the Trust's Occupational Health physician to outline the issues and clarify what arrangements there may be for onward specialist assessment. She wrote:

> "Subject to any initial screening provided by OH this could include neuropsychiatric assessment of cognitive function, or clinical psychological/psychiatric assessment to exclude diagnosable conditions such as Autism Spectrum Disorder ("ASD")."

28. On 29 January 2015, Elizabeth Street made a referral to Occupational Health. The concerns identified in relation to the claimant included communication difficulties. She requested guidance as to whether there was an underlying diagnosis consistent with the behaviour and difficulties described and, if not, what conditions had been screened for and excluded. If there was an underlying diagnosis, she asked for a view on the severity of the condition and the likelihood of continued productive employment in clinical practice. She also asked whether the Trust needed to make reasonable adjustments and, if so, the arrangements the Trust would need to put in place.

29. On 29 January 2015, an incident occurred which has been described as the "slow sodium incident". This was one of the incidents which led to disciplinary proceedings being started at a later date. However, the claimant was not suspended at the time the incident was discovered. She was required by a letter dated 20 February 2015 to attend an investigatory interview on 23 April 2015.

30. On 3 February 2015, NCAS wrote to Elizabeth Street with their final decision, refusing to carry out a performance assessment of the claimant. NCAS felt that a remediation plan supported by NCAS was the most suitable way forward, which might require the support of a behavioural psychologist.

31. Occupational Health referred the claimant on 2 March 2015 to the Priory for an assessment on whether there was an underlying medical cause for the claimant's performance issues.

32. Following a telephone conversation with Elizabeth Street, NCAS wrote to Elizabeth Street on 18 March 2015, writing that they would see whether further advice or support could be supplied once health issues had been assessed.

33. On 26 March 2015, there was a further incident which has been known as the "clarithromycin incident". This was one of the incidents which led to later disciplinary proceedings. The claimant was suspended on 26 March 2015 after this incident.

34. The claimant was absent from work due to suspension in the period 26 March 2015 to 11 October 2015. In accordance with the respondent's policies on suspension, it appears that the decision to suspend was regularly reviewed and the claimant received frequent letters confirming that her suspension was continuing.

35. On 2 April 2015, Dr Mbaya, Consultant Psychiatrist, interviewed the claimant and prepared a report. The claimant supplied a copy of this report to the respondent on 20 April 2015. Dr Mbaya wrote:

> "[The claimant] presents with longstanding behaviours being over involved, not letting things go, not trusting colleagues – especially junior members of staff – becoming over-focussed with things, which would lead to her being late for other duties. Her presentation is consistent with an obsessive personality disorder, 301.4 DSM-IV. This would affect her ability to function properly including at work."

36. Dr Mbaya referred to an appendix. Unfortunately, the appendix appears to have related to the diagnostic criteria for 300.3, obsessive compulsive disorder, rather than 301.4, obsessive personality disorder. This appears to have caused some confusion later on as to whether the claimant had been diagnosed with obsessive personality disorder ("OPD") or obsessive compulsive disorder ("OCD"), which are different conditions. Dr Mbaya compounded this confusion by referring, in answers to specific questions, to obsessive compulsive disorder rather than obsessive personality disorder.

37. Dr Mbaya recommended that the claimant would benefit from psychological treatment (CBT/EMDR). He wrote that he felt that the claimant would be able to continue in her role provided the necessary adjustments were made to her role. He wrote that her work should be within her capabilities and it may be appropriate to reduce the amount of work she is given to deal with and then over time increase the amount to within her contract and abilities. Dr Mbaya recommended that, after having 4-6 sessions of psychological treatment, the claimant could have a phased return to work over a period of approximately 8-12 weeks. It is not clear from Dr Mbaya's report whether he considered and ruled out the possibility that the claimant had Asperger's Syndrome.

38. Before the respondent received a copy of Dr Mbaya's report, the claimant forwarded to Elizabeth Street on 13 April a letter dated 8 April 2015 from the claimant's sister. It appears that the sister was compelled to write after being told that Dr Mbaya had decided that the claimant was merely "over absorbed". The sister wrote that this was not the case and he would not think that if he knew any of the things that she, as the claimant's sister, knew. The claimant's sister wrote:

> "What I have known for many years is that she struggles with some aspects of the career she has chosen. This isn't for one minute due to her not WANTING to do the best job she can as I am sure you are already aware; it's more a case of her not being able to function the way the job demands because of what I have for many years suspected to be her brain functioning the way it does."

39. The sister wrote that she had been a registered childminder for just over ten years and had cared for children who had fallen under the autism spectrum and two who were a combination of Asperger's and ADHD. She wrote:

> "Having worked with these children I saw some remarkable similarities between them and my sister while she was growing up and have tried to get her to get a referral for an assessment for many years. She has never been willing to do this as she (1) thought it was 'rubbish' – just differing personalities, (2) no-one else has had these observations."

40. The sister wrote in detail about the reasons which led her to suspect that her sister had Asperger's Syndrome, including obsessive traits and social problems.

41. On 20 April 2015, the claimant provided Elizabeth Street with a copy of Dr Mbaya's report. Elizabeth Street forwarded this to Mr Haque. She wrote:

> "Bottom line appears to be that [the claimant] has an obsessive personality disorder, needing CBT/EMDR and should not come back to work until she has received 4-6 sessions of this and then come back on a phased return."

42. Ms Street noted that the claimant had offered to pay privately for the CBT sessions. The claimant did go on to pay for CBT sessions privately to avoid the longer wait which would have ensued had she obtained therapy through the NHS.

43. Following receipt of Dr Mbaya's report, Dr Spurlock of Occupational Health reported, noting Dr Mbaya's opinion that the claimant has OPD. Dr Spurlock gave the opinion that the Equality Act was likely to apply and recommended a phased return to work and psychological therapy and that the claimant may need adjustments to the role such as allowing her more time to learn new tasks and complete her work.

44. On 8 May 2015, the claimant wrote to Occupational Health and Elizabeth Street, writing about an appointment she had had with a psychologist. The psychologist had told the claimant that he could not do the treatment. The claimant reported that he said:

> "(1) It looked like I needed a better employment lawyer;
>
> (2) My sister and I seemed to be disagreeing;
>
> (3) There was a big overlap between obsessive behaviours and Asperger's";

and also that it was up to the psychologist how many sessions she needed.

45. The claimant asked if they could recommend any other psychologists.

46. Elizabeth Street wrote to Occupational Health asking if they could advise the claimant where she should go for the CBT sessions and what it was she was expecting the counsellor/therapist to achieve. Elizabeth Street wrote:

> "She obviously has the psychiatric report but this seems to contradict both [the claimant's] and her sister's thoughts that [the claimant] has suffer [sic] from an Asperger's type syndrome rather than OCD. Obviously I am no expert on these things, I just want to make sure that [the claimant] is clear on what the next step should and apologies but I have no experience of where to signpost her to."

47. This email also went to the claimant, who responded that she agreed with Dr Mbaya and asked them to ignore her sister's letter, other than for background information. She wrote:

> "Don't know anyone of close friends/relatives who agrees with sister!".

48. A further Occupational Health report on 11 June 2015 noted that the claimant agreed with the psychiatrist's assessment and was finding CBT useful. They wrote that the claimant was fit to take part in the management process and that a further psychiatric assessment would take place after the CBT sessions to assess whether the claimant had psychological robustness to return to her substantive role. This was expressed as being a matter for the claimant's safety in the workplace rather than that of patient safety.

49. On 26 June 2015, the claimant was informed of the outcome of the disciplinary investigation which was that this should go to a disciplinary hearing.

50. On 30 June 2015, Dr Mbaya issued a further report. He noted that the claimant felt she had benefitted from CBT. He recommended a phased return to work over a 12 week period, with supervision by the claimant's line manager/senior colleague during the process.

51. On 10 July 2015, one of the respondent's Occupational Health advisers, Dr Williamson, produced a report. The report said the claimant was fit to return to work with recommendations, being a phased return to work over eight weeks and supervision/mentorship over 3-6 months to assist her prioritise and effectively manage workload and effective timekeeping.

52. On 15 July 2015, Elizabeth Street wrote to Mr Haque in anticipation of the disciplinary panel's meeting the following week. She attached what she described as a very brief history of the claimant's story to date which she wrote that she thought might assist the panel, although she had not been asked to provide this by the investigators. She wrote that she felt it necessary to put the two incidents that the panel were reviewing into the context of "a fraught five years of the claimant's career with us". She wrote that she was pleased the claimant had made positive progress with her CBT with regard to timekeeping and organisational skills, but wrote:

> "My main concern is, it does not address her tendency to misinterpret rules/policies and guidelines which have been the root cause of most of the Datix incidents she has been involved in.

> Without addressing this, there is a potential risk to patient safety at this Trust and I am not sure mentoring and supervision, which incidentally we have already done to support [the claimant] will change this."

53. By a letter dated 4 September 2015, the claimant was required to attend a disciplinary hearing on 18 September 2015. The allegations to be considered were described as follows:

- "On 29 January 2015 you incorrectly clinically checked a discharge for patient SW. The patient was prescribed slow sodium to treat hyponatraemia. The discharge prescription should have been for a potassium supplement (i.e. Sando K) as the patient should have been treated for hypokalaemia.

- On 24 March 2015, you clinically checked a prescription for clarithromycin for a patient whom you had stated on the front of their medication chart, had a medicine sensitivity/allergy to clarithromycin.

- The role of the clinical pharmacist is to identify potential pharmacotherapeutic problems, you failed to do this. This contravenes the Royal Pharmaceutical Society's Medicines, Ethics and Practice: the professional guide for pharmacists (see page 7, chapter 2.4 clinical checking)."

54. The claimant was advised that the allegations were serious and, if substantiated, they could be deemed as gross misconduct and lead to summary dismissal.

55. On 4 September 2015, Elizabeth Street sent to Mr Haque a summary of events over the past few years that she wrote she hoped would answer any questions the disciplinary panel might have. She apologised for being on annual leave for the hearing. She wrote:

> "My overriding concern is that [the claimant] has been fully supported and mentored during her employment at the Trust, she has had more time spent with her in this capacity than any other pharmacist that I have managed including the junior ones that are fresh out of uni but has failed to show improvement. Despite this support she continued to make errors and mistakes. Her reasoning and justification for these errors often appears random and based on poor judgment and differs considerably from how the rest of the team of pharmacists behave or think. She is a lovely person but I have massive concerns regarding her fitness to practice and even with four sessions of CBT and further mentoring, I have grave concerns regard to patient safety if she is allowed back on our wards."

56. In the summary written by Elizabeth Street, she included the following statement:

> "[The claimant's] reasoning seems very different to mine, and her justifications have been a little off the wall."

57. Elizabeth Street confirmed in her oral evidence to this Tribunal, as is apparent from the correspondence, that by this stage she did not feel that the claimant was safe to work on the wards.

58. A consultant physician, Dr Davison, wrote in support of the claimant on 4 September 2015. The doctor wrote that the claimant's manner could sometimes be "abrupt" but they and senior nursing staff on the wards had no concerns about her work. They wrote that they always found her helpful when they had a pharmacy or drug query.

59. The disciplinary hearing was to be chaired by Susan Davies, Head of Women's and Children's Services. The pack for the disciplinary hearing included the letter from the claimant's sister, Dr Mbaya's reports and Occupational Health reports, although the report of 10 July 2015 is not listed. Susan Davies confirmed in evidence that she was aware, prior to the disciplinary hearing, that there was medical evidence that the claimant suffered from obsessive personality disorder, that it was likely that the Equality Act applied and recommendations had been made of a phased return and psychological therapy.

60. Dr Clare Goad and Dr Debbie Alexander, who both worked at East Cheshire Hospice, wrote letters in support of the claimant in anticipation of the disciplinary hearing. Dr Goad wrote that the claimant had worked methodically and carefully, always thorough in her checking of prescriptions. She wrote:

> "I have been reassured when she has queried off licence medications and drug dosing and she has not been afraid to ask questions."

She wrote that she had not had any negative feedback from other staff at the hospice or for patients and their friends and families.

61. Dr Alexander wrote that the claimant was not afraid to challenge them to ensure that their prescribing was safe, that their patients' drug regimes were often complex, using large doses of controlled drugs, and the claimant asked when she was unsure and appeared to be aware of her own limitations.

