EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108777/2018

Hearing Held at Dundee on 8, 9, 10 and 11 April, 29 and 30 May and 9 July 2019

Employment Judge A Kemp
Tribunal Member L Brown
Tribunal Member A Shanahan

Mrs A Stewart — **Claimant**
Represented by:
Mr A Hardman
Advocate

Tayside Health Board — **Respondents**
Represented by:
Ms A Stobart
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous decision of the Tribunal is that the respondents did not fail to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010, and the Claim is dismissed.

2. The Tribunal further grants an order under Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rule 50, that the identity of the member of staff of the respondents against whom the claimant made allegations should not be disclosed to the public and should be referred to only by the initials “AB”.

REASONS

Introduction

1. This hearing had been fixed as a final hearing on the issue of liability only.

2. The initial claim had been raised after the claimant had been dismissed, and included a claim of unfair dismissal and unpaid holiday pay. After it commenced, the respondents allowed an appeal, and re-instated the claimant. The claims of unfair dismissal and for holiday pay were not insisted on in light of that. Within the Claim Form, the provision, criterion or practice (PCP, considered further below) on which the claimant relied had been set out at paragraph 55 and the steps that the respondents could have taken were set out in paragraph 56. The claimant's solicitors' details were provided on the Form.

3. A Preliminary Hearing (PH) was held on 3 December 2018 before EJ McFatridge. at which both parties were represented by their solicitors. At that PH, the PCP on which the claimant relied, for the two claims which were referred to being failure to make reasonable adjustments and indirect discrimination, was noted to be:

> "(a) The respondents' requirement that employees attend work regularly and effectively
>
> (b) The application of the respondents' bullying and harassment policy and in particular the requirement that the claimant make her complaint unassisted and contribute fully to its investigation."

It was noted in relation to the latter PCP that the claimant's position was that she was placed at a disadvantage because as a result of her disability she was unable to engage with the respondents' HR department to say what her grievance was or express concerns about the behaviour of colleagues.

4. The Note of that hearing also recorded the claimant's position on what steps as the reasonable adjustments required of the respondents under the Equality Act 2010 (an issue set out in more detail below) would have been, as follows:

> "(a) To investigate her complaints about a colleague without the necessity for the claimant raising a formal grievance or engaging with the respondents' HR department regarding this.
>
> (b) Transferring the colleague with whom the claimant was having difficulties.
>
> (c) Continuing to pay the claimant her full pay after her sick pay had run out."

5. That Note did not refer to any other claim made under the Equality Act 2010.

6. On 4 April 2019 the claimant's solicitors wrote to the Tribunal with an amended set of pleadings, referring to a potential dispute over paragraph 47. It also included a paragraph, numbered 42, which included a claim under section 15 of the Act. The Tribunal confirmed by email of 5 April 2019 that the issues raised in the letter would be discussed at the start of the hearing.

7. The hearing commenced on 8 April 2019. The parties were by then represented by Advocates, Mr Hardman for the claimant and Ms Stobart for the respondents. Ms Stobart stated that she objected to the claim under section 15. After a discussion on that issue, Mr Hardman stated that he was content to keep the claim to sections 19 – 22.

8. One of the members of the panel then sitting, Mrs Canning, indicated to the Judge that she knew Ms Stobart, as she had sat with her on the Scottish Social Services Council (SSSC) Tribunal, and that was conveyed to the parties. It was also disclosed that the second member, Mrs Shanahan, had earlier been a manager at the office of the Scottish Public Services Ombudsman, having left three years ago. She had managed investigations

concerning the respondents, but had not been a decision-maker in relation to them. There was an adjournment for parties to take instructions on whether or not there was an objection to the panel, and after that the claimant confirmed that she did object to Mrs Canning being on the panel. In light of that objection, and having regard to the circumstances, the member indicated to the Judge that she wished to recuse herself. The Judge gave an oral decision that having regard to the test in ***Porter v Magill [2002] AC 357,*** and taking account of ***Locabail UK Limited v Bayfield Properties Limited [2000] IRLR 96, Ansar v Lloyds TSB [2007] IRLR 211, Williams v Caterlink Limited EAT 0393/08, South Lanarkshire Council v Burns EATS 0040/12*** and ***University College of Swansea v Cornelius [1988] ICR] 735***, that Mrs Canning did require to be recused and confirmed that she had agreed to do so. Mrs Canning did not attend the Tribunal for that decision to be given or thereafter.

9. Neither party had any objection to Mrs Shanahan sitting on the panel. The claimant indicated that she wished there to be a panel of three members, and arrangements were then made to secure a new member, Mrs Brown, to join the panel. She was present for the second and subsequent days, and evidence was heard from and after that second day. She disclosed that she had been a former council member of the SSSC and had left in October 2016. Neither party had any objection to her sitting on the panel.

10. Mr Hardman also confirmed on the first day of the hearing, after the decision explained above had been given, that in relation to the terms of the paragraph that had been the subject of query in the letter referred to, being number 47, the issue raised there was within the PCP as outlined by EJ McFatridge. There was no application at that stage to amend the PCP, or the steps forming the reasonable adjustments on which the claimant sought to rely.

11. On 29 May 2019 when the case resumed after an adjournment, Mr Hardman indicated that he wished to argue a claim under section 15 of the Act. Ms Stobart objected to his doing so. There was a discussion as to the

sequence of events, from the pleadings, to the preliminary hearing, to the letter referred to, and to the discussion on the first day of the hearing before this Tribunal, and after consideration Mr Hardman confirmed that he would not proceed with such an argument.

12. At the stage of submissions being made, both in writing and orally, on 30 May 2019, Mr Hardman argued for the following PCPs as having been applied by the respondents:

(i) Its practice that employees such as the claimant work in their substantive post with colleagues within a team environment.
(ii) Its practice not to pursue informal allegations of bullying without full and formal details of the allegation provided by the complainer.

That was a change to the position from the PH and was opposed by Ms Stobart for the respondents.

13. The reasonable adjustments that the respondents were said to be under a duty to take were also argued for at the stage of submissions in a manner different to that at the PH. Three were proposed by Mr Hardman in his submission:

(i) Moving AB to a different location outwith the hospitals where the claimant worked
(ii) Moving AB to a different working location within those hospitals or
(iii) Adjusting shift patterns so that AB and the claimant did not work together.

That attempt to change the steps was also opposed by Ms Stobart the respondents. These matters are dealt with further below. Whilst there had been a claim initially made for indirect discrimination, that was not pursued.

14. The respondents made on 30 May 2019 an application for an order under Rule 50 to anonymise the member of staff referred to in the proposed steps set out above. It was not opposed by the claimant. The Tribunal considered that it was within the terms of that Rule, and the overriding objective, to do so. The member of staff is accordingly referred to in this Judgment as "AB".

15. Whilst the respondents admitted that the claimant had a disability under the Equality Act 2010, and that it was aware of that fact from 31 October 2017 it did not accept that that was or ought to have been the position from any earlier date.

Evidence

16. Evidence was given by the claimant, and by way of written report from Dr A Wylie, Consultant Psychiatrist dated 28 April 2019. For the respondents evidence was given by Mrs P Baxter, Mrs G Irving, Mrs A Younger, Mrs L Baillie, Mrs E Devine and Mrs A Taylor. AB did not given evidence.

17. The parties had prepared a bundle of documents, most but not all of which were spoken to in evidence. It was also added to during the course of the evidence, including to bring matters up to date for the time of the adjourned hearing which took place on 29 and 30 May 2019. On the former date the parties tendered a Statement of Agreed Facts, and Chronology. The Tribunal wishes to thank both the Advocates for doing so, and for the manner in which they conducted the proceedings.

