EMPLOYMENT TRIBUNALS

Claimant: **Ms C Davis**

Respondent: **Cardiff and Vale University Local Health Board**

Heard at: **Cardiff** **On: 30 September and 1, 2, 3, 4, 7 and 8 October 2019**

In Chambers: 29 October 2019

Before: **Employment Judge S Davies**
Mr M Pearson
Mr A Fryer

Representation:
Claimant: **Mr O James, counsel**
Respondent: **Mr J Walters, counsel**

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that all claims are dismissed.

REASONS

Claims

1. The Claimant brings the following claims: disability discrimination (failure to make adjustments – section 21 Equality Act 2010 (EqA), discrimination arising from disability – section 15 EqA and harassment – section 26

EqA), whistleblowing detriment – section 47B Employment Rights Act 1996 (ERA) and automatically unfair dismissal – section 103A ERA, "ordinary" unfair dismissal – section 98 ERA and unauthorised deduction from wages – section 13 ERA.

Summary of case

2. This case is about the dismissal of the Claimant following long term sickness absence, in circumstances where there was historic workplace conflict between her and other nightshift workers. At the point of her dismissal the Claimant