62. The disciplinary hearing took place on 18 September 2015. It was chaired by Susan Davies. Mr Haque and Sue Haslam from HR were on the panel. The claimant was accompanied at the hearing by her trade union representative, James Durrand. During the course of the hearing, the claimant referred to NCAS saying something about Asperger's. The claimant stated that obsessive compulsive disorder and Asperger's can be linked, being super focused.

63. The panel gave their decision after an adjournment at the hearing. They concluded that the claimant was guilty of gross misconduct and expressed grave concerns about the claimant working independently as a Band 7 pharmacist in the Trust.

64. As an alternative to dismissal, the panel offered the claimant the opportunity to have a period of retraining akin to a preregistration situation, which would be a period of fully supervised practice for six months, to be reviewed at the end of that period. Throughout the six months, the claimant would be paid as a Band 5, rather than a Band 7. The claimant would be expected to achieve competencies and

demonstrate improvements in her practice during that period. The process was to run alongside the NCAS process which had already started. The panel also said that they would be reporting their concerns to the General Pharmaceutical Council ("GPHC"). They gave the claimant until 21 September to inform them what she wanted to do. They advised her of the right of appeal.

65. The claimant accepted the alternative to dismissal and did not appeal the outcome.

66. The outcome from the disciplinary was confirmed in a letter dated 28 September 2015. The outcome did not require Mr Haque and Elizabeth Street to report on the claimant's social behaviour during the period of retraining.

67. The respondent made a report to the GPHC on 1 October 2015.

68. A further Occupational Health referral was made and the claimant was assessed by Dr Spurlock on 2 October 2015. The report of that date noted that the disciplinary process had been stressful for the claimant, however she appeared to have more insight into some of the difficulties she had with interpersonal relationships at work. Dr Spurlock wrote:

> "As per the psychiatric report, there is a tendency to be overinvolved, not letting things go and not trusting colleagues, and also being over-focused which has led her to be late for other duties. She has been having CBT which has been helpful. As you know the psychiatrist felt her presentation was consistent with obsessive personality disorder. In effect she has some personality traits at the tail of a normal distribution, which cause her difficulties with functioning in the social environment.
>
> In answer to your question about the Equality Act 2010; in my opinion she would be considered disabled within the Act as she has a mental impairment that causes difficulty with normal activity. She has difficulties with interpersonal function both inside and outside work. In terms of adjustments I would advise open discussion with [the claimant] to help her understand how people may view situations differently to her own perspective. It would be important to create a supportive non-judgmental environment in order for her to further develop her skills in reading situations and other people."

69. Dr Spurlock noted that the claimant had a further two sessions of CBT to utilise and suggested a phased return over a couple of weeks back to full hours.

70. Susan Davies could not recall whether she had this report at the panel meeting in December 2015.

71. On 6 October 2015, there was a meeting between the claimant, Mr Haque, Elizabeth Street and Karen Burton, Senior Dispenser. Mr Haque wrote to the claimant on 7 October 2015 summarising the discussion, the purpose of which was to discuss the training plan and expectations of the claimant. The claimant was informed that she would be expected to complete clinical dispensary logs. The letter of 7 October 2015 does not set out the expectations in terms of number of items required to be accurately dispensed in order to pass the competency. There are also two different versions of the document setting out the requirements for dispensing

training in the Tribunal hearing bundle, which express the requirements in different ways. We find, on the balance of probability, that the version given to the claimant was that at page 825C of the bundle, since this forms part of a document where sections have been completed in handwriting. This version includes the statement:

> "After working in the area and gaining knowledge and competence, completion of practice dispensing log following by 500 item log dispensing log."

72. Elizabeth Street's witness statement stated that the North West Framework required the dispensing of 200 items with no errors. If the claimant was told this, this was at best outlined orally and not confirmed in writing. We are left with the impression that the requirements for the claimant to pass the competency on dispensing logs was not clearly set out for the claimant.

73. At the meeting, they also discussed a communication to the department about the claimant's return and the fact that she would not be acting as a pharmacist. Mr Haque's letter of 7 October recorded that they agreed the respondent would do an announcement at the Wednesday communication meeting which would be followed up with a global email to all the pharmacy staff. He wrote that they would not reveal the reason for the claimant's absence and would also inform staff that they should not be asking her.

74. An email went to the pharmacy team on 6 October 2015 from Elizabeth Street. In addition to the communication which had been agreed, this email attached a feedback form and invited comments. This had not been discussed and agreed with the claimant. Susan Davies and John Hunter, who chaired the relevant disciplinary and capability panels, gave evidence that they were not aware that feedback had been solicited from all members of the team in this way.

75. In an email dated 7 October 2015, Elizabeth Street wrote to Mr Haque that they should have made it clearer to the claimant that if she did not make the required improvements or meet required standards or broke any of the rules she would be dismissed. This is not consistent with the terms of the outcome letter which went to the claimant or Mr Haque's letter of 7 October 2015 which stated that failure to complete the training and meet the competencies **could** (our emphasis) lead to an inability to return to the former Band 7 role and, therefore, dismissal. The letter to the claimant from Mr Haque did not set out how many errors the claimant could make in a log and the training programme also did not specify this. It did not set out how many practice attempts the claimant would have.

76. On 7 October 2015, Elizabeth Street wrote to Mr Haque to register "my massive anxiety that we are taking [the claimant] back to retrain her". She expressed concern about the potential consequences. Elizabeth Street expressed concern about a text she had received from the claimant in which she said it seemed apparent that the claimant was still convinced that she had not done anything wrong and Elizabeth Street commented that the text was rambling and did not really make sense. She wrote:

> "Not an ideal trait for what we would expect a safe Band 7 pharmacist to behave like."

77. On 9 October 2015, Elizabeth Street wrote an email to NCAS expressing concern that behavioural issues had not been resolved.

78. The disciplinary panel left it to Elizabeth Street and Mr Haque to design the retraining programme. Susan Davies gave evidence that she was reassured that it would be in line with preregistration student training and give the claimant every opportunity to demonstrate her competency.

79. We note from the evidence we have heard that pharmacists do not do dispensary logs as a regular part of their day-to-day work, although they may be required to do this on an occasional basis, for example when they are on call.

80. The claimant returned to work on 12 October 2015. She had been absent from work since being suspended on 26 March 2015. She came back on a full-time basis, having chosen to return on this basis rather than on the recommended phased return. We are unclear from the evidence we have seen and heard what period was intended as a practice period for completing dispensary logs and when the claimant started doing actual logs which counted towards assessment of her competency.

81. On the second day of the claimant's return to work, there is an allegation that the claimant was late back from lunch when she was trying to contact her union on the phone, and a further allegation about the same type of behaviour on 14 October.

82. On 16 October 2015, the claimant was spoken to about wearing jeggings which were said not to comply with the dress code for Band 5s. Elizabeth Street accepted in cross examination that jeggings were not contrary to the letter of the dress code policy. We note that the dress code was different for technicians than for pharmacists. The claimant is alleged to have made two dispensing errors and to have been late for a one-to-one meeting with Elizabeth Street. Further errors were alleged on other logs and there was an allegation about using personal email during work time.

83. Elizabeth Street had a one-to-one meeting with the claimant on 23 October 2015. Elizabeth Street told the claimant to take leave until she could have an Occupational Health appointment. Elizabeth Street made a referral to Occupational Health that same day to assess whether the claimant was fit for work in view of the stress caused by the retraining programme. Elizabeth Street recorded that she had advised the claimant not to come to work the following week and to take authorised leave.

84. Also on 23 October, Elizabeth Street wrote to the claimant summarising the outcome from their meeting. She wrote:

> "We have had a challenging two weeks and this has culminated in further errors being made on your dispensary logs despite several attempts to complete these logs. I am concerned that you are feeling stressed and anxious about this 'back to work' training plan and that this stress and anxiety may then precipitate in you making further errors."

85. Elizabeth Street informed the claimant of the referral made to Occupational Health and that they had informed her it could take up to five days for the appointment to go through, so the claimant had been advised to take authorised

absence and remain off work until further notice. The letter does not refer to what, if any, margin for error there was in completing the dispensing logs.

86. On 23 October, Elizabeth Street also wrote to Susan Davies and the other panel members to update them and to request that they reconvene the panel. She wrote of the claimant making countless errors, being stressed and that a referral had been made to Occupational Health. Elizabeth Street wrote about the claimant having now failed three dispensing logs.

87. The claimant was absent from work on involuntary paid leave from 26 October 2015 until 14 February 2016. Since this was not suspension, there were no formal reviews in the way there would be under the policy of suspension.

88. The claimant attended for an Occupational Health assessment on 2 November 2015. Dr Williamson, Clinical Lead for Occupational Health, wrote a report on the same day. He wrote that the claimant was fit for work and fit to complete the planned programme of supervision. He wrote that she was undoubtedly finding the supervision and surveillance associated with retraining stressful, however this should be mitigated by ensuring that lines of communication regarding expectations of [the claimant] are clear and presented in a documented format. He wrote:

> "It is also advised that management are mindful that [the claimant] is currently vulnerable to the impact of criticism and where possible feedback should be reserved until after key milestones in her retraining programme."

89. He wrote that the claimant was hypersensitive to criticism due in main to recent events and felt that feedback received the day prior to her completing one of the logs impacted on her performance.

90. Elizabeth Street wrote to Mr Haque on 2 November, referring to this Occupational Health report. She asked for advice on next steps for management. She wrote:

> "My concern is that she is failing on fairly simple labelling and dispensing of medication task. When she has made an error we do need to feed this back to her in a timely manner as the medication needs to be corrected to ensure safe [sic] for our patients. If she is failing at these simple tasks and is sensitive to criticism of her abilities/errors this is a capability issue and hence reconvening of the panel please to consider if she can remain in this current Band 5 position?"

91. We accept Elizabeth Street's evidence that she was not sure if the claimant was capable of doing the job and considered that the retraining process was not helping; she could see the process was causing the claimant stress.

92. Mr Haque forwarded this to Susan Davies and Sue Haslam. He wrote that he thought they needed to review the panel decision in the light of this.

93. The claimant was notified by a letter dated 16 November 2015 that they were reconvening the disciplinary panel hearing to consider her failure to demonstrate improvements and the potential impact of this on patient safety, following concerns having been raised about the number of errors she was making and the potential

impact of these on patient safety. The disciplinary hearing was to take place on 18 December 2015.

94. On 30 November, Karen Burton sent a number of feedback forms completed by her relating to the claimant for the period 19 October to 23 October to Mr Haque.

95. The claimant obtained a statement from Sally Stubbington, antibiotic pharmacist with the Trust, which was in positive terms, referring to the claimant's good antibiotic knowledge and that the claimant generally referred queries when she was unsure. Sally Stubbington expressed some concern about the claimant's organisational skills.

96. At the reconvened disciplinary hearing on 18 December 2015, Mr Haque was no longer on the panel but was presenting the management case. The panel remained chaired by Sue Davies. John Hunter, Medical Director, joined the panel in the place of Mr Haque. Sue Haslam continued to support them. The claimant was accompanied at this hearing by Julie Whitehead, a colleague. We accept Ms Whitehead's evidence that she went because the union representative could not go and that Elizabeth Street had suggested to the claimant that she ask Ms Whitehead to accompany the claimant.

97. Sue Davies accepted in cross examination that the panel had the same information before them as when presented with a different diagnosis of Asperger's at a later time, although at this time the diagnosis was different.

98. Mr Haque took the panel through events since the claimant's return to work. It appeared from this that the claimant started the first log which counted towards assessment after, at most, two days' practice. The claimant commented that she felt she had no run-in period of training in the new role as a normal student would have had. She also made the point that pharmacists did make errors and were not usually under this level of scrutiny. She said, when she was doing the final log, she felt under intolerable stress and felt she should have been given more support. The claimant said she had done a lot of research on the internet relating to cognitive behaviour therapy linked to time management and said she had felt she had made adjustments to her working style and was more focused on time management and communication on the wards. The claimant commented that she felt she had been set up to fail. She said that other pharmacists had been baffled about the level of scrutiny for mistakes. Ms Whitehead said that other pharmacists do make errors and every log has the odd error. The claimant said it felt like bullying and harassment.

99. Caroline Bell, pharmacy technician, gave evidence saying she had worked with the claimant on the wards on many occasions and had no reason to doubt her competence.

100. The panel adjourned for consideration and then informed the claimant that they were not going to make a final decision that day and had decided to adjourn and reconvene in the New Year. The claimant was to remain on authorised absence and was not formally suspended.

101. In a letter dated 18 December 2015, the claimant was informed that the panel had grave concerns about patient safety and the claimant's lack of insight into the issues and concerns of the original panel, together with her apparent inability to

follow processes and SOPs. Ms Davies wrote that the panel would reconvene on 5 January 2016 and the claimant would remain on authorised paid leave of absence.