18. Adjustments were made to take account of the fact that the claimant was a disabled person in relation to her giving evidence, which was given with a number of adjournments. After the initial phase of her evidence, Mr Hardman explained that after giving evidence for about an hour she was distressed, and lost concentration. She was becoming exhausted. The panel was asked to accept the grievance that was lodged as her evidence of what had happened. The respondents had no objection to that, and noted that not many

facts were in dispute. Mr Hardman produced a list of the documents he wished the panel to read, and the panel duly did so over the remainder of the second day. The claimant returned to give further evidence on the third day of the hearing, when she was examined by each Advocate with conspicuous care and consideration.

19. There was an objection to a question put to the claimant in examination in chief with regard to different ways of working, which the Tribunal allowed to be asked reserving for submission whether that line was permissible.

Issues

20. The issues in the case narrowed during the course of the hearing to the following:

20.1 When could the respondents reasonably be expected to know that the claimant was a disabled person, having regard to paragraph 20 to Schedule 8 to the Equality Act 2010?

20.2 Was a provision, criterion or practice (PCP) applied to the claimant by the respondents, and if so what was that?

20.3 Did the claimant suffer a substantial disadvantage from the application of such a PCP, with the term “substantial” meaning not minor or trivial having regard to section 212 of the Equality Act 2010?

20.4 If so, did the respondents fail to take any step that it was reasonable to have to take to avoid the disadvantage?

20.5 In addressing the issues at (ii) and (iv), a preliminary point arose as to whether or not the claimant ought to be permitted to amend the PCP and steps from those which had been noted at the preliminary hearing.

Facts

21. The Tribunal found the following facts to have been established:

21.1 The claimant is Mrs Alison Stewart. She was employed by the respondents from August 1988, initially in training and then as an enrolled nurse at Murray Royal Hospital.

21.2 The claimant is a disabled person for the purposes of the Equality Act 2010.

21.3 The respondents are responsible for the provision of health services in areas that include Tayside, Perth and Kinross. They operate as NHS Tayside, and are part of the National Health Service.

21.4 They operate a Policy for Preventing and Dealing with Bullying and Harassment. It stated under paragraph 2 "Statement of Policy" as follows:

> "NHS Tayside is committed to provide a working environment which is free from bullying and harassment. Every employee of NHS Tayside has a responsibility to treat employees with dignity and respect irrespective of their race, nationality, sex, sexual orientation, disability, age, religion or belief, marriage or civil partnership, pregnancy, maternity, gender recognition, political conviction, membership/non-membership of a trade union/professional organisation or work pattern. ….
>
> Bullying may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.
>
> Harassment is unwanted conduct related to a relevant protected characteristic (age, disability, gender reassignment, race, religion or belief, sex or sexual orientation) which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.
>
> Where possible, bullying and harassment issues will be dealt with informally. Even so, NHS Tayside takes the view that bullying and

harassment may amount to serious or gross misconduct, depending upon the specific circumstances of each case, and which will be subject to action under the disciplinary procedure."

There was reference to a Code of Positive Behaviour, found at Appendix 1 to the Policy.

21.5 Paragraph 7 under the heading "The Procedure" included the following –

"***b) Informal stage***

This involves the complainant approaching the alleged bully/harasser in order to tell them their behaviour is found to be offensive, why this is the case, and to ask them to stop. The complainant may ask a colleague or a staff-side representative to be present for moral support. If the complainant would find confronting the alleged bully/harasser too difficult, but still wishes to pursue the matter informally, they can ask their line manager/HR for support in speaking to the person concerned…..Should the informal approach prove unsuccessful, or the complainant has chosen to go straight to the formal stage of the procedure, the following arrangements will apply"

21.6 Those formal arrangements included the following:

"***c) Formal stage***

A formal complaint should be made to the complainant's line manager or supervisor, HR or with the line manager of the alleged bully/harasser. Any formal complaint should be made in writing detailing the basis upon which the alleged bullying or harassment has taken place. A pro forma is attached as Appendix which will assist the complainant in formatting and including the relevant information….."

21.7 The document then sets out details for an investigation of allegations, and a disciplinary hearing, at which there were four potential outcomes, which are:

- The complaint is not founded;
- There is insufficient evidence;
- The evidence and/or nature of the complaint justifies counselling/advice only; or
- The evidence justifies formal disciplinary hearing.

21.8 The pro forma referred to is found at Appendix 3. It included the name and designation of the alleged bully/harasser, their work location, and details of the incident(s). It also included the following:

> "You are required to detail all actions/incidents you wish to be taken into consideration giving the following information on which you are going to rely:
>
> - Date of incident/action
> - What the incident/action was
> - Clarification of the protected characteristic in the event of harassment being claimed
> - Names of any witnesses
> - Contact details of any witnesses"

21.9 Appendix 7 had an equality and diversity impact assessment which noted the involvement of a number of representatives from the staff side of the respondents.

21.10 The respondents also operate a Policy on Promoting Attendance at Work. Its purpose and scope was said to be to provide "structure and direction on promoting attendance at work and managing absence. It is in place to enable employees to fulfil their work potential, which

includes effectively managing any health condition at work." It refers to a proactive approach to managing absence.

21.11 Section 3 headed "Arrangements" stated "Everyone in the workforce at all levels feels the impact of ill health on attendance at work. It can significantly affect how an organisation performs. This in turn affects the level and quality of service we give our patients, clients and customers."

21.12 The need to consider reasonable adjustments for those who are disabled is referred to on page 15. It includes the comment "An adjustment would not be considered reasonable if it adversely affects either service delivery or a member of staff's colleagues."

21.13 The procedures are set out at Appendix B, and include informal attendance review discussions, formal attendance reviews, and consideration for dismissal. It also has provisions in relation to making reasonable adjustments at paragraphs 2.5 to 2.6.3.

21.14 They further have an Employee Conduct Policy. Within that is the Disciplinary Procedure. It includes the following:

> "Prior to any disciplinary process a full and thorough investigation must be carried out timeously in order to establish the facts of the case….
>
> The formal disciplinary sanctions available to the panel are '…
>
> - First written warning – 6 months
> - Final/First and Final Written Warning – 12 months
> - Alternatives to Dismissal: or
> - Dismissal……
>
> [In relation to alternatives to dismissal] "Any such alternatives should be based on the general principles of equity and consistently and may be subject to review, and will normally be in conjunction

with an appropriate level of warning. Alternatives to dismissal may include a permanent or temporary demotion (protection of earnings would not apply in such cases), relocation to another suitable post/location or a period of retraining…."

There is provision for appeals against decisions made.

21.15 The claimant latterly worked as a staff nurse (band 5) in the Psychiatry of Old Age Hospital Liaison Team within Perth Royal Infirmary. She did so from August 2012 on secondment, and then took up a permanent position in 2013.

21.16 She worked on a part-time basis for 16 hours per week, on a Monday and Tuesday from 7.30 am to 4 pm.

21.17 She worked in a team that was led by Mrs Gillian Irving, the Senior Charge Nurse. Reporting to Mrs Irving was Mrs Pamela Baxter the Charge Nurse who was the claimant's line manager. In addition to those three nursing staff the team included an occupational therapist and five support workers. The occupational therapist was the only person of that discipline in the team, and reported to a senior occupational therapist. Mrs Irving managed the occupational therapist on a day to day basis in the allocation of work and management of caseload.