102. The disciplinary hearing reconvened on 5 January 2016. The claimant was accompanied by her trade union representative, James Durrand. Mr Durrand expressed a belief that the claimant was pushed to get the outcome they wanted. He had understood that the retraining programme was meant to be for 6-12 months but less than two working weeks into the retraining and she was out and finished. He commented that it should have been obvious that the claimant was under significant stress. He felt this contributed to her making errors. He asked, "why didn't somebody take a positive approach and say 'let's make her win and not make her lose?'". He said he understood preregistration trainees were allowed two or three weeks' observations before they were assessed and questioned why the claimant had been put into an assessment situation straightaway. He referred to the claimant as being classed as having a disability and asked what adjustments had been made. He said the claimant had been picked up on small things which happened in pharmacies every day. He said the claimant had in her records a log which contained 45 items as part of her appraisal from the previous year which had no mistakes on it. At the time, she was not put under this duress. He questioned what the results would be over a sample of 100 pharmacists if pharmacists had not done dispensing for some time and were subjected to rigorous assessment of, say, 200 items.

103. After an adjournment, the panel reconvened with their decision. Sue Davies said they would like to review the training programme to give the claimant another chance, and they wanted to see a robust training programme with very clear milestones and with built in sign off dates for achievement. She said there would be a mentor from outside the pharmacy. The training programme would be based on preregistration training but with clear milestones and sign off dates. There would be a reasonable period for observation and, as the claimant became more used to the processes, she would be allowed to work more independently with minimal supervision.

104. Sue Davies noted that the panel still had concerns about the claimant's practice. There were concerns about the potential impact on patients and that was one of the reasons she had not been put straight back onto the ward area. This was an opportunity for learning and reflection. She said the panel reserved the right to reconvene if necessary with further disciplinary hearings. The claimant was to be referred back to Occupational Health. The programme was to be worked up with feedback requested from NCAS. If the claimant failed to reach the competencies, they reserved the right to call another hearing at any point.

105. Sue Davies said the claimant would have a lot of opportunities to apply herself and work with mentors to get back into the workplace and demonstrate she was competent, to give assurance to the team that she was safe to work at Band 7. The panel did not say that there should be a behaviour agreement. It was agreed that, while the retraining programme was drafted for discussion, the claimant would not be in work.

106. On 6 January 2016, Elizabeth Street wrote to Mr Haque. She wrote that she would like them to draw up a contract whereby they specified that the claimant was to adhere to the uniform policy/timekeeping/use of personal email etc as well as when she is shadowing not to take any "pharmacist only" action with regard to

patient care. The failure of her to follow these rules or reach specified milestones would result in immediate suspension with the panel then recalled and potential dismissal. Elizabeth Street wrote that, if the claimant failed to adhere to the agreed "rules," then she was not happy for her to remain there for any further retraining.

107. On 7 January 2016, Elizabeth Street wrote to Sue Davies and John Hunter registering concern at the decision made by the panel on 5 January. She wrote that the claimant had been given a final written warning the previous year following four years of multiple errors, complaints and issues in conduct and performance. She did not note that there had been two years when there were no incidents serious enough to merit disciplinary or capability action. Elizabeth Street wrote:

> "Please can you clarify at what point we accept that a member of staff is unsafe to carry out their clinical duties and not capable of performing in a role that we pay them to do? I feel her continued employment working in pharmacy and involvement with medication and patients is a risk to patient safety (as she will not be under one-to-one supervision 7.5 hours per day as I do not have this staffing resource available to do this). I feel that failure to raise my concerns would deem me professionally negligent. The only reason that I am sending this email is because I have a genuine concern for patient safety."

108. Sue Davies replied on 8 January 2016. Her reply included a comment that the panel felt that the claimant had not had sufficient time to demonstrate improvements on her return as she was in work for less than two weeks.

109. John Hunter gave evidence that, on the basis of Mr Haque's evidence at the panel hearing, he shared Elizabeth Street's concerns that patient safety would inevitably be compromised if the claimant returned to unsupervised employment. He said in cross examination that he had to defer to the experts, Elizabeth Street and Mr Haque, both of whom he described as "highly credible" members of staff.

110. The panel's decision was confirmed to the claimant by a letter dated 13 January 2016. Susan Davies wrote that the panel continued to have grave concerns about the claimant's practice and the impact on patient safety and her lack of insight into the issues and concerns, together with her apparent inability to follow procedures and SOPs. She said that the panel's decision was that the reviewed and updated training programme would be more detailed in relation to the expected learning competencies and outcomes; there was to be a departmental mentor identified to oversee her training plan; and they would endeavour to identify a Trust based mentor to support her. She confirmed that they had tried to find a placement for the claimant at another hospital to enable her to undertake the programme in a less stressful environment but this had not been possible to facilitate.

111. Elizabeth Street wrote to NCAS on 14 January 2016 asking for advice. It appears from what she wrote that she was anticipating that the claimant would have a period of practice and three goes at an error free log of 200 items on her return to work. Elizabeth Street asked whether it would be possible to draft a Code of Conduct agreement to include matters such as timekeeping, not using personal email during work time and adhering to uniform policy. NCAS replied that a behavioural agreement would be a good idea. They said this would be separate from the "back

on track" plan and failure to adhere to it and, therefore, Trust policy would lead to disciplinary action.

112. Elizabeth Street then sent an email on 15 January 2016 to Sue Davies and John Hunter saying she had spoken to NCAS who had suggested a behavioural impact agreement, giving the impression that the initiative had come from NCAS, although it appears from the correspondence that it had come from Elizabeth Street. John Hunter replied with some suggestions as to what should be included in the behaviour plan.

113. Following a further referral to Occupational Health, Dr Spurlock produced another report on 22 January 2016. She wrote that the claimant had a long-term mental impairment causing the claimant substantial difficulty with normal daily activities. She expressed the view that the claimant would be considered disabled for the purposes of the Equality Act. She expressed the opinion that the claimant was medically fit to return to work and take part in the competency assessment process. Shew wrote that reasonable adjustments should be made to minimise stress as far as it was reasonably possible. She proposed a phased return and one-to-one mentoring and keeping the claimant fully informed regarding the process and expectations.

114. Elizabeth Street wrote to Mr Haque in relation to the Occupational Health report on 30 January 2016. This included the following:

> "This ongoing difficulty that [the claimant] has with normal daily activities including problems with interpersonal skills…good interpersonal skills are an essential requirement in her Band 7 job (and also in the lower grade pre reg pharmacist role). We will endeavour to support [the claimant] with your/the panel's recommendations and those of the NCAS 'back on track' team, but I am still not clear how [the claimant] can be fit to carry out her role with the documented issues OH have raised."

She also wrote:

> "Our return to work plan will not 'cure' her diagnosed issues. According to OH, it is at the discretion of the management to consider what is reasonable for us to accommodate, but the bottom line is we need a Band 7 pharmacist who is able to function safely and effectively on the ward. What is the planned outcome of this retraining if we know she has these underlying issues, we make a new job for her and lose the Band 7 post?"

115. NCAS assisted in drawing up a Practitioner Action Plan. We note that Elizabeth Street was named as case manager, mentor and named supervisor in this Plan, with the external mentor to be confirmed. The panel agreed the training plan and behavioural impact and action agreement. It was noted in the behavioural agreement that any beach of that agreement could result in disciplinary action. Elizabeth Street was identified as the agreement monitor, to decide whether there had been a breach of the agreement. Occupational Health advice was not sought on the behavioural plan.

116. The claimant returned to work on 15 February 2016. She had a one-to-one with Elizabeth Street on 22 February 2016. The matters raised by Elizabeth Street,

on the basis of feedback from Karen Burton, included that the claimant had taken a reading book to reception with her, which she explained she did to read during quiet times. She was told this was not appropriate. It was also raised with the claimant that she was standing too close/leaning over members of staff when she was shadowing them. The claimant said she had reflected and recorded in her diary that she would sit on a chair next to them instead.

117. The claimant was on planned annual leave out of the country from 2 March to 11 April 2016.

118. On 4 April 2016, Elizabeth Street chased Susan Davies by email for details of a mentor from outside the department.

119. On 18 April 2016, the GPHC obtained a medical report from Dr Hussain. However, the respondent was not made aware of this report until the reconvened panel in August 2016 and did not see a copy of the report at that time. It appears the claimant did not see the report until August 2016. This report gave the view that the claimant had OCD and autistic spectrum disorder (ASD). However, as noted, neither party was aware of this diagnosis at the time it was made.

120. On 4 May 2016, Mr Haque forwarded to Sue Davies and Sue Haslam an email from Karen Burton about the claimant becoming angry and upset after Karen Burton spoke to her about errors on a log.

121. On 17 May 2016, Sue Davies informed Mr Haque that she had identified someone as a mentor for the claimant.

122. On the same day, the claimant is alleged to have made a major error on the log. The evidence is somewhat confusing as to whether the claimant should have had three attempts at a log, from when she returned to work in February 2016, to demonstrate her competency and, if so, how many attempts she had had by 17 May 2016. However, Mr Haque did not appear to be relying on the number of attempts before error when deciding to refer the matter back to the panel. His evidence was that he felt it right to go back to the panel because of the major error. We note that the claimant was not suspended because of the alleged error. The claimant continued to do practice logs in the period May to June 2016.

123. On 31 May 2016, Mr Haque sent an email to Sue Davies notifying her of the alleged major error in the log and behavioural issues. He wrote:

> "We have also tried to support her in referring her to Occupational Health – but she has point blank refused to attend."

124. The claimant's evidence was that the log was causing her stress and going to Occupational Health who might advise that she took time off would not help alleviate the stress. The claimant later asked for an Occupational Health referral in relation to the possibility of Asperger's Syndrome. Mr Haque also wrote:

> "As the professional lead for pharmacy I have very serious concerns about her ability to practice independently. Her training programme clearly stated no major errors on her log. The panel agreed if she failed her training plan then to reconvene the panel.

> "Can I please ask how the panel wish to move forward and how we manage [the claimant] in the interim as there is clearly a patient safety issue."

125. We were unable to find in the training programme the reference about makng no major errors on the log. We think perhaps Mr Haque intended to refer to the outcome letter rather than the training programme.

126. An email conversation between Mr Haque and Sue Davies ensued, with Sue Davies querying what would happen if someone else had committed the error. At this point Mr Haque refers to the claimant having previously failed three logs and that there were a maximum three attempts at a log.

127. On 9 June 2016, Elizabeth Street made a further Occupational Health referral for the claimant. The reason she gave for the referral was that the claimant had been researching behavioural issues and completed an Asperger's assessment which revealed she had some of the traits. The GP had not offered to help. The reference was to see if Occupational Health could support her in an assessment/review to diagnose the condition.

128. In a report dated 20 June 2016, Occupational Health reported that the claimant had contacted her GP to arrange an assessment about a possible diagnosis of Asperger's. Occupational Health said they could not offer any further assistance with this. Sue Davies did not think she had seen this before the panel met again.

129. On 22 June 2016, Mr Haque provided the panel with a report about errors, with his comments on risks to patients. He wrote that:

> "Alongside this there have been numerous examples of [the claimant] not sticking to her behaviour agreement"

130. On 24 June 2016, the claimant wrote by email to Sue Davies asking how things were going with her review. She wrote that she had continued with dispensing log sheets and had now had 900 plus items available for perusal with three minor errors. She said the process had been very helpful for seeing how many errors are potential and the need for enhanced communication in order to catch them. Sue Davies was relying on the claimant's line managers, Elizabeth Street and Mr Haque, to report on how the claimant was progressing.

131. On 1 July 2016 Elizabeth Street wrote to John Hunter and Sue Davies. She wrote that the claimant had potentially failed her dispensing logs and "my understanding was that if she failed a milestone, in spite of weeks of coaching and mentoring, then she was to be dismissed as unfit to practice". She wrote that the claimant was stressed and also causing stress and anxiety to her colleagues in the dispensary. They could not move the claimant to the next milestone as she had failed the first log but could not suspend her as it was not gross misconduct. She asked that they resolve the matter as a matter of urgency.

132. Sue Davies replied the same day, writing that the next step would be a short meeting with the panel. She wrote:

> "If you are feeling that [the claimant] is now not able to be supported in the short-term in the workplace or she is so stressed as to be unable to continue working I do not see an option other than having her off on unpaid special leave."

133. It appears the reference to "unpaid" rather than "paid" special leave was an error, as the claimant was subsequently put on "paid" special leave.

134. Elizabeth Street replied to Sue Davies clarifying:

> "This delay in process is causing her personal angst and the rest of the team frustration at working with her whilst unclear of what her current roles and responsibilities are."

135. Elizabeth Street informed the claimant on 4 July 2016, and confirmed in writing on the same day, that she was placed on special paid leave with immediate effect. She wrote that this was to continue until such time as the panel could be reconvened. We note there was no Occupational Health report which indicated that the claimant needed to be absent from work. Sue Davies believed that the decision was made in the claimant's best interests.

136. We find that the panel was to be reconvened because the panel understood, from reports from Mr Haque, that he claimant was not progressing as expected. Sue Davies and John Hunter also agreed that alleged breaches of the behavioural agreement were part of the reason why the case came back before the panel.

137. The claimant remained absent on special leave from 4 July 2016 until the effective date of termination on 26 October 2017. Since the claimant was not suspended there were no reviews as would be required under the procedure for suspension.

138. On 8 July 2016, the claimant emailed Elizabeth Street asking whether there was any word on her coming back. Sue Davies did not recall whether she had seen this email. Elizabeth Street replied that the claimant would be contacted when they had a date.

139. Elizabeth Street left the Trust on 15 July 2016 to undertake a secondment elsewhere.

140. The claimant was informed on 4 August 2016 that the panel was to be reconvened. The reasons for this were stated as follows:

> "I have been informed that you have failed to meet the requirements of the action plan in that you have failed to successfully complete the dispensing log with no major errors. I have also been informed that there have been a number of behavioural issues, which whilst they have been addressed with you, are in breach of the 'behavioural impact and action agreement'. The purpose of the disciplinary hearing will be in respect of the following:
>
> - Your failure to demonstrate improvements and the potential impact of this on patient safety.

- Your failure to adhere to the behavioural impact and action agreement."

141. Sue Davies informed the claimant that the allegations were serious and if substantiated they could be deemed as gross misconduct and lead to the claimant's dismissal.

142. The disciplinary panel reconvened at a hearing on 12 August 2016. Sue Davies chaired the panel with John Hunter and Sue Haslam. The claimant was accompanied by her trade union representative, Mr Durrand. Matters considered by the panel included the following matters:

- The major dispensing error.
- The claimant reading her book at work.
- Looking up a city on the internet during work time.
- Reading a congress printout in work time.
- Taking all items needing dispensing leaving colleagues with no work to do.
- Acting independently as a pharmacist contrary to a retraining agreement.

143. At an early stage in the hearing, Mr Durrand informed the panel that the claimant's lawyer in the PDA had, that week, received a medical report from the GPHC, although the report was dated 19 April 2016. It said the report detailed a diagnosis of obsessive compulsive disorder and this was being chased up by a lawyer with the GPHC because the original diagnosis was obsessive personality disorder. However, he said the key factor in the report was that there was now a key new issue in that the report had diagnosed the claimant as having autistic spectrum disorder. He said that this obviously shed a significant new light on the claimant's situation and the panel's situation.

144. The panel then continued to go through the allegations in detail, hearing from Mr Haque on the management case and from the claimant.

145. Following an adjournment, the panel said they had decided to defer a decision that day because they believed they needed some further information about the claimant's health. They said they were going to organise for the claimant to be seen again by the Occupational Health team but, on this occasion, by an independent consultant in Occupational Health medicine. They would be seeking information from him around the claimant's recent diagnosis around autism, and also his advice and guidance on any impact that this diagnosis would have on the claimant's future ability to do her job as a Band 7 pharmacist. They would also be asking him for advice around any potential adjustments and support that could be provided to enable the claimant to return to her work successfully. The claimant was advised that she would remain off work on full pay.

146. Sue Haslam then made a request for a referral to a consultant in Occupational Health on 26 August.

147. The panel's decision was confirmed in an outcome letter dated 30 August 2016.

148. On 7 September 2016, the claimant's GP referred the claimant for specialist assessment.

149. The respondent's Occupational Health adviser, Mr Gidlow, wrote on 16 September 2016 that he would have another appointment with the claimant when she had had her psychological assessment, when he had more background information, including the outcome of any comments about the claimant's competency. He recorded that the claimant expressed strong feelings that she had not been sympathetically treated in her employment, including that she said she should have had three chances to do her competency log but was only given one chance. Mr Gidlow asked for any further information the respondent could give him about these concerns. Dr Gidlow agreed with Dr Hussain that the claimant remained fit for work with appropriate supervision.

150. There were a number of postponements of the planned reconvened disciplinary hearing, during which time the claimant remained on paid special leave.

151. On 3 November 2016, Dr Bahia, a highly specialist Clinical Psychologist, issued a report. This was as a result of the referral from the claimant's GP and was produced without any questions being posed by the respondent or any information being provided by the respondent to Dr Bahia. Dr Bahia concluded that the claimant has autism spectrum disorder, commonly known as Asperger's Syndrome, due to difficulties in social communication, social interaction, flexibility of thought and unusual sensory experience. Under the heading of "social communication," Dr Bahia noted that the claimant struggled to make conversation and was aware of not understanding facial expression. Under the heading of "social interaction," she referred to various examples of day-to-day difficulties in social interaction described by the claimant. Under the heading of "flexibility of thinking," Dr Bahia noted that it is very common for individuals on the autism spectrum to have a strong preference for structure and predictability as well as a need for certain routines, and many have a thinking style which can seem slightly fixed. However, she noted that many adults with Asperger's Syndrome also have real strengths in being able to think logically and methodically. She commented that the claimant has a black and white thinking style and reported that she could become very hyper-focused, which resulted in difficulties seeing the bigger picture or missing deadlines. Dr Bahia advised that this was a disability within the context of the Equality Act 2010.

152. Dr Bahia recommended that the claimant attend a follow-up appointment with her colleague, David Reiser. This would give the claimant the opportunity to discuss her transition to the diagnosis and any questions she might have. Dr Bahia commented that the claimant may also like to use the appointment to think about any reasonable adjustments that can be made for her at work. Dr Bahia gave sources of further information. In relation to reasonable adjustments in employment, Dr Bahia

said that adjustments should be negotiated with employers and tailored to the needs of the individual.

153. The panel reconvened on 11 November 2016. They had received a copy of Dr Bahia's report that morning. Mr Durrand reported that their lawyer had spoken to the Autism Society in the West Midlands and the simple advice they gave had changed the lawyer's behaviour in terms of the way that she interacted with the claimant, with dramatic results. He commented that the claimant was, according to Occupational Health, fit to return to work with adjustments, but the challenge at the time was that they did not seem to be absolutely crystal clear on what those adjustments are, and that is why they thought the session with Dr Reiser might be useful.

154. Towards the end of the meeting, Sue Davies summarised that what she thought they had agreed was that, now they had the report with the claimant's diagnosis, they would share this with their Occupational Health team. The claimant had an appointment on 5 December to see Dr Reiser and Mr Durrand was to liaise with the GPHC in terms of the diagnosis.

155. Following the hearing, the panel decided that it was more appropriate to manage the claimant's case under the attendance management policy rather than the disciplinary policy, as they considered this to be more of a health issue than a disciplinary issue. To make this decision, it seems implicit that the panel must have thought there was at least a potential link between the matters giving rise to the disciplinary proceedings and the claimant's disability.

156. The evidence of John Hunter supports this where he states that, in considering whether they should continue under the disciplinary frame work or whether they should follow the attendance management policy after being informed of the diagnosis of Asperger's, they were aware that Asperger's could be considered a disability under the Equality Act 2010 and could potentially impact on the claimant's ability to perform her duties.

157. The respondent's Attendance Management Policy provides that, where there is a clear indication that an on-going medical condition is impacting on the employee's ability to perform their normal duties a three step procedure should be followed: 1) occupational health referral to obtain advice to ascertain the best course of action; 2) reasonable adjustments/redeployment; 3) incapacity review. In relation to the third step, the policy states:

> "If the employee's substantive post is unsuitable due to their on-going medical condition and where it has not been possible to make reasonable adjustments to their current post or been possible to re-deploy them into another post it will be necessary to proceed to an incapacity review hearing (see section 17) to determine the employee's future employment with the organisation. Where termination of the contract of employment on the grounds of incapacity is considered, all reasonable efforts should be made to obtain appropriate medical evidence via Occupational Health, including Occupational Health advice as to whether the employee is likely to be a candidate for ill health retirement."

158. Section 17 of the policy provides that, "Where all possible stages of this policy have been exhausted and there is no likelihood of the employee maintaining regular attendance at work it may be necessary to consider termination of the employee's contract on the grounds of incapacity/incapability due to ill health."

159. Section 18 of the policy provides that, before any decision to terminate an employee on medical incapacity grounds, the following options must be considered: rehabilitation; phased return; a return with or without adjustments; redeployment with or without adjustments.

160. On 17 November 2016, the claimant was sent a letter informing her that a hearing was to be reconvened no earlier than the week commencing 12 December 2016, after the occupational health report and the claimant's appointment with Dr Reiser. The letter informed the claimant that the panel had decided, in the light of Dr Bahia's report, that it would be more appropriate for the matter to be managed in accordance with the Trust Attendance Management Policy. The claimant was informed that she would remain off work on authorised paid leave until she had had her follow up appointment with Dr Reiser.

161. On 17 November 2016, Sue Davies wrote to Dr Gidlow, enclosing Dr Bahia's report and asking questions, in the light of the claimant's diagnosis of Asperger's Syndrome, including whether she was fit to undertake the role of a Clinical Pharmacist and whether there were any reasonable adjustments that could be made to facilitate her return to work and enable her to undertake the role of a Clinical Pharmacist to the required standard.

162. By a letter dated 22 December 2016, the claimant was invited to a case hearing on 9 January 2017 under the managing attendance policy. She was warned that a possible outcome of the hearing would be that her employment with the Trust could be terminated on the grounds of incapability due to ill health. The respondent had not received the occupational health report at this time and had not considered whether the claimant could return to work with reasonable adjustments or redeployment, although the respondent's Attendance Management Policy required these steps before an incapacity review.

163. On 30 December 2016, the claimant raised a grievance which ultimately delayed the proposed attendance management meeting.

164. On 4 January 2017, Dr Reiser produced his report. Again, we note that this was as a result of the GP's reference and no questions were put to Dr Reiser by the respondent or information provided by the respondent to Dr Reiser. Dr Reiser recorded that they had decided that the following adjustments would significantly improve the situation at work:-

> "(1) [The claimant] has a direct style of communication and as part of her Asperger Syndrome she is unlikely to communicate anything she feels is redundant. She is very precise with her language and what she communicates will be honest and relevant. It is important that people who work with her understand this and do not take offence if she is not using pleasantries and polite forms in her communication. [The claimant] does not engage in any office gossip, politics or small talk

and this should not be understood as being anti-social or offensive in any way. It is just that she sees her time at work for work.

(2) [The claimant] needs specific instructions that are unambiguous and also complete. [The claimant] may not make the same assumptions about the steps involved in the task that other people do and this needs to be supported.

(3) Where a policy is ambiguous or that it cannot be applied in a specific situation then [the claimant] should always ask an opinion from somebody of the same banding or experience or somebody senior. She will need a confident interpretation that also makes sense to her.

(4) In her work many people are part time and on different shift patterns and she has to take over other people's work. This is done through the use of handover sheet. The sheets by themselves are often not adequate to provide the full picture for a safe handover. [The claimant] would like verbal clarification of any issues to discuss any issues that are involved although she does acknowledge that sometimes it is impractical because the person she is taking over from is not always available".

165. On 26 January 2017, Dr Gidlow issued an occupational health report. He recorded that the claimant had been diagnosed with Asperger Syndrome, which is part of the Autistic Spectrum. He referred to the letter from Dr Reiser and commented "in that letter Dr Reiser gives a very clear indication of the types of adjustments that should be made to enable [the claimant] to succeed in her work". Dr Gidlow understood there had been concerns about time keeping and inappropriate dress. He wrote "the time keeping can be explained by the fact that people with Asperger's tend to lose track of time and focus on the task in hand so she therefore could be late for meetings, ward rounds etc. She now uses an alarm system to make sure that she does not miss appropriate appointments".