21.18 The team provided care and support to patients in hospitals, but also to those in care homes. Mrs Irving sought to establish good and open relationships between team members. Each of the nursing staff had their own caseloads of patients. The team would meet once per week to review existing matters, but also on an ad hoc basis in smaller groups. Mrs Irving encouraged team members to discuss decisions made constructively, with the best interests of patients in mind, enabling team members to question whether a decision had been the

best one for that patient. Generally relationships within the team were good.

21.19 For a substantial period of time the claimant has had mental health difficulties, which are set out in detail in Dr Wylie's report. On occasion she had absences from work on account of those difficulties.

21.20 The claimant had a good relationship with her line manager Mrs Baxter. They had a supervision meeting approximately once every 6 – 8 weeks, which was documented in writing on a pro forma document. The format of that document changed from February 2016 to April 2016. That used from April 2016 had a section titled "managing and developing the team" with bullet points under that, the first of which was "Team issues". The previous version did not. Both of the pro forma documents had a line for signature by each of the supervisor and the supervisee.

21.21 Each supervision meeting was an opportunity for the claimant to raise any issues of concern that she had at work. In the period March to September 2016 there were a number of such meetings, each of which took about 30 minutes. They took place on 22 February 2016, 19 April 2016, 24 May 2016, 2 August 2016 and 20 September 2016. The claimant did not raise any concerns at any of those meetings. Notes of these meetings were made, and all save that of 24 May 2016 were signed by both the claimant and Mrs Baxter. On the pro forma it was noted specifically that there were no team issues for the meetings on 19 April 2016 and 24 May 2016. The note of 2 August 2016 had nothing stated in respect of team issues.

21.22 The claimant, who was then called Mrs Alison Nimmo, was undergoing a divorce during the year 2016, and on occasion became upset at work. Her colleagues, particularly Mrs Baxter and Mrs Irving, were supportive of her when that happened.

21.23 In about mid-September 2016 a telephone call was made to the team by a care home about a resident. The claimant dealt with it. Another member of the team, AB, was present during that call and said to her that she should have left the matter to Mrs Irving to deal with. Mrs Irving was the team member with primary responsibility for dealing with matters raised by care homes. The claimant felt that the manner in which AB had done so was not appropriate as it had undermined her, and raised that issue with Mrs Baxter at the clinical supervision meeting held on 20 September 2016. Mrs Baxter reassured her that she had handled matters correctly. Mrs Baxter noted on the pro forma for that meeting "team issues to be discussed further". She reported the issue to Mrs Irving shortly afterwards.

21.24 Mrs Irving had the lead role in relation to requests for assistance from care homes, but did not answer such calls exclusively within the team.

21.25 The issue of how to handle such calls from care homes was later (the date not being given in evidence) raised at a team meeting by Mrs Irving, who explained that it was the right thing to do to take such a call, and that not all such calls required to be dealt with by her personally. AB was present at that meeting.

21.26 Shortly thereafter the claimant went on annual leave, and on return from annual leave on 3 October 2016 commenced a period of sick leave. The claimant suffered from a recurrence of a depressive disorder from September 2016. That rendered her potentially more vulnerable to her perception of the severity of stressors within the workplace, which in turn could exacerbate the depressive disorder (explained at page 56 of the report from Dr Wylie).

21.27 In October 2016 Mrs Irving spoke to the claimant by telephone, who explained that she was very stressed, but was so distressed that she

was not able to explain why that was. Shortly thereafter during another telephone call the claimant explained to Mrs Irving that she had felt bullied by AB but was not able to provide details of that.

21.28 On 18 October 2016 the claimant had an exchange of texts with Mrs Baxter, In one, Mrs Baxter said “Hope your ok x”. The claimant replied “I’m not really xxx”. Mrs Baxter responded “Oh dear. Is it the court case?” By that she referred to ongoing divorce proceedings between the claimant and her then husband. The claimant replied “Among other things, one being working with [AB] and ….arrogance. I just can’t cope with everything. I haven’t slept a full night for weeks xxx” She added later “Its not that II never get on with ….Its … attitude towards me and comments …made to me about things. I don’t think in my whole 28 years working in the NHS anyone has reduced me to tears on so many occasions.”

21.29 Mrs Baxter offered to meet her for a chat, and they arranged to meeting in the canteen of Perth Royal Infirmary. They did so on 25 October 2016. The claimant was upset and told Mrs Baxter that she felt bullied.

21.30 Mrs Baxter informed Mrs Irving of the conversation that she had held with the claimant and her perception of bullying by AB. Mrs Irving tried to call the claimant on 8 November 2016 to discuss matters, initially without success. She told Mrs Baxter who sent the claimant a text, after which Mrs Irving did speak to the claimant the following day, during which the claimant made an allegation of bullying by AB. The claimant was crying during that call. There was a discussion about possible actions under the policy with regard to bullying and harassment, but the claimant said that she felt unable to consider actions to address her concerns at that time. The claimant also reported that she had received a date for attendance at court for her divorce action in December 2016 which was adding to her stress.

21.31 On the same date she referred the claimant to the respondents' Occupational Health (OH) Team. In the referral letter Mrs Irving stated "Alison has a history of anxiety and depression and has had previous absences as a result" She added in hand "None since 2005". The referral continued "These were in relation to her personal circumstances including divorce proceedings which are ongoing. Alison has also reported that she feels that one member of team has been undermining her confidence and perceives this as "bullying". As a result of this perception Alison is experiences high levels of anxiety and stress. …..At this time she is having difficulty sleeping, anxious and experiencing 'panic attacks'. Alison states she is too anxious to come to Team Office as if she is 'scared' she experiences a 'panic attack' "

21.32 Also on 8 November 2016 Mrs Irving completed a management statement of case document with regard to the claimant's absence from work.

21.33 After seeking advice internally within the respondents, Mrs Irving discussed privately with the other team members whether there were any issues within the team, during the month of November 2016. She considered that this was an opportunity for any of the team members to raise any concerns that they had in relation to AB, in the event that such concerns existed. None of the team members raised any concerns either about the team as a whole or AB in particular.

21.34 During the period November 2016 to February 2017 Mrs Irving sought to make regular contact with the claimant, who remained on sick leave. She tried to telephone her on a number of occasions without success. She sent text messages. On 12 December 2016 the claimant texted Mrs Irving to state that she was not available for a call as she had appointments. A call did take place on 9 January 2017 when the

claimant stated that her GP had advised her that she was not ready to discuss a return to work or address her concerns regarding what she thought was bullying. After two further attempts at telephone calls were made by Mrs Irving without success she ceased to do so lest they caused additional anxiety or distress for the claimant.

21.35 The claimant was re-referred to OH, as the original referral had not been received.

21.36 OH reported on 8 February 2017. The report noted the claimant's anxiety and depression, and expressed an opinion that she might return to work within six to eight weeks, but that "a significant improvement in her baseline symptoms would be required" for that. Reference to her concerns with regard to AB was made, and it was recommended that future meetings be held away from Perth Royal Infirmary.

21.37 The respondents convened an absence review meeting under their policy for the same on 9 March 2017 in Drumhar Health Centre. The claimant sought the assistance of her union representative for that meeting. The meeting became, at his suggestion, a general discussion about the claimant's condition and what support would be available to her.

21.38 An absence review meeting was scheduled for 11 April 2017. This was cancelled by the claimant by email on 10 April 2017

21.39 Another absence review meeting was scheduled for 9 May 2017 but had to be rescheduled as the claimant's union representative was unable attend. On 9 May 2017 Mrs Irving telephoned the claimant, after the claimant's union representative confirmed that it was in order to do so. The claimant was distressed during that call. She explained that she had had a panic attack when referred to a Consultant

Psychiatrist. She was to be reassessed in three months' time. A file note of that conversation is an accurate record of it.