166. Dr Gidlow wrote that he believed the claimant was fit to return to work but there were a number of adjustments that needed to be made. He wrote "in addition people such as her work colleagues and Ward Sisters need to be aware of her disability so that her behaviour is not seen as rude or inappropriate but is understood in the light of her condition. The report from Dr Reiser specifically states that she will remember to use pleasantries and greetings to people on the ward. He also suggests that she has a mentor that understands her and guides her in situations where she is unsure or needs support". He expressed the view that the claimant was fit to undertake the role of Clinical Pharmacist but when she returned to work she would need further training and supervision for some time. He wrote that he thought reasonable adjustments were very adequately listed in the report from David Reiser and, if these could be put into effect, they should enable the claimant to work efficiently. He confirmed that Asperger's Syndrome would be covered by the disability provisions of the Equality Act. His conclusion was as follows:

"I believe that [the claimant] is now relieved at the diagnosis and there is a way forward based on communication and appropriate adjustment. I believe it would also be sensible for the National Autistic Society to come into work to

> do a work place assessment. Hopefully with all of these procedures in place [the claimant] will be able to return to work and provide reliable and effective service".

167. The respondent never asked the National Autistic Society to do a work place assessment. The respondent's witness statements did not explain why this was not done before the decision to dismiss was taken. In oral evidence, Mr Hunter confirmed that the reason was not cost; his evidence was that they thought the complexities would be better understood by a pharmacist.

168. On 1 February 2017, the claimant submitted a particularised grievance which included that she considered she had been discriminated against and that the respondent had failed to make reasonable adjustments and directly discriminated against her.

169. The grievance hearing took place on 8 February and 6 March 2017 and an outcome was provided on 15 March 2017. The grievance panel felt unable to deliver an outcome on the allegation about failure to make reasonable adjustments until the original panel had been concluded. The grievance panel did not uphold the grievance that the claimant felt discriminated against in the way she had been treated during the process that the Trust had followed by the original disciplinary panel.

170. The claimant appealed unsuccessfully the grievance outcome. The grievance was dismissed at stage two on 14 June 2017.

171. John Hunter confirmed that the disciplinary/managing attendance panel had been told that the grievance panel felt unable to determine the claimant's grievances until the attendance management panel had concluded their decision.

172. The claimant was notified by letter of 4 July 2017 that the incapacity review hearing would be reconvened on 7 July 2017 and the claimant was again warned that this could result in the termination of her employment.

173. On 6 July 2017, John Hunter wrote to Sue Haslam, expressing major reservations about the hearing scheduled for the next day. He wrote "I think the rush to convene this hearing is going to present us with major issues and ultimately prejudice the case". He noted that he had not received any documents to date which would leave little time the following day to fully comprehend what was actually going on.

174. Mr Haque produced a report for the review meeting considering Dr Reiser's recommendations. This did not mention the suggestion made by the Trust's occupational health advisor that the Trust should seek advice from the National Autistic Society. Mr Haque wrote that this had been a long process, which commenced in 2014, and stated there were concerns that there had been a number of errors involving the claimant which potentially impacted on patient safety. He wrote "there have been concerns throughout that there may have been an underlying condition that was affecting [the claimant's] performance. It was important for the Trust to understand if that was the case and what the impact of this was on [the

claimant's] ability to undertake her role as a Clinical Pharmacist and on patient safety". He noted the diagnosis which had now been given of Asperger's Syndrome.

175. The rescheduled Incapacity Review Meeting took place on 7 July 2017. Sue Davies was not involved, due to a period of leave, and the meeting was chaired by John Hunter.

176. Mr Durrand provided the panel with the latest GPHC medical report from Dr Garvey. This report, dated 8 February 2017, gave the prognosis "at present it cannot be guaranteed that [the claimant] will manage to return successfully to work, though her disorder will have been a lifelong one and she has apparently worked as a Pharmacist successfully up until very recently so it would be reasonable to hope, given an established diagnosis, a successful return can be achieved". The doctor recommended that the claimant should be made the subject of a Conditions of Practice Order but not suspended. The doctor expressed the view that the claimant posed a risk to members of the public if allowed to practice without restrictions because of the clinical errors she had making at work. The doctor agreed with the diagnosis of Asperger's Syndrome. The doctor expressed the view that the errors that the claimant made at work would have the potential to cause risk to patients but did not think there was a risk to the public. The doctor wrote that he thought the claimant had a good insight into her difficulties.

177. There are no minutes of the Incapacity Review Meeting, other than some handwritten notes.

178. The panel decided that they needed more information before taking a decision. They adjourned so that Karen Adams, Deputy Chief Pharmacist, who had taken over from Elizabeth Street in July 2016, could meet with the claimant to discuss possible adjustments and whether adjustments could reasonably be made which would address concerns and allow the claimant to practice safely and effectively as a Band 7 Pharmacist.

179. John Hunter wrote to the claimant on 18 July 2017, informing the claimant of their decided course of action. He informed the claimant she was to meet Karen Adams on 24 July and the panel would reconvene on 4 August to consider whether reasonable adjustments could be made to facilitate the claimant's reinstatement to the Band 7 Clinical Pharmacist role and whether those adjustments would address the patient safety concerns, to consider redeployment to another post within the Trust or whether the claimant's employment with the Trust should be terminated.

180. Karen Adams is a very experienced Pharmacist. However, she had no previous experience of managing someone with Asperger's Syndrome and had received no training in this. Although it appears that the Trust has people who are trained to support people with Autism, Karen Adams was not put in touch with anyone who could give support about this.

181. The information Karen Adams was given before meeting the claimant was Dr Reiser's letter and a letter from Sue Haslam. The letter from Sue Haslam set out an extract from the letter to the claimant which had informed the claimant that Karen Adams was to discuss with the claimant the following:-

(1) "Your interpretation of what you need;

(2) What practically would this look like?

(3) What difference would this make to your practice and would this address the patient safety concerns?. In addition Karen will be asked to consider:-

(4) Can this be accommodated?

(5) With appropriate and reasonable adjustments in place would you be able to safely fulfil the full role of a Band 7 Clinical Pharmacist? The panel will ask Karen to prepare a report which will be shared with both you and the panel before the panel reconvenes".

182. Karen Adams was not told what specific patient safety concerns the Trust had. She was aware that there were patient safety concerns and difficulties with communication and she assumed that these were linked. She was not given Dr Bahia's report. She did not know that Dr Reiser had not been asked questions by the Trust.

183. The claimant met with Karen Adams on 24 July 2017. The claimant was accompanied by Mr Durrand. Mr Durrand commented that Dr Reiser's recommendations were on a very high level. He commented that they could discuss and dig a bit deeper to look at the practicalities about what Dr Reiser was talking about "but at the end of day we still feel it needs, under the Trust's obligations to the Equality Act etc reasonable adjustments to ensure given best shot possible, it needs someone from National Autistic Society (NAS), and they are available, and can go into workplaces, look at reasonable adjustments, talk to [the claimant] and you Karen and ensure everything ok".

184. Karen Adams went through Dr Reiser's recommendations with the claimant and put various scenarios to the claimant to try to understand what adjustments would need to be made to allow the claimant to work safely. Karen Adams was looking for some way to provide an assurance that the claimant could practice safely in the future. She struggled to see how the Reiser recommendations could be practically applied to day to day tasks. This is consistent with Mr Durrand's view that the Reiser recommendations were of a high level. Karen Adams did not understand that contacting the National Autistic Society was a step for her to take; her understanding was that this would be a step for the panel to take.

185. Karen Adams produced a paper for the panel. In relation to the first recommendation about communication, Karen Adams concluded that they could train or advise the Pharmacy Teams and Line Managers on the best methods of communication with the claimant and could do this with Ward Sisters but the greatest challenge would be medical staff and patients. Karen Adams could not see how they could practically brief all staff with whom they would need to communicate and could not do this with patients. She concluded "with these adjustments in place I do not believe the patient safety concerns would be addressed. Whilst they may in part

with some staff groups prevent offence or conflict they are predominantly focused on corrective action rather than prevention. I do not believe [the claimant] could work independently without supervision on a ward, on a one to one basis with patients or in an on-call situation, all of which are key roles for a Band 7 Clinical Pharmacist".

186. In relation to the second recommendation, about needing specific instructions that are unambiguous and complete, Karen Adams concluded that there are hundreds of steps involved in the task of covering a ward and it would be impossible to give the claimant specific instructions of these without constant supervision from another qualified Pharmacist. Karen Adams did not believe the adjustment suggested by Mr Reiser was possible to implement for the role.

187. In relation to the third recommendation, about the claimant asking someone else about ambiguous policies, Karen Adams wrote that there were many policies but they could not cover every eventuality and that, whilst the claimant could access the support available to all pharmacists, her interpretation of this adjustment relied on her own judgment when to access this unless she was constantly supervised. Karen Adams concluded "for this reason whilst we can of course accommodate including [the claimant] in our existing support network, I do not feel this would address the patient safety concerns and allow her to work safely and independently as a pharmacist. However, it would be impossible to accommodate a requirement for [the claimant] to consult a colleague every time the interpretation or application of a policy is required (which would go some way to addressing the safety concerns) as the frequency of this would be unmanageable".

188. In relation to the fourth recommendation, about hand over sheets, Karen Adams concluded that they can reinforce a clear and accurate handover of high risk information to the pharmacist team and, as such, partly accommodate the recommendation. She noted that the claimant's interpretation of what adjustment was involved was different to Mr Reiser's recommendation. Karen Adams concluded that the adjustment alone could not address patient safety concerns or allow the claimant to safely fulfil the role of a Band 7 Clinical Pharmacist.

189. Karen Adams wrote that the claimant provided few suggestions to facilitate resumption in her role and, where these were provided, they were not solutions that would assure Karen Adams that the claimant would be able to practice independently as a pharmacist and, in Karen Adams' opinion, constant supervision would be the only way that the patient safety concerns could truly be addressed.

190. On 28 July 2017, the claimant's trade union lawyer wrote to Sue Haslam asking why a meeting had been arranged on 4 August, so soon after the last. He expressed the view that the meeting to discuss the claimant's return to work should be delayed until expert evidence had been obtained to enable meaningful discussions to take place. If there was a reply to this letter, it does not appear to be in the bundle.

191. Sue Haslam sent Karen Adams' report to John Hunter asking whether he was happy that the report met the brief given to Karen and provided sufficient information to enable them to make an informed decision when the panel reconvened on 4

August. John Hunter replied that he was satisfied with the report provided and thought it was sufficiently robust to enable a decision to be made on Friday.

192. The Incapacity Hearing reconvened on 4 August 2017. Mr Durrand again argued that the Trust should obtain expert advice from the National Autistic Society. It was put to Mr Hunter in cross examination that, given that the Trust's own occupational health adviser advised them to go the National Autistic Society, apart from the fact that they were urged to do so by the claimant's trade union, it was wrong not to do so. Mr Hunter replied that it was the decision of the panel to ask an expert pharmacist to see if the Reiser adjustments could be made to allow the claimant to practice safely; that the claimant and her representative did not object and agreed that this was a sound course of action. It was then put to him that, before the decision to dismiss was made, the claimant and her representatives had suggested a reference to the National Autistic Society. Mr Hunter replied that it was suggested, but not forcefully. He was referred to the relevant parts of the minutes of the meeting of 4 August and it was suggested to Mr Hunter that it was not fair to say that it was not suggested forcefully. Mr Hunter replied that he did not recall it being suggested forcefully. It appears to us, from the notes of the meeting, that the point was put forcefully on a number of occasions by Mr Durrand that the respondent should seek advice from the National Autistic Society. Mr Durrand referred to this having been the recommendation of Dr Gidlow in January, and questioned whether Karen Adams was skilled enough in understanding Asperger's in the workplace to have pursued the relevant practical avenues which needed to be explored. He re-iterated the points.

193. Mr Hunter was the only member of the panel who gave evidence to the Tribunal about their reasons for their conclusions. Mr Hunter gave evidence that the panel had to be assured that the claimant could act in a safe and competent manner. He said they concluded, based on the Reiser report, that there was a risk of the claimant omitting vital information. He said they concluded that the claimant could not work independently with patients based on Karen Adams not being able to envisage a reasonable adjustment except being buddied up with another pharmacist.

194. After an adjournment, Mr Hunter gave the panel's decision on the same day. He agreed in cross examination that he used the same script as then appeared in the outcome letter. The meeting notes record him as saying

> "We have asked [the claimant] for input into how reasonable adjustments can be achieved to enable a return to band 7 clinical pharmacist role however [the claimant] failed to convince the panel that had sufficient insight into how this can be achieved and how it would aid a return to safe practice.
>
> In summary panel not assured that [the claimant] can safely return to substantive position and all clinical responsibilities this role entails as a clinical pharmacist.
>
> We therefore have no alternative other than to terminate [the claimant's] contract on the grounds of incapability due to health. [The claimant] entitled to 12 weeks' notice during this period [the claimant] to be placed on redeployment register where we will work with [the claimant] to identify redeployment in suitable areas.