21.40 A further OH report was received by Mrs Irving after that call, although dated 5 May 2017. The claimant remained absent from work, as the report confirmed. It added the following:

> "Mrs Nimmo's anxiety and altered mood remains persistent with Mrs Nimmo's levels of anxiety becoming heightened with some elements overwhelming her at the idea of attending Perth Royal Infirmary or confrontation with the above mentioned individual. In view of this, it is unlikely that Mrs Nimmo would be fit to return to work if this involved any contact with the above individual…… In my opinion Mrs Nimmo would require extensive support to return to work at Perth Royal Infirmary with an agreement that she would not be working with or have contact with the individual identified by Mrs Nimmo in the future. Mrs Nimmo has been made aware of the additional support available to her through Occupational Health should she wish to access this."

21.41 An absence review meeting took place on 8 June 2017 in Drumhar Health Centre. The claimant attended with her union representative, and Mrs Irving and Ms Anne Younger of HR also attended. The claimant advised that she was being reviewed regularly by her GP and was obtaining further support. She was too distressed to explore the concerns she had regarding AB. It was agreed that the possibility of returning to work in a different team would be explored, but the claimant considered that she should not be required to move. The outcome was recorded in a letter dated 25 July 2017.

21.42 The respondents sought alternative positions for the claimant but none were available at that stage within the areas of Perth and Kinross.

21.43 The claimant was referred to OH again, and they reported on 29 August 2017

21.44 The respondents then conducted a further absence review meeting with the claimant on 19 September 2017, with the same attendees as on 8 June 2017. The claimant remained unfit for work. She stated that she was not able to leave her house unaccompanied and that she was not able to meet in any premises of the respondents. The claimant was informed that a long term absence review meeting may be held, which may consider the termination of her employment. The claimant stated that she may raise a grievance with regard to bullying and harassment. There was a discussion about the possibility of mediation, which the claimant did not accept. The claimant was provided with the form on which to raise a grievance and her trade union representative stated that he could help her complete it.

21.45 The outcome of that meeting was confirmed in a letter to the claimant dated 19 September 2017.

21.46 A report was received by the OH Nurse from Dr A Parillon a consultant psychiatrist on 25 September 2017. It recorded that the claimant had been assessed in the psychiatric outpatient clinic at Perth Royal Infirmary on 22 December 2016. It included the following:

> "At that assessment she informed me that two months prior to that appointment, she started experiencing anxiety and panic attacks. She informed me that she works at Perth Royal Infirmary in Old Age Liaison Psychiatry. A work colleague however had been nasty towards her at work and had been belittling her in front of other members of staff. She started experiencing episodes of anxiety and panic to the degree where she was unable to return to PRI."

21.47 It recorded the medication she was then receiving, and concluded "At this time, I remain guarded as to her prognosis".

21.48 A further OH review took place on 27 October 2017 and a report provided thereafter. A report was received from an OH physician on 7 November 2017. He did not think that the claimant would be able to return to work in the foreseeable future, unless a resolution to her issue with AB could be achieved.

21.49 The claimant submitted a grievance by letter on 30 November 2017, sent by email, in which she alleged that AB had bullied and harassed her. She alleged that he had continually questioned her actions, and had a standoffish approach towards her. She alleged that he had a work colleague in tears, had students feeling inferior and had challenged "our Manager on her judgments and plans of care for our patient base in front of all the team at weekly meetings which was embarrassing to witness". She alleged that the final incident had been in September 2016 with his comments following the call from the care home referred to above. She considered that AB should have been disciplined, and removed from working with her. She alleged that inadequate support had been given to help her return to work. She also stated that she was a disabled person under the Equality Act 2010.

21.50 The claimant's absence from the team had an impact on that team. The absence was primarily covered by other members of the team. That included working longer hours. It also impacted on the level of service given to patients, with a longer period of delays for assessments or actions to be taken.

21.51 A long term absence review meeting was held on 5 December 2017. It ended with the claimant being dismissed on the ground of incapacity by letter 7 December 2017. The claimant was given twelve weeks'

notice of termination of employment, and provided with a right of appeal.

21.52 The claimant exercised that right of appeal by letter dated 13 December 2017. She had indicated by email dated 6 December 2017 that she wished her grievance to be progressed.

21.53 The respondents sought to address the claimant's grievance and a hearing into that was arranged for 15 February 2018 at Murray Royal Hospital. It was postponed at the claimant's request, and arranged for 15 March 2018, on which date it was held before Ms Sally Furlong. The outcome of that meeting was communicated to the claimant by letter dated 20 March 2018, which led to a new panel being established to hear the two grievances.

21.54 The grievance was considered by Mrs Lindsay Baillie, Locality Manager of the respondents, following a meeting on 20 April 2018 between her, the claimant, and the claimant's union representative. The claimant had presented two grievances. The first was the complaint of bullying against AB. The second was a complaint about how the first grievance had been dealt with, in particular the choice of venue proposed for the 15 February 2018 meeting.

21.55 The second grievance was determined by letter dated 19 June 2018, and the grievance in relation to the choice of meeting venue was upheld.

21.56 In relation to the first grievance, Mrs Baillie decided after investigation not to uphold it, deciding that there was not sufficient evidence to support the claimant's allegations. The investigation had included taking statements from Mrs Irving, Mrs Baxter and AB. AB rejected the allegations made, denying that there had been any bullying or

harassment. The outcome was set out in letter from Mrs Baillie to the claimant dated 24 July 2018.

21.57 The claimant's appeal against dismissal was heard on 17 October 2018 and considered by Mrs Evelyn Devine, who sat with colleagues Sandra Gourlay Lead Nurse and Iain McEachan HR Business Lead, and on 25 October 2018 Mrs Devine met the claimant and explained that the panel had allowed the appeal and reinstated the claimant. A letter of that date confirmed the outcome. The claimant had exhausted her entitlement to sick pay. She returned to being an employee of the respondents but has not returned to work due to ill health and has not been in receipt of any pay.

21.58 On 20 November 2018 the claimant informed Ms Baillie that she wished to appeal the outcome of the grievance, the claimant having earlier been told that she could not do so as she was not then an employee. A follow up meeting was held with Mrs Devine and the claimant on 21 November 2018, confirmed by letter of that date. It confirmed that information had been attained that confirmed that the claimant was a disabled person, and that a review of the bullying and harassment investigation was to be carried out by an independent senior manager.

21.59 On 17 December 2018 the claimant lodged a further grievance by email to Mrs Devine. On 19 December 2018 Mrs Devine informed the claimant that the review process would be undertaken by Mrs Amanda Taylor, and separately on the same date Mrs Devine wrote to the claimant discussing posts to which she could return, and attaching job descriptions for them. The two posts were –

(i) Older Peoples Mental Health Team, Community Mental Health Nurse, B5, Base Pullar House, Perth City

(ii) Tayside Substance Misuse Service, Community Staff Nurse, B5, Base Highland House, Perth City.

21.60 On 3 January 2019 the claimant responded with regard to those roles, stating that she could not respond until there could be a guarantee of no contact with AB, and asking about a risk assessment for them. Mrs Devine replied on the same date by email.

21.61 On 10 January 2019 Mrs Baillie contacted the claimant about a further referral to OH.

21.62 On 18 January 2019 Mrs Devine wrote to the claimant replying fully to the claimant's email of 3 January 2019.

21.63 On 24 January 2019 Mrs Taylor wrote to the claimant with regard to her review, and offering either a face to face meeting or a review of papers.

21.64 On 5 February 2019 Mrs Baillie met the claimant, who was accompanied by her sister, and discussed the referral to OH, which was made after that meeting.

21.65 The claimant lodged with the respondents a Statement of Fitness for Work confirming that she would not be fit from 16 February 2019 to 16 April 2019.

21.66 On 25 February 2019 Mrs Taylor wrote to the claimant with an offer of new dates for the meeting to review the grievance, as the original dates offered had not been possible for the claimant, who did wish to have a face to face meeting, as she confirmed by email that same day.

21.67 On 6 March 2019 the claimant confirmed that she would be able to attend a grievance review meeting with Mrs Taylor on 28 March 2019.

21.68 On 11 March 2019 an updated OH report was received.

21.69 The meeting on 28 March 2019 was cancelled the day before as the claimant's union representative was not able to attend.

21.70 On 16 April 2019 Mrs Taylor contacted the claimant by letter and offered new dates for the review of her grievance. On 17 April 2019 the claimant emailed Mrs Taylor to state that her union representative would be on annual leave from 13 May 2019 and requesting a meeting after 10 June 2019. Mrs Taylor replied on 19 April 2019 noting that that latter date was almost two months away and suggesting that the claimant request another union representative in order to progress the review.

21.71 On 23 April 2019 the claimant relied, agreeing that 10 June 2019 was too far away and stating that she would try and get another representative. She confirmed on 24 April 2019 that she would be able to attend and a meeting took place on 13 May 2019. A letter from Mrs Taylor of that date recorded the outcome of her review, which was that the original decision was reasonable based on the information before the original panel, and that no new information had been provided at the meeting.

21.72 Discussions with the claimant with regard to possible alternative roles at the respondents have continued. Two such roles are being considered, the claimant having earlier rejected one role in Crieff in light of the additional travelling involved. There has been a risk assessment carried out in relation to the two roles, and a further meeting to address the possibilities in relation to them is to be held after the final hearing.

21.73 The claimant continues to be signed as unfit for work by her General Practitioner.

21.74 As a result of her perception of bullying by AB she has been afraid of attending Perth Royal Infirmary or Murray Royal Hospital. She has required to be accompanied when leaving her house. She has become afraid of AB.

21.75 In the event that AB had been removed from the team, doing so would have had a detrimental effect on the service given to patients. It would have interrupted continuity of service to patients.

Submissions for claimant

22. Mr Hardman very helpfully produced a full written submission. He supplemented that orally. The following is a very basic summary. Matters no longer in dispute are omitted.

23. The major area of factual dispute was what the claimant told Mrs Baxter and Mrs Irving in the period around commencement of sick leave in September/October 2016, and he asked the Tribunal to prefer the tenor of the claimant's evidence. He set out a series of proposed findings in fact beyond those in the Statement of Agreed Facts.

24. He argued that the date by which the respondents ought to have known of the claimant's disability status was 5 May 2017. He referred to ***Gallop v Newport City Council [2013] EWCA Civ 1583,*** and ***Donelien v Liberata UK Ltd [2018] EWCA Civ 129.*** The OH advisor had never been invited to address the issue of disability.

25. He referred to the guidance in ***Environment Agency v Rowan [2008] IRLR 20.*** He identified the two PCPs set out above at paragraph 12.

26. He argued that there was a substantial disadvantage suffered by the claimant as a result of the PCPs as they had prevented her from returning to work in her substantive post. It had been identified as early as the OH report of 8 February 2017. The claimant's condition had prevented her from making a formal complaint concerning her perception of AB's behaviour for many months after the commencement of her sickness absence.

27. In oral submission he argued that the proposed steps were reasonable, and he elaborated further on them. He said that there could have been an informal approach to AB, and a discussion about the claimant's perception. If there was a refusal to engage with that by him the claimant could have been told that the respondents had looked at it and nothing could be done. The possibilities were not just about AB moving location.

Submissions for respondents

28. Ms Stobart also very helpfully produced a written submission and the following is again a very basic summary, omitting issues now not disputed. She objected to the proposed reformulation of the PCPs and steps. She asked the Tribunal to prefer the evidence of the respondents' witnesses, particularly over the discussions held with Mrs Irving and Mrs Baxter. She argued that the respondents did not know that the claimant was a disabled person until October 2017 when an OH report was received, and that the earlier OH reports did not give detail that would lead to a conclusion of disability as they were in the context of a possible return to work, and at a time of absence of a few months duration.

29. The claimant had not explained the nature of her concerns about AB, and it was not possible for the respondents to resolve the issues. It was not a case of high severity such as an allegation that may indicate the potential for harm to other members of staff which would require investigation even if the original complainer did not wish to do so. It would not have been appropriate to have

done more than Mrs Irving did, by raising matters with the team as she did. The respondents had taken all the steps required of them.

30. The respondents did not apply the PCPs as alleged. The claimant was subject to the absence management policy but did not suffer a particular disadvantage as she appealed successfully. It was not a part of the policy to make a complaint unassisted or contribute fully to its investigation. Once the complaint has been specified it can be investigation with or without further input from the employee. The claimant did attend the grievance hearing. There was no substantial disadvantage that she could claim to have suffered.

31. It was not reasonable to require the adjustments proposed. In respect of the first – investigation of the complaint without a formal grievance or engaging HR – it would not have been reasonable to investigate the complaint based on the limited information Mrs Irving was aware of. Mrs Baxter had not been told in the period March to September 2016 of alleged bullying by AB. The claimant had refused to accept that she had been upset about her divorce, but Mrs Irving and Mrs Baxter had given evidence that she had been. That was also reported to her doctor.

32. In respect of the second, transferring AB, it would not be reasonable to do so unless it could reasonably be held that AB had contravened the bullying and harassment policy. In the absence of specification of the allegations, it was not reasonable to move AB.

33. It was noted that adjustment three was not being pursued.

Law

34. The law relating to discrimination is complex. It is found in statute and case law, and account is take of guidance in a statutory code.

(i) Statute

35. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

36. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……"

37. Section 21 of the Act provides:

> **"21 Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

38. Section 39 of the Act provides:

> "**39 Employees and applicants**
>
> …….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……"

39. Section 136 of the Act provides:

"**136 Burden of proof**

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

40. Section 212 of the Act states:

"**212 General Interpretation**

In this Act - …….

'substantial' means more than minor or trivial"

41. Schedule 8, at paragraph 20 states:

"**Part 3**

Limitations on the Duty

Lack of knowledge of disability, etc

20

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

42. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

(ii) Case law

43. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632*** and in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.*** The guidance given in ***Environment Agency v Rowan [2008] IRLR 20*** remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of, relevant for the present case:

(a) the provision, criteria or practice applied by or on behalf of an employer; and
(b) the nature and extent of the substantial disadvantage suffered by the claimant.

44. Mr Justice Laws in ***Saunders*** added:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

45. The nature of the duty under sections 20 and 21 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different…… Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage."

46. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondents at the second stage. If the second stage is reached and the respondents' explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

47. The application of the burden of proof is not as clear as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, said this:

> "53
> ……It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.
> 54
> In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.
> 55
> We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

48. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

49. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The importance of identifying the step that the respondents is said not to have taken which amounts to the reasonable adjustment required in law of it was stressed in ***HM Prison Service v Johnson [2007] IRLR 951.*** Setting out what the step or steps that comprise the reasonable adjustments are, before the evidence is heard, was however referred to in ***Secretary of State v Prospere EAT 0412/14. General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43*** highlighted the importance of identifying precisely what constituted the step which could remove the substantial disadvantage complained of.