> We will also inform the GPHC of this decision".

195. The claimant was advised of her right to appeal. Mr Hunter did not identify the ways in which the panel had concluded that the claimant could not do the role. He did not say what they had concluded she was incapable of doing because of her condition. Although one of the expressed purposes of the meeting had been to include consideration of re-deployment, there is no discussion recorded in the meeting notes about possible redeployment before the decision to dismiss is given.

196. The outcome was confirmed by letter dated 9 August 2017. The conclusions were recorded as follows:-

> "The panel in reaching their decision considered the impact of the diagnosis of Asperger's Syndrome on your ability to undertake your role of Clinical Pharmacist (Band 7) and any reasonable adjustments in the context of clinical concerns and the potential impact on patient safety.
>
> The panel reviewed all the adjustments presented and considered the views of those responsible for delivering the services.
>
> With regard to any adjustments we had asked for your input into how reasonable adjustments could be achieved to enable you to return to a Band 7 Clinical Pharmacist role, however you failed to present to the panel information relating to specific details of what these adjustments would look like in the operational setting.
>
> The panel are not assured that adjustments can be made to enable you to safely return to your substantive position and all the clinical responsibilities this entails. Without this detail it is the panel's view that you are unable to return to your post as a Band 7, Clinical Pharmacist, it is therefore with regret that there is no alternative but to terminate your contract of employment on the grounds of incapability due to ill health".

197. The claimant was advised that she was dismissed with twelve weeks' notice on pay and that, during that period, she would be placed on the Trust's redeployment register and they would work with her to identify any potentially suitable roles. She was notified that, if no suitable alternative post was found, her employment would cease on 26 October 2017. She was advised of the right of appeal.

198. The outcome letter did not say that the panel had concluded that the claimant was not capable of doing the job because of Asperger' Syndrome but Mr Hunter accepted in cross examination that that was a pre-condition of the decision to dismiss the claimant.

199. The claimant appealed against her dismissal on 21 August 2017.

200. On 4 September 2017, the claimant forwarded to Mr Hunter and others an email from the National Autistic Society saying that, if an assessment had been done via Access to Work, the assessment would have been free to the hospital. The National Autistic Society email set out what the National Autistic Society would do for

a fee of £1,420 plus VAT. There would be a visit to gather information taking around four to five hours, including: a meeting with the employee on the Autism spectrum; a meeting with the line manager and senior manager; meetings with colleagues who worked closely with the employee; meetings with any other relevant staff; and a tour of the working environment, where possible. Following the visit, they would write a comprehensive assessment report recommending reasonable adjustments and adaptations specific to the claimant's role, including practical strategies for both manager and employee.

201. The claimant had her first meeting with an HR Manager about redeployment on 27 September 2017. We have been given no explanation for the delay.

202. The claimant submitted revised grounds of appeal on 10 October 2017. These included an allegation that the claimant's dismissal was an act of direct disability discrimination. The grounds suggested that the panel's reasons for dismissing the claimant were inadequately reasoned: the outcome letters did not specify in what respect the claimant was incapable of carrying out her role as a Band 7 Clinical Pharmacist and did not specify why that was due to ill health or a long term condition. The grounds noted that the claimant had consistently been certified to be fit to return to work. The grounds asserted that the decision to dismiss was not proportionate to the presumed aim of patient safety. Points made included that the panel had failed to address the failure of the Trust over many years to make reasonable adjustments and the unfairness of the monitoring process but yet presumably took account of allegations made against the claimant within the disciplinary process as if those allegations had been proved. The claimant was told within the grievance process that the matters would be addressed in the incapacity process but they had not been and her grievance and appeal against the grievance had not therefore been dealt with properly or at all. The grounds allege that the claimant was dismissed at a time when the Trust was in breach of their duty to make reasonable adjustments. The grounds of appeal assert that the decision to dismiss was not within the range of responses open to the Trust and was unfair in all the circumstances. Points made in support of this ground included that, from the time of her diagnosis with ASD condition (OPD) in April 2015, there had been little or no activity by the Trust to take steps to assist the claimant with suitable reasonable adjustments. The final ground of appeal was that the decision to dismiss was procedurally unfair.

203. On 12 October 2017, the claimant met with Sue Fleet concerning a vacancy for a Customer Care Officer role, Sue Fleet understood that the claimant was on the redeployment programme but did not have any information as to why this was the case. The claimant's application for the Customer Care Role was rejected on 23 October 2017. The letter informed the claimant that Mrs Fleet considered the claimant unable to demonstrate some of the essential criteria for the role, including working knowledge of Word and Excel which were essential for report writing. Sue Fleet also wrote that she was concerned that the claimant felt she would not be confident in challenging senior members of staff when managing complaints and also that, during their discussion, the claimant queried about staying late on a regular basis if she had not completed her work, which raised Mrs Fleet's concern about her time management.

204. In an email on 17 October from Sue Fleet to Sue Haslam, Sue Fleet wrote that she did not think the claimant was suitable "and the one thing we really wanted was someone who was very able to provide reports from Excel as highlighted in the PS".

205. On Friday 12 October 2017, John Hunter mailed Sue Haslam, writing that he was concerned that he had nothing for Monday, the date of the appeal hearing. He sent a further email on 14 October asking what was happening, saying he thought he would have a report by Friday lunchtime at least.

206. On Monday 16 October 2017, the day of the appeal hearing, Sue Haslam sent John Hunter at 8.52 an email attaching a report. This report was the management case which John Hunter was to present at the appeal. John Hunter said in evidence that he could not recall whether they had worked on this report together. We find, on a balance of probabilities, that it was prepared by Sue Haslam without any input from John Hunter. We consider that the correspondence would have been written in a different way between John Hunter and Sue Haslam had Sue Haslam merely been amending a report on which they had both worked together. Mr Hunter would not have written that he had nothing for Monday, had he been working on a draft report by then.

207. The appeal was heard by Rachael Charlton on 16 October 2017. The management case was presented by John Hunter, who read from a paper at the hearing. The claimant did not have the paper in advance. Mr Durrand's evidence to this Tribunal was that he did not have the paper at all. He was not challenged on this evidence. However, when Ms Charlton gave evidence later, she asserted that Mr Hunter had handed out the paper at the hearing. Even if, contrary to Mr Durrand's recollection, which we accept to be an honest one, a copy of the paper was given to him at the hearing, this was manifestly not given in time for there to be any consideration of it prior to the hearing. The management case set out in more detail the reasons for the panel's decision than had been contained in the outcome letter. The management case did not explain why the panel decided not to approach the National Autistic Society for advice.

208. Ms Charlton did not have a copy of the grievance or the grievance outcome or grievance appeal outcome.

209. After an adjournment of 55 minutes, Rachael Charlton delivered an oral outcome to the appeal. In relation to the allegation of discrimination, she dealt only with the allegation of failure to make reasonable adjustments and did not decide whether previous failures to make reasonable adjustments contributed to the claimant's errors. Ms Charlton relied on the evidence of John Hunter and Mr Haque in reaching her conclusion that the claimant was unable to work in a safe way with reasonable adjustments. She said in cross examination "I am not a Clinician". She said she was taking evidence from the Chief Pharmacist and the Medical Director. She continued "they were not confident the claimant would be able to carry out duties in a safe way protecting patients from harm".

210. We find that Ms Charlton made no independent assessment of whether reasonable adjustments could have been made, relying instead on the opinion of Mr Hunter and Mr Haque.

211. The outcome of the appeal was confirmed in a letter dated 20 October 2017. Ms Charlton explained the appeal panel's decision as follows:-

> "The appeal panel did not find the decision to dismiss you was an act of disability discrimination. In reaching this conclusion the panel took into account the information previously provided, relevant sections of the Equality Act, the detailed analysis of Mr Reiser's letter by the Deputy Chief Pharmacist and the consideration given to the reasonable adjustments that were requested by yourself. The appeal panel agreed with the original hearing that the adjustments proposed by yourself, your representative and your medical advisor provided insufficient assurance that you would be able to carry out your role without exposing the patients or the Trust to risk.
>
> "The appeal panel found that the dismissal outcome was within the range of reasonable responses open to the panel as outlined within Section 17 of the Attendance Management Policy. In addition, the appeal panel was satisfied that alternatives had been explored including downgrading and redeployment. The panel agrees that you should remain on the Redeployment Register for the period of time specified within the policy and the Trust should support you in attempting to gain none [sic] pharmacy roles within that time.
>
> "The appeal panel did not find that the decision to dismiss was procedurally flawed however I was disappointed with timeliness of the provision of notes or recordings and will be reviewing the process surrounding this with the relevant teams.
>
> "In summary, the appeal panel upheld the decision of the original incapacity review hearing to terminate your contract of employment on the grounds of incapacity on the grounds of ill health. The decision of the appeal panel is the final internal stage of the process and as such the outcome is final".

212. The claimant's employment ended on 26 October 2017.

213. For the purposes of this hearing, the parties jointly instructed Dr Suleman, a Consultant Psychiatrist and Honorary Senior Clinical Lecturer, to prepare a psychiatric report on the claimant, answering specific questions put by the parties. The report included the following points: that it appeared the claimant has theory of mind deficits i.e. she has limited ability to attribute mental states (including beliefs, intense, desires, emotions and knowledge) to others. Dr Suleman wrote that people with Asperger's syndrome like the same routine and struggle with any change in their routine and personal environment. This can apply to clothing or food, for example, they struggle to change for winter to summer clothing and can have a tendency to wear similar clothes irrespective of social environment. People with Asperger syndrome require more time to process information and, therefore, require more time to respond. Dr Suleman wrote that it appeared the claimant has these difficulties.

214. Dr Suleman noted that the claimant has difficulty with time management due to slow processing speed and her perfectionism and she can attribute her attributes (diligence) to others due to the theory of mind deficits. Dr Suleman wrote that slow processing speed, theory of mind deficits and the need for perfection are more likely to occur in people with Asperger's syndrome. She expressed the view that it was more likely than not that the claimant displayed these behaviours due to her Asperger's syndrome.

215. In answer to a question as to whether a person with Asperger syndrome who suffers stress and anxiety is more likely than a neuro typical person to make errors, Dr Suleman wrote as follows:

> "It is difficult to conclude that a person with Asperger syndrome when exposed to stress and anxiety is more likely to make any specific errors compared to a person without Asperger syndrome. However it is known that difficulties due to Asperger syndrome are exaggerated when exposed to stress and anxiety for example ritualistic behaviour and intense interests increase during stress and anxiety."

216. Dr Suleman wrote that it was possible that the claimant's failure to realise that jeggings were not a permitted article, without being explicitly told so, could be due to Asperger's syndrome. This was because people with Asperger's syndrome are more likely to struggle with change and can have a tendency to wear the same clothes irrespective of the social situation.

217. Dr Suleman wrote: "[the claimant] informed me that in her view accessing personal emails to contact her union was work-related and that is why she felt it was not inappropriate. It is my view that such confusion can occur in a person with Asperger's syndrome."

218. Suleman expressed the view that poor timekeeping was not a typical trait of person with Asperger's syndrome as some people with Asperger syndrome could be more particular with timekeeping. However, she wrote that it could occur as a consequence of ritualistic behaviour, slow processing speed and unfamiliar surroundings.

219. Dr Suleman expressed the view that the retraining programme should have taken into account the claimant's social and communication difficulties and could have allowed for reasonable adjustments.

220. We heard some evidence about drug errors made by other pharmacists where disciplinary action was not taken. In relation to one serious incident, Karen Adams decided to take no disciplinary action because there was no previous history of similar errors by the person in question and that person came to Karen Adams, admitting to the error and expressing remorse and reflection.

221. We accepted the evidence given by Julie Whitehead about errors being common and that she and Elizabeth Street both made errors when completing dispensing logs.

Submissions

222. Both representatives produced comprehensive written closing submissions and gave brief supplementary oral submissions.

223. In summary, the respondent's closing submissions were as follows. The respondent denied that it had constructive knowledge of the claimant's disability by the end of April 2015; the respondent's case was that it had actual knowledge on 11 November 2016 when the report of Dr Bahia was presented by the claimant. The respondent submitted that that it was only with Dr Bahia's report that there was clarity; prior to that date there was a complex medical picture. If the tribunal accepted the respondent's submissions as to no knowledge until November 2016, this had the consequences that the claims of discrimination arising from disability, other than the complaint in relation to dismissal, and all the claims for alleged failures to make reasonable adjustment must fail. Notwithstanding this argument, the respondent made submissions as to the merits of those discrimination complaints.