50. The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it also emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

51. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill [2006] ICR 524***. The need to focus on the practical result of the step proposed was referred to in ***Royal Bank of Scotland plc v Ashton [2011] ICR 632***.

52. Where an employer argues that it could not reasonably have been expected to know of the employee’s disability, the onus falls on the employer to

establish that, and the issue is one of fact and evaluation – ***Donelien v Liberata UK Ltd [2018] IRLR 535.*** The matter, in the context of a claim under section 15 of the Act, was very recently examined in ***A Ltd v Z UKEAT/0273/18*** where it was held that the assessment included what the employer might reasonably have been expected to know after making having made appropriate enquiries.

(iii) EHRC Code

53. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular:

> **Knowledge**
>
> 6.19
>
> For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.

6.20

The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

Substantial disadvantage

6.15

The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

Reasonable steps

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

6.29

Ultimately the test of the “reasonableness” of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take, such as the following]:

Allocating some of the disabled person's duties to another worker

Example: An employer reallocates minor or subsidiary duties to another worker as a disabled worker has difficulty doing them because of his disability. For example, the job involves occasionally going onto the open roof of a building but the employer transfers this work away from a worker whose disability involves severe vertigo.

Transferring the disabled worker to fill an existing vacancy

Example: An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.

Altering the disabled worker's hours of work or training

Example: An employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

Assigning the disabled worker to a different place of work or training or arranging home working

Example: An employer relocates the workstation of a newly disabled worker (who now uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor. It may be reasonable to move his place of work to other premises of the same employer if the first building is inaccessible. Allowing the worker to work from home might also be a reasonable adjustment for the employer to make

6.35

In some cases, a reasonable adjustment will not succeed without the co-operation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it. An employer would at least need to be able to show that they took such behaviour seriously and dealt with it appropriately. Employers will be more likely to be able to do this if they establish and implement the type of policies and practices described in Chapter 18 [which refers to an equality policy]."

Observations on the evidence

54. The Tribunal considered that the claimant was seeking to give honest evidence. It was clearly not easy for her to give evidence to the Tribunal, which is stressful for many witnesses but particularly so for someone suffering from anxiety and depression. She was questioned on the issues that she required to be. The Tribunal considered the position having regard to the steps taken in relation to her evidence set out above.

55. The report from Dr Wylie was not produced until 29 May 2019, after her own evidence had been concluded. It set out very clearly the difficulties that she has experienced, and the impact various matters have had upon her, which for entirely understandable reasons had not been referred to in her own evidence. There is no need to set out in full detail what is stated in that report, but there are some aspects of it that are matters that the Tribunal considered to be relevant and are commented on below.

56. The witnesses for the respondents gave evidence clearly and candidly. They displayed no antipathy towards the claimant, in fact there was clear evidence of them all having a material level of sympathy for her.

57. There were some areas of evidence where there was a dispute on fact, particularly whether the claimant told her managers Mrs Baxter and Mrs Irving of her concerns over AB in the period March to September 2016, as she claimed. They denied that she had done so.

58. The claimant said that she had informed Mrs Baxter in the March 2016 meeting that there had been a couple of instances where she had felt intimidated and undermined by AB, and that Mrs Baxter had said that she would speak to Mrs Irving about it privately. She said that the issues had been discussed at each supervision meeting. She stated that she was surprised that the written records did not support that.

59. The written records, which included ones signed by the claimant, indicated nothing of there having been any such conversation as claimed by the claimant until the entry in September 2016. For two entries there was a positive entry to the effect that there were no issues, one of which the claimant signed. Mrs Baxter's evidence was that if the issue claimed had been discussed, she would have recorded it, but that it had not been discussed.

60. The Tribunal considered that Mrs Baxter and Mrs Irving were most likely to have been accurate in their evidence. Mrs Baxter was both a work colleague of the claimant, and acted as a friend of hers. That was evident not just from her evidence, but also the text messages between them. The oral evidence of Mrs Baxter and Mrs Irving was given in a straightforward and candid manner. They did not present as people who were ignoring the claimant's comments at the time. When they became aware of her concerns they gave her advice which included about raising a grievance, or in Mrs Irving's case the suggestion of mediation. Whilst the claimant did not feel able to accept those suggestions, both of the two witnesses were seeking to help her. The claimant was also not able to recall whether she raised whether there had been any progress regarding AB with Mrs Baxter, which one would expect if that issue had been raised earlier with no discussion of what had been done. The Tribunal preferred the evidence of Mrs Baxter and Mrs Irving.

61. The claimant also claimed in her evidence that she had not been stressed by her divorce, but only by the behaviours of AB. When asked about whether the divorce was stressful she said, "Not really, the lawyer was dealing with it." The report from Dr Wylie included quotations from GP records, which indicated that the claimant had reported that the divorce had been a stressor at the time, in particular an entry on 15 August 2016 which led to the prescription of medication, a text message from the claimant sent to Mrs Baxter in which she inferred that the divorce was a source of stress for her, and the conversation between Mrs Irving and the claimant on 8 November 2016. The Tribunal concluded that the suggestion in evidence that the divorce was not a source of stress was not accurate.

62. The claimant said in her evidence that when she met Mrs Baxter at the canteen she had been asked by Mrs Baxter whether she wished to make a formal complaint about AB and she had said yes. Mrs Baxter denied that that conversation had taken place. The claimant also argued that she was not able to pursue a formal grievance as she was not well enough to do so,

however, and the Tribunal considers that Mrs Baxter's evidence is more reliable.

63. Similarly, the claimant claimed that she had given Mrs Irving details of why she was upset in the telephone call on 8 November 2016, which Mrs Irving denied. The Tribunal considers that Mrs Irving's evidence is more reliable. It is consistent with the claimant not being able to give such details at the meeting on 9 March 2017. When asked about that meeting, the claimant stated that she could not remember the detail of it.

64. The claimant was also not able to recall the meeting on 19 September 2017.

65. She accepted that she had union assistance from at the latest March 2017, and that her solicitors had helped her frame the grievance she presented on 30 November 2017.

66. In her grievance letter she alleged that others had been affected, and that the manager had been challenged at team meetings. In the letter from Dr Parillon he noted that she had said that it was in front of witnesses. The suggestions from those comments that there may be support from other members of staff in relation to AB's undermining behaviours made by the claimant were not borne out in the evidence from the respondents' investigation, including in particular that of Mrs Baxter and Mrs Irving, and were not borne out in the evidence before the Tribunal, with none of the members of staff who might have been called to give evidence doing so save those referred to above.

67. The Tribunal considered that the respondents witnesses were credible and reliable, and where there was a dispute over a fact with the claimant, that the evidence of the respondents' witnesses was to be preferred. In reaching that conclusion the Tribunal is very mindful of the fact that the claimant is a disabled person, and has had mental health issues over a period of time, which continued during the hearing itself. It does not wish to add to the

distress she has suffered, but must make findings in fact where issues are disputed before it, and explain its reasons for doing so.

68. The claimant undoubtedly did have a perception that she had been bullied and harassed by AB, and that was accepted by the respondents. There was an investigation by the respondents into what had happened, and that did not find evidence to support that allegation, which was confirmed on a review. It was not suggested that there was evidence to support a finding that there had been conduct which would have engaged the Bullying and Harassment Policy, or lead to disciplinary action.

69. The Tribunal did not consider that objectively there was evidence before it that AB had bullied or harassed the claimant, as she had claimed in her grievance letter which was taken to be her evidence on that issue, nor was that suggested by Mr Hardman. The argument was made on the basis that the perception held by the claimant was sufficient.

70. There were four general areas where the claimant perceived there to have been bullying conduct.

71. The first was her being undermined by AB, or challenged as to decisions made. The only detailed example of this given in evidence related to the handling of a call from a care home, where it was said that AB suggested that it should have been left to Mrs Irving to deal with. Mrs Irving herself was happy with the way that the claimant had conducted the call, and whilst AB may not have handled the issue well, it was not an issue that of itself amounted, in the Tribunal's opinion, to bullying or to conduct that required any formal disciplinary action. It is commented on further below.

72. The second related to the use of desks. The statement from AB indicated that he did consider that one of the desks was used by him, there being no formal such allocation of desks, but the Tribunal considered that a dispute about a desk was not one that could by itself amount to bullying or require any formal

disciplinary action. In the workplace employees often consider a particular location to be their own one even if that is not formally the position. There was no evidence of any aggression or other inappropriate conduct which the Tribunal considered to be sufficient to amount to bullying or harassment, and none of the other team members confirmed that there was an issue in relation to this, either in the investigation by the respondents or the evidence before the Tribunal.

73. The third was a general allegation as to manner, with the use of words such as “arrogant” or “standoffish”. That was also not sufficient to amount to bullying in the Tribunal’s opinion, but was in any event not the evidence of others either interviewed by the respondents or who gave evidence before the Tribunal. That evidence was that the team members got on well together. There was also evidence that AB and the claimant had been seen relating well together on occasions.

74. The final area was in relation to third parties, including someone identified by the claimant as “Betty”, students, and her manager, who were said to have been upset or affected in some way by what AB had said or done, but there was no evidence to support that, rather it was to the contrary, that relationships within the team were good.

75. The claimant’s perception that she had been bullied and harassed by AB was such that she became fearful of coming into contact with AB and for that reason did not wish to attend at Perth Royal Infirmary or Murray Royal Hospital. The Tribunal noted the comments of Dr Wylie that a relapse of the claimant’s depressive disorder would also render her potentially more vulnerable to her perception of the severity of stressors within the workplace which in turn could exacerbate the depressive disorder.

76. What was clear was that the claimant was a well-regarded member of the respondents’ staff, who had performed well in her role. She and her colleagues provided a vital service to vulnerable people.

Discussion

77. The Tribunal applied the law set out above to the facts that it had found, as follows in relation to each of the issues identified:

When could the respondents reasonably be expected to know that the claimant was a disabled person, having regard to paragraph 20 to Schedule 8 to the Equality Act 2010?

78. The claimant argued that this was on or around 5 May 2017, and the respondents on 31 October 2017. The Tribunal considered that the claimant is generally correct, with a slightly later timescale. The claimant's colleagues Mrs Baxter and Mrs Irving were aware of her fragile mental state, and that she was crying at work on occasion. The report from the occupational health nurse was requested by a referral form that referred to absence from work, anxiety and depression and a history of anxiety and depression with previous absences. The report, dated 8 February 2017, confirmed the anxiety and depression, and that she remained under the care of her GP. There was reference to being likely to remain absent for six to eight weeks, but advice on a return to the GP for medical management of her symptoms. That may well have been sufficient to put an employer on notice of the possibility of the person being disabled, and asking for an opinion on that issue, but it was followed by a further referral which did not ask that question. It led to a report dated 5 May 2017 which referred to levels of anxiety being heightened, the anxiety and altered mood being persistent, and the absence by then stretching well beyond the six to eight weeks referred to. At that stage it ought to have been considered a material possibility, at the least, that the claimant was a disabled person under the Act. The Tribunal considered that the matter was then put beyond reasonable doubt by the terms of a conversation between the claimant and Mrs Irving on 9 May 2017. The note of that conversation referred to her being distressed and very tearful, there had been no improvement in her level of anxiety and distress, she had attended a

Consultant Psychiatrist, and had suffered a panic attack. She was to be reviewed in three months' time. Mrs Irving received the OH report shortly after the conversation on 9 May 2017.

79. The Tribunal noted that those dealing with the issues at the respondents included managers with expertise in adult mental health issues. There was also, it appeared to the Tribunal, limited involvement of human resources staff at the earlier stages of the process. Had HR been consulted more directly, the issue may then have been investigated more thoroughly at the latest in May 2017.

80. Mrs Irving stated in evidence that OH had informed her by telephone that the claimant was not thought to be a disabled person but she firstly could only relate that to some time in 2017, unable to recall when that was, secondly had not taken a note of that call, or at least it was not before the Tribunal and thirdly the factual basis on which any such opinion was tendered was not explained.

81. The Tribunal considered, having regard to all the evidence that was given, and taking account also of the example given in the Code of Practice at paragraph 6.19, that the respondents ought reasonably to have been aware of the material possibility, at least, of the claimant being a disabled person and then to have made further enquiries, asking either their occupational health department or an external adviser for a formal opinion, which would probably have been carried out in consultation with the claimant's GP. That may have taken about two weeks to undertake, and be concluded by about 23 May 2017. Had they done so, the long history that was set out in the report from Dr Wylie is likely to have been discovered, and the conclusion given the circumstances at the time is most likely to have been that the claimant was disabled under the Act, as the respondents now accept.

82. In light of that, the Tribunal concluded that, having regard to the terms of paragraph 20 of schedule 8 to the Act, the respondents ought reasonably to

have known that the claimant was a disabled person by on or about 23 May 2017.

Was a provision, criterion or practice (PCP) applied to the claimant by the respondents, and if so what was that?

83. The first question is what PCP is to be considered in this context, and whether the claimant can be permitted to change from what had been identified at the PH. The Tribunal considered that issue in the light of the case law referred to above, particularly ***Prospere***, and the terms of the overriding objective. It concluded that it was not just to permit the claimant to re-write the PCP on which she founded at such a late stage, after the evidence had been heard. The respondents had not had fair notice of it. The PCP proposed was materially different to that set out at the PH. At the commencement of the present hearing, no application to change the PCP had been made.

84. The PCPs that were proposed at the PH, and were those before the Tribunal during the evidential hearing, were:

> "(a) The respondents' requirement that employees attend work regularly and effectively
>
> (b) The application of the respondents bullying and harassment policy and in particular the requirement that the claimant make her complaint unassisted and contribute fully to its investigation."

85. The first PCP was not challenged by the respondents. The Tribunal finds that the first PCP was so applied.

86. The second PCP was not borne out by the evidence. The respondents did not require the claimant to make her complaint unassisted. She was offered the opportunity to make a complaint, under the grievance policy, and she chose not to do so. She later did so, and had the support of her union representative to do that. She did in fact attend for the investigation meeting

into her grievance, but she was given options before then that included providing written evidence only. She was not required to contribute fully to it, although in fact she did so.

87. The Tribunal concluded that the claimant had not established that that second PCP had been applied to her. It then considered matters in the event that that conclusion was wrong.

Did the claimant suffer a substantial disadvantage from the application of such a PCP, with the term "substantial" meaning not minor or trivial having regard to section 212 of the Equality Act 2010?

88. The Tribunal considered that the claimant was placed at a more than minor or trivial disadvantage by the application of the first PCP. There were a series of steps taken with a view to seeking her return to work, with meetings which were stressful for her to attend.

89. The Tribunal considered that a substantial disadvantage had not been suffered by the claimant in relation to the second of the PCPs referred to above, in the event that it is wrong that such a PCP was not applied to the claimant. It concluded that any effect on the claimant was minor. The claimant's allegation of bullying and harassment did not have a sufficient basis in fact to be upheld. She herself did not make a grievance when the opportunity to do so was given to her initially, but did so later. When she did, she contributed to the process for that, and to a review. The outcome of the review of the grievance was not to uphold it, and there is no challenge to that finding. The Tribunal considered the following issue in relation to that PCP lest that conclusion was also wrong.