224. In relation to the complaint of discrimination arising from disability in relation to demotion and requiring the claimant to undergo a period of re-training, the respondent submitted that the unfavourable treatment arose as a consequence, not only of the issues that had arisen in early 2015 but also previous warnings. The respondent submitted that the claimant wholly failed to link these earlier matters to Asperger's. The respondent submitted that, if stress caused errors, this was not as a result of her disability. In relation to the allegations of discrimination arising from disability, aside from the allegation relating to dismissal, the respondent submitted that the claimant failed to make the causal link between the disability and the failures in respect of the dispensing logs which led to the disciplinary in 2016.

225. The respondent accepted that, by the time of the dismissal, the respondent knew about the claimant's disability. It accepted that the claimant's dismissal arose in consequence of her disability. The respondent relied on justification in that the dismissal was a proportionate means of achieving a legitimate aim, namely protecting patient safety.

226. Mr Williams commented that the direct discrimination claim was unclear and commented that there had been no reference to a comparator.

227. In relation to the complaints of failure to make reasonable adjustments, the respondent submitted that the PCPs did not place the claimant at a substantial disadvantage compared with non-disabled persons.

228. In relation to the complaint of unfair dismissal, the respondent submitted that the claimant was dismissed by reason of capability. The respondent submitted that the decision to dismiss was in the band of reasonableness. The respondent submitted that the respondent formed an honest belief, after reasonable enquiry, that the claimant was no longer capable to act as a Band 7 Independent Pharmacist. The respondent submitted that what the National Autistic Society would have done would have simply repeated what had been performed between Mr Reiser and Karen Adams.

229. In summary, the claimant's closing submissions were as follows.

230. The facts recorded by Dr Mbaya constituted the effect on the claimant of the long standing mental impairment from which she suffered. The claimant suggested that this was sufficient to fix the respondent with knowledge, even though an incorrect diagnosis had been made. There were also reasons to think that the respondent did not think, or ought not to have thought, that the diagnosis of Dr Mbaya was correct.

231. In terms of substantial disadvantage, the claimant's case was that the respondent knew, or ought to have known, that she was suffering the substantial disadvantage relied upon because it was one which would have been suffered by both a person disabled by reason of OPD and one disabled by reason of ASD.

232. In relation to the claim of direct discrimination about the claimant's dismissal, the claimant's case was that the respondent jumped to the conclusion that she was incapable of fulfilling the role of Band 7 Clinical Pharmacist without sufficient evidence for the conclusion. Ms George referred to cases about direct discrimination occurring when assumptions are made that a claimant as an individual has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics. The claimant argued that the true reason for her dismissal was the presumption that a person with Asperger's Syndrome was incapable of carrying out that role. Ms George argued that this amounts to the reason of disability itself and was, therefore, less favourable treatment on grounds of disability.

233. In the alternative, the claimant argued that dismissal was discrimination arising from disability. The claimant argued that the reason for dismissal included patient safety concerns and a link with Asperger's Syndrome was made out because the respondent presumed that those arose in connection with her condition. The burden, therefore, passed to the respondent to prove that the decision to dismiss was a proportionate means of achieving a legitimate aim.

234. The claimant submitted that the question whether the respondent unreasonably rejected the proposed adjustments in Mr Reiser's report was relevant to the question of whether the respondent had made out its defence of justification. It was accepted that, in principle, patient safety is a legitimate business aim. The claimant submitted that the decision to dismiss was not reasonably necessary. In particular, the claimant submitted that the respondent had failed to carry out the analysis of the ways in which the claimant was shown not to be capable of performing the role of a Band 7 Clinical Pharmacist and whether that was as a consequence of the impairment of Asperger's Syndrome. The claimant submitted that, without carrying out this analysis, the decision to dismiss was not proportionate or fair.

235. In relation to unfair dismissal, the claimant relied on the same reasons relied on in the discrimination arising from disability claim as supporting the argument that the decision to dismiss was not reasonably necessary. In addition, the claimant argued that the appeal was plainly inadequate.

236. The claimant submitted in relation to the other complaints of discrimination arising from disability that all the matters were causally linked to the claimant being a person with Asperger's Syndrome. The claimant argued it was not proportionate to impose the retraining programme because, by it, the claimant was set up to fail and she was picked up on for relatively minor matters. The claimant submitted that placing her on leave was not a proportionate means of achieving a legitimate aim.

237. In relation to the decision to revert to the disciplinary panel after the alleged error of 17 May 2016, the claimant relied on the same matters as the argument that it would have been a reasonable adjustment to the action plan for the claimant to have three attempts at the dispensing log starting from her return to work in February 2016.

238. In relation to the complaints of failure to make reasonable adjustments, the claimant submitted that the first PCP put her at a substantial disadvantage compared to neuro typical people in that she had greater difficulty with working under stress, pressure or time constraints and did not have an instinctive understanding of what is and what is not socially acceptable clothing and behaviour. The adjustments which should have been made were those recommended by occupational health on 2 October 2015. The respondent failed to comply with these recommendations. The same substantial disadvantage was relied upon in relation to the second and third PCP's, the claimant argued that it would have been a reasonable step not to impose the Behaviour Impact and Action agreement.

The Law

239. Section 13(1) EQA provides:

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

Section 4 lists protected characteristics which include disability.

240. Section 23(1) EQA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

241. Section 15 EQA provides:

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

242. The provisions relating to the duty to make adjustments are included in section 20 EQA and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising:

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

243. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

244. For an adjustment to be reasonable, it is sufficient that there is a prospect of it alleviating the disadvantage: *Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*.

245. Section 136 EQA provides:

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

Conclusions

Knowledge

246. We consider first the issue of knowledge as this is critical to many of the complaints brought by the claimant. We have considered the following matters, in particular, relevant to the issue of knowledge:

246.1. Elizabeth Street considered, from an early stage, that the claimant was "different" in some way. Her referral to NCAS at the end of September 2014 wrote of the claimant lacking an understanding of reading others' verbal and non-verbal communication. In her referral to occupational health in November 2014, she expressed concerns about the ability of the claimant to pick up on non-verbal language and, in her email to Mr Haque about the referral to occupational health, commented on whether the occupational health advisor would be a Psychiatrist.

246.2. Despite these concerns, the occupational health report of 1 December 2014 gave the view that there was no evidence of any significant medical issue. Elizabeth Street was not clearly convinced by this, writing in her email to HR on 5 December 2014 about her concerns for the logic reasoning and emotional intelligence of the claimant and that the claimant's thought process appeared random and nonsensical and expressing concern that the claimant's behaviour was inappropriate.

246.3. The NCAS letter of 28 January 2015 suggested consideration of Asperger's in an assessment.

246.4. There were concerns in the occupational health reference of 29 January 2015 about communication difficulties.

246.5. Dr Mbaya's report of 2 April 2015 gave a diagnosis of Obsessive Personality Disorder. The behaviour he relied on for this diagnosis was the claimant being over involved, not letting things go, not trusting colleagues and being over focused on things, leading to her being late.

246.6. The claimant's sister's letter of 8 April 2015 set out behaviour which had led her to suspect her sister had Asperger's Syndrome.

246.7. Dr Spurlock's occupational health report of 27 April 2015, based on Dr Mbaya's diagnosis, gave the view that the Equality Act applied.

246.8. The claimant agreed at this time with Dr Mbaya's diagnosis of OPD.

246.9. We note that Mr Haque said, in his management report, that there had been concerns from late 2014 and concerns throughout about underlying condition affecting performance.

246.10. In an email of 4 September 2015, Elizabeth Street commented on the claimant being different, which was reflected in her evidence to this Tribunal.

246.11. On 4 September 2015, Dr Davison's letter referred to the claimant having an abrupt manner.

247. We conclude that, up to this point, there was behaviour which was enough to put the respondent on enquiry as to whether the claimant had a disability. The respondent did make enquiries which resulted in a reasoned expert's report; Dr Mbaya giving a diagnosis of Obsessive Personality Disorder. We conclude that, up to this point, the respondent did not know and could not reasonably be expected to know, not only that the claimant had Asperger's Syndrome, but that there were primary facts which would eventually lead to that diagnosis.

248. However, we consider that, from receipt of an occupational health dated 2 October 2015, the situation changed. This report stated that the claimant had personality traits which caused the claimant difficulty with functioning in social environments and expressed the view, based on this, that the claimant was disabled because of difficulties with interpersonal functions. We conclude that, from this point, the respondent knew that the claimant was disabled by reason of a mental impairment which related to the claimant's interpersonal skills. It matters not that the diagnosis of Asperger's came at a much later stage; the respondent was in possession of the primary facts from receipt of the 2 October 2015 report, based on which they had actual or constructive knowledge that the claimant had a mental impairment relating to interpersonal skills. Subsequent developments confirmed this information.

249. On 22 January 2016, Dr Spurlock's occupational health report noted obsessive symptoms and interpersonal difficulties.

250. On 30 January 2016, Elizabeth Street was raising concerns that the training plan would not "cure" the diagnosed issue. This seems to be an obvious red flag which should have caused the respondent to look at what reasonable adjustments could be made to alleviate any disadvantage caused by disability.

251. By 9 June 2016, the claimant had told Elizabeth Street that she had done an Asperger's assessment and this was the reason for an occupational health referral then being made.

252. On 12 August 2016, the panel were told that a GPHC report had diagnosed the claimant with Autism although the panel did not actually see the report.

253. On 11 November 2016, a diagnosis of Asperger's was given in the Dr Bahia report.

Discrimination arising from Disability

Demoting the claimant to band 5 on 18 September 2015 and requiring her to undergo a period of retraining

254. Our conclusion in relation to the knowledge of the respondent has the consequence that this complaint must fail because the respondent did not have the requisite knowledge at the relevant time.

255. However, had we concluded that the respondent did have the requisite knowledge, we would have found that the complaint was not well-founded because, even assuming that a causal link could be made between the unfavourable treatment and the claimant's disability, we would have been satisfied that the concept of retraining the claimant and, during that period of retraining, paying her as a Band 5 as an alternative to dismissal was a proportionate means of achieving a legitimate aim, the legitimate aim being patient safety.

256. Our conclusion in relation to knowledge means that the respondent did have the requisite knowledge in respect of the other complaints of discrimination arising from disability.

Requiring the claimant to take involuntary paid authorised leave between 26 October 2015 and February 2016

257. The claimant was put on leave because, on the evidence of Elizabeth Street, the claimant was stressed. We conclude that the claimant was required to take involuntary paid authorised leave in this period because she was suffering from stress. We conclude that some of the things that the claimant was stressed about were that she had been picked up on behaviours which were linked to her disability of Asperger's Syndrome: the dress code, the use of personal email and being late because she was making calls to her trade union. The evidence of Dr Suleman supports that these behaviours were linked to her disability. She made two of the drugs errors after being spoken to about the breach of the dress code. We conclude that, in these circumstances, stress was "something arising" in consequence of her disability.

258. We conclude that being placed on involuntary paid authorised leave was unfavourable treatment. The claimant did not want to be off work; she had not asked to be off work and had not received medical advice that she should be off work. Her evidence in relation to why, when she recommenced the retraining period, she did not want to go to occupational health was that they might have advised staying off work and she did not consider that would assist her stress level, since it was the retraining programme which was causing her stress and she needed to complete the programme to remove that cause of stress. Whilst off work, she did not have the opportunity to exercise her clinical skills, and this could make it more difficult for her to achieve the requisite standards of work when she returned, although she made good use of time off work in study.

259. The only legitimate aim put forward is that of patient safety. We conclude that this is a legitimate aim. However, we conclude that requiring the claimant to take involuntary paid authorised leave was not a proportionate means of achieving that aim. We consider the claimant would have been suspended if the problems which arose during retraining had serious implications for patient safety. The evidence of Elizabeth Street is that the claimant was put on leave because the claimant was stressed, not that she was put on involuntary paid leave to protect patient safety. It is possible that an argument could be made (although this is not how it is put for the respondent) that the claimant was likely to make more errors because of stress and that could impact on patient safety. However, given that the errors were not sufficiently serious to warrant suspension of the claimant, we conclude that putting her on involuntary paid authorised was not a proportionate means of achieving the legitimate aim of patient safety. We conclude, therefore, that this complaint is well-founded.

Requiring the claimant to take involuntary paid authorised leave from 4 July 2016 to 26 October 2017

260. For the same reasons as given in relation to the previous complaint, we conclude that this complaint is well-founded. The respondent had the requisite knowledge. The claimant was required to take involuntary paid authorised leave because she was considered to be suffering from stress, and that was, at least in part, because of behavioural matters. Behavioural matters discussed with the claimant prior to this period of involuntary leave included reading a book in reception and standing too close to people she was shadowing. These are behaviours which are clearly linked to the claimant's disability, displaying a lack of understanding of behaviour which would be instinctively understood by most neurotypical people.

261. The treatment was unfavourable because it was not wanted by the claimant and could lead to a diminution of her skills.

262. Elizabeth Street's email which caused Sue Davies to suggest putting the claimant on involuntary leave was that the claimant was stressed and also causing stress and anxiety to her colleagues in the dispensary. She wrote that they could not move the claimant to the next milestone as she had failed the first log but could not suspend her as it was not gross misconduct. It is clear from this that there was no conduct sufficiently serious as to lead to her suspension at this time. We, therefore, conclude that requiring her to take involuntary paid authorised leave in these circumstances was not a proportionate means of achieving the legitimate aim of safeguarding patient safety. We conclude that this complaint is well founded.

Deciding to revert to the disciplinary panel after the alleged error of 17 May 2016 on the dispensing log

263. We conclude that the respondent had the requisite knowledge at the relevant time.

264. The decision to revert to the disciplinary panel was, at least in part, because of behavioural matters. However, there was also a legitimate concern that the claimant had made a major error on the dispensing log and they needed to review what action to take. In these circumstances, we conclude that deciding to revert to the disciplinary panel to review the matter and consider what action to take was a proportionate means of achieving the legitimate aim of patient safety. We conclude that this complaint is not well-founded.

Dismissal

265. We deal with this complaint after addressing the complaints of failure to make reasonable adjustments.

<u>The complaints of failure to make reasonable adjustments</u>

266. The first provision, criterion or practice (PCP) is that, from 18 September 2015 onwards, the claimant was required, as a condition of avoiding dismissal, to undertake a period of fully supervised practice and/or a period of retraining and supervision aligned to a period of preregistration training for six months. We conclude that this PCP was applied to the claimant. We have concluded that the respondent had the requisite knowledge of disability from 2 October 2015. This was partway through the period when this PCP was being applied. We are not satisfied that the PCP put the claimant at a substantial disadvantage compared to neurotypical people. We are not satisfied, on the evidence, that the claimant, because of her disability, would have more difficulty with a training programme per se; the arguments put forward on her behalf relate more to the third PCP with which we deal below. We conclude that this complaint is not well-founded.

267. The second PCP is the application of the NCAS Practitioner Action Plan. For the same reasons as in relation to the first PCP, we conclude that this complaint is not well-founded since we are not satisfied that this PCP put the claimant under a substantial disadvantage compared to neurotypical people.

268. The third PCP is that the claimant was required from January 2016, as a condition of avoiding dismissal, to agree to be bound by the behaviour impact and action agreement. The respondent had the requisite knowledge of disability at this time. We conclude that the respondent also had the requisite knowledge that the requirements of the behavioural agreement were likely to put the claimant at a substantial disadvantage compared to people without her disability. The respondent was aware, from occupational health advice, and also from their own experiences, that the claimant had difficulties with interpersonal functions. We consider it more likely than not that it was apparent to them that she was likely to have more difficulty complying with behavioural requirements than someone without her disability. If they were not aware of this, they should have been.

269. We conclude that this PCP did put the claimant at a substantial disadvantage compared to neurotypical people. Because of her disability, the claimant had more difficulties with communication and understanding behavioural norms than neurotypical people, and was likely to have more difficulty in complying with the requirements relating to behaviour than neurotypical people would have. The claimant was, therefore, more likely to be criticised for her behaviour, causing stress, with an adverse effect on her ability to complete the retraining programme. She was also more likely to be called back before the disciplinary panel for infringements of the behaviour agreement than someone without the disability, with the possible outcome of dismissal.

270. We conclude that the duty to make reasonable adjustments did arise.

271. We conclude that a reasonable adjustment would have been not imposing the behaviour impact and action agreement at the same time as the retraining programme. This was not something the panel had asked for. The initiative for it came from Elizabeth Street, although it was presented to the panel as the idea of NCAS. We consider that it was draconian to apply this to someone with the claimant's disability, particularly one who had been out of the workplace for such a period. It would have been a reasonable adjustment not to apply it, at least for a period until the claimant got confident in her work and adjustments had been made which would have allowed her to function in her environment better. This adjustment would clearly alleviate the disadvantage caused by imposition of the behaviour agreement.

272. A further reasonable adjustment would have been not to criticise her for minor errors and for issues arising from her disability and, in particular, from a misunderstanding of behavioural norms, where her behaviour did not impact on the quality of her work and patient safety. There was at the very least a prospect that this adjustment would alleviate the disadvantage of the behaviour agreement being applied; the claimant would not suffer as much stress if she was not pulled up for minor infringements and would, therefore, have a better prospect of successfully completing the retraining programme.

273. The argument in the List of Issues that an adjustment should have been to give the claimant advance notice of the ways in which she was alleged to have failed to comply with the behaviour impact and action agreement so that she could prepare her defence against the allegations for the resumed hearing of 11 November 2016 was not pursued in submissions. We would not have been satisfied that that would have alleviated the disadvantage since that would have been after the event. The suggested reasonable adjustment of allowing the claimant to attempt 3 logs rather than 1 before requiring her to take paid authorised leave and returning her case to the disciplinary panel does not appear to relate to the third PCP and we do not consider it would have alleviated the disadvantage caused by the imposition of the behaviour agreement.

274. We conclude that the complaint of failure to make reasonable adjustments is well founded in relation to the third PCP.

Dismissal

Complaint of direct disability discrimination

275. It is accepted that the respondent knew that the claimant was disabled by reason of Asperger syndrome by the time of dismissal.

276. We must consider whether the claimant has proved facts from which we could conclude that the dismissal was because of the claimant's disability. This is distinct from dismissal being because of something arising in consequence of the claimant's disability, which would be the basis for the complaint of discrimination arising from disability, which we consider later.

277. The main thrust of the claimant's argument on direct discrimination appears to be that she argues she was dismissed because, as a person with Asperger's Syndrome, she was perceived to have impairments which she does not have or because Asperger's syndrome was perceived to impact on her ability to carry out her role when it does not. We do not consider the evidence supports this argument. It appears to us that the respondent dismissed because of impairments which the claimant does have because of her disability and which had at least some impact on her ability to do her job if reasonable adjustments were not made, in particular, difficulties with communication.

278. We agree that the reasoning of the panel as expressed in the review meeting and the outcome letter is lacking in not specifying the precise ways in which they considered the claimant was unable to carry out the role. However, they were relying on the report of Karen Adams which was clearly addressing matters such as communication. This suggests to us that the panel was concerned about behaviours related to the disability, rather than the disability itself. Whether the respondent was justified in taking the view that the perceived difficulties meant that the claimant should be dismissed is a matter which can be considered in the context of the discrimination arising from disability complaint and the complaint of unfair dismissal. The paucity of reasoning does not, we consider, provide sufficient grounds, on its own or with other matters, for inferring that the dismissal was because of disability.

279. We do not consider that the evidence about the treatment of other pharmacists who made mistakes is sufficient for the claimant to satisfy the initial burden of proof. There is insufficient evidence to enable us to conclude that pharmacists in the same or not materially different relevant circumstances were being treated more favourably. The evidence about specific instances has suggested that the relevant circumstances are not the same in material respects. We consider that relevant circumstances include not only the nature of the error but the person's reaction to that error and previous record.

280. Other arguments put in relation to this claim seem to us to go more to the question of justification for the discrimination arising from disability discrimination claim and the fairness of the dismissal than a complaint of direct discrimination.

281. Considering all relevant evidence, we conclude that the claimant has not proved facts from which we could conclude that there was direct discrimination. We conclude that this complaint is not well founded.

Discrimination arising from disability

282. The respondent had the requisite knowledge and it is accepted that the dismissal arose in consequence of the claimant's disability. The live issue is as to justification.

283. The respondent relies on patient safety as the legitimate aim. This is clearly a legitimate aim. Nothing in our decision should be taken as in any way undermining the very serious and proper concern that the respondent must have for patient safety. However, as witnesses recognised, errors do occur and it is not possible to eliminate all risk. The systems put in place by the respondent, with checks at various stages, for example, of the dispensing process, are designed to minimise the risk that errors, which do occur, lead to harm to patients.

284. In looking at justification, the tribunal must do a balancing exercise. In this case, are the very serious discriminatory effects of dismissal on the claimant outweighed by the very legitimate concern for patient safety?

285. We conclude that the respondent had not considered properly what reasonable adjustments might be made, having not obtained the assistance of the National Autistic Society, as suggested by their own Occupational Health adviser. We conclude it was not enough to rely on the combination of Karen Adams and the high-level recommendations of Mr Reiser. Karen Adams was very experienced in pharmacy but had no knowledge about dealing with people with Asperger's Syndrome and was not fully briefed. It appears she was expecting the panel to get the input of the National Autistic Society after she made her report. The recommendations of Mr Reiser were made without questions being put to him or any input from the respondent.

286. The respondent put the onus on the claimant to put forward reasonable adjustments, rather than recognising their own responsibility to consider what reasonable adjustments might be made.

287. It was clear also, from the report of Karen Adams, the explanation of the panel's decision and the evidence we heard, that the respondent took the view that any adjustments must be guaranteed to succeed rather than having a prospect of success. They were applying an incorrectly high standard as to whether the proposed adjustments would alleviate the disadvantage. If there were adjustments which could be made which had a prospect of enabling the claimant to work safely, they should have been made. Only if such adjustments failed should the respondent have gone on to consider dismissal.

288. The respondent acted contrary to their own attendance management policy which required that occupational health should be obtained and reasonable adjustments should be tried before getting to the stage of considering dismissal. The respondent wrote to the claimant requiring her to attend a review meeting and warning her that the outcome of this could be dismissal before they had even received occupational health advice and considered any reasonable adjustments. Mr Hunter expressed concern at the speed of the process. This "rush to justice" could indicate a closed mind-set that the process would inevitably result in the claimant's dismissal, rather than a genuine willingness to consider, now that the claimant had a

diagnosis of Asperger Syndrome, what adjustments might help to retain the claimant working safely as a pharmacist.

289. The respondent did not follow their own Occupational Health advice. Occupational Health advice was to the effect that the claimant could do the job with reasonable adjustments.

290. We conclude that the respondent did not do a proper assessment as to whether reasonable adjustments could be made. The necessary level of analysis was lacking as to what difficulties were caused by the claimant's disability and therefore what adjustments might be made to try to alleviate those difficulties.

291. We conclude, in these circumstances, that the decision to dismiss the claimant was not a proportionate means of achieving this legitimate aim. We conclude that the complaint of discrimination arising from disability in relation to the dismissal is well-founded.

Unfair Dismissal

292. We conclude that the respondent has shown a potentially fair reason for dismissal, being capability. We accept that Mr Hunter had a genuine belief that the claimant was incapable of doing the role because of her condition of Asperger's Syndrome. We, therefore, look at whether the decision to dismiss was reasonable in all the circumstances.

293. We have found that the respondent did not do an analysis of what the claimant could not do which was linked to her condition. The decision that she was incapable of doing her role because of her condition of Asperger's could not, we consider, therefore, be based on reasonable grounds.

294. In addition, the reasons we have given as to why dismissal was not a proportionate means of achieving a legitimate aim lead us to conclude that the dismissal was not reasonable in all the circumstances.

295. The respondent was also in breach of its own Attendance Management Policy by not considering redeployment before considering dismissal. Instead, the respondent decided to dismiss the claimant and only then put her on the redeployment register, with a further unexplained delay.

296. Mr Hunter relied on the views of Elizabeth Street and Mr Haque and Karen Adams that the claimant was not capable of performing the role. At the appeal stage, Ms Charlton relied on the views of Mr Hunter and Mr Haque. The appeal did not cure defects in the decision to dismiss.

297. We conclude, for these reasons, that the decision to dismiss was not within the band of reasonable responses and the complaint of unfair dismissal is well-founded.

_____

Employment Judge Slater

Date: 15 February 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 February 2019

FOR THE TRIBUNAL OFFICE