If so, did the respondents fail to take any step that it was reasonable to have to take to avoid the disadvantage?

90. For similar reasons as those given for the application to change the PCP the Tribunal did not consider that the claimant ought to be permitted to amend the proposed steps at the stage of submissions, after the evidence had been heard. The respondents had not had fair notice of the amendment, the steps that the claimant proposed were required had been identified at the PH, with no application to change them either then, or made at the start of the present hearing. The changes proposed were material. There had not been detailed evidence on them. Had it been clear that those steps were being contended for at an earlier stage, the questioning of the respondent's witnesses by Ms Stobart would have been materially different.

91. The steps that had been identified at the PH and before the Tribunal at the evidential hearing were:

> "(a) to investigate her complaints about a colleague without the necessity for the claimant raising a formal grievance or engaging with the respondents' HR department regarding this
> (b) Transferring the colleague with whom the claimant was having difficulties.
> (c) Continuing to pay the claimant her full pay after her sick pay had run out."

(a) Investigation

92. The suggestion that the respondents should investigate a complaint without that complaint being made on a formal basis, or engaging with the HR department, on the basis that what was proposed was an investigation asking team members direct questions in relation to the allegation made against AB, is not a step that the Tribunal regarded as reasonable. An inquiry was made by Mrs Irving, in that she asked generic questions of the team, not identifying AB particularly, or any particular allegation and had nothing raised of concern with her. To have conducted an investigation of greater detail than that, or as the claimant put it in evidence to speak to AB and make AB aware of how the claimant felt, would have been outwith any procedure, and involve the

material risk of damage to the manner in which the team operated, and to the level of care provided to patients. It would have involved a question raised with AB which would have alerted AB to there being a member of the team with a perception that there had been bullying by AB, which would almost inevitably have led to AB asking who had said what, together with the possibility of AB raising a grievance on what was being done by the respondents on the basis that it was outwith any procedure.

93. The bullying and harassment procedure does have provision for an informal step. Whilst the claimant argued that she had raised matters with her managers in the period from February to August 2016, the Tribunal did not accept that evidence for the reasons set out above. Matters were reported in September 2016 and onwards, and at that stage the possibilities were explored of a grievance, and mediation. The claimant did not provide the detail to enable a grievance to be progressed, and did not wish to undertake mediation.

94. The claimant's argument is that separately, despite her wishing not to pursue a grievance, or being unable to do so because of illness, and without her articulating what had happened, when, and who else if anyone had been present, the issue should have been investigated. The Tribunal did not regard that as a practical proposition. To investigate an issue, an allegation, or a concern, basic details of what had happened, when, and who else if anyone had been present are required. An investigation cannot be undertaken in a vacuum. The respondents' procedures had a requirement for a reasonable level of specification as to what is alleged. That allows an investigation to proceed fairly. It was reasonable. Fairness requires to be shown to both the person making the allegation, and the person against whom that allegation is made. All that the claimant had said was that she felt bullied by AB, and that he had made reference to her handling of the care home call. Mrs Irving did not ignore that. She quickly held a team meeting to state that calls such as that from the care home can be dealt with other than by her, and in November 2016 asked each member of the team privately about whether they had any

concerns. No one raised any issue that might require to be followed up further. She took reasonable steps in doing so.

95. Going beyond what Mrs Irving did in fact do was not, the Tribunal considered, practical in such circumstances, and was not therefore a reasonable step required by the statute. Mrs Irving did not consider that the threshold for bullying had been met from her understanding of what had happened. She understood that there was no suggestion of aggression when AB spoke about the care home. She understood that the claimant had been angry about the remark, but she considered it to have been an "off the cuff" remark. It was reasonable for her to have held that opinion.

96. The Tribunal also considered that it was in reality inevitable that had AB been approached in the manner suggested, AB would have rejected any suggestion of moving location and/or team, or that there was any basis for the perception held by the claimant. The strong likelihood was of a challenge to the matter being raised outwith policy.

(b) Transfer

97. The heart of the claimant's case as presented in evidence, and falling within step (b) as proposed, was that AB ought to have been moved to another location in light of her perception of being bullied by that person. The Tribunal considered that that was not a reasonable step the respondents required to have taken under the statute. There are a number of reasons for that:

(i) To do so would have had a detrimental impact on the patients who were being cared for by AB. They were being cared for as a part of an integrated team. AB was the only member of the team with expertise in one particular discipline (the detail of which is not stated to seek to preserve anonymity). A change to that team would have broken the continuity of care for the patients then being assisted, and likely to have led to an exacerbation in delays in responding to

issues in the future. It was liable to have caused a material level of disruption. It was not practical as a step in those circumstances.

(ii) There would have been a detrimental impact on the team of which the claimant and AB were a part. The evidence was that the team operated in an open and constructive manner. It was described as a health and social care partnership, with both sets of professionals in those two disciplines working together to benefit patients. Mrs Irving had been seeking to develop that team, improving the manner in which it worked, and encouraging open communications within it such that a decision or approach could be questioned by any team member so as to seek to improve the service given to patients. The relationships within the team would inevitably have been affected were AB to have been moved as proposed.

(iii) There would have been a detrimental impact on AB, who is likely to have regarded a change of work location or team as a form of punishment. It is likely to have led to at least a grievance, if not a claim for constructive dismissal, by AB, had it been undertaken. In the absence of evidence to found a disciplinary investigation and procedure, it is not reasonable to require a member of staff to move to a different location or team.

(iv) There is a policy for Bullying and Harassment, and it would have undermined that policy to act on the basis of perception alone, rather than at least a basic level of evidence. In addition it was contrary to the policy terms to make an adjustment where that had a detrimental effect on members of staff, as referred to at paragraph 21.12. The enforced move of another member of staff is one of the potential outcomes of the disciplinary policy, which requires investigation of allegations and a formal hearing. The Tribunal did not consider it practical to have done so.

98. The Tribunal took account of the terms of the occupational health report dated 5 May 2017, with its advice that the claimant required extensive support to return to Perth Royal Infirmary and not working with, or having contact with,

AB, but concluded that the factors set out in the preceding paragraph operated to make doing so not practicable.

99. The Tribunal also considered the terms of paragraph 6.35 of the Code of Practice, but concluded that it was not intended to cover the step proposed of moving a member of staff to a different working location and team. It referred to “co-operation”, which indicated that it was a consequence of the step involved, and was not intended to refer to a move of a member of staff specifically as the step itself. The list of examples at paragraph 6.33 did not have anything similar to the moving of another member of staff in this manner, particularly one against whom allegations had been made, rather the move proposed in the list was by the disabled person to another role, location or similar. Whilst there was no equality policy specifically falling within the terms of that paragraph, there had been equality impact assessments undertaken, and staff side representatives involved.

100. To use the language of the Framework Directive referred to above, the arguments for the claimant would put a disproportionate burden on the respondents. They are not reasonable in all the circumstances as steps that the respondents were required to take as adjustments under section 20 of the Equality Act 2010.

(c) Pay

101. No argument was presented in relation to step (c) and no finding is made in relation to that accordingly.

Conclusion

102. In light of the findings made above, the Tribunal must dismiss the Claim.

103. It would however wish to express the hope that there may shortly be a solution found in the process of seeking to identify an alternative role for the claimant,

which is continuing, which may enable the claimant to return in some way to the valuable work that she did with the respondents.

Employment Judge: **Alexander Kemp**
Date of Judgment: **10 July 2019**
Date sent to parties: **11 July 2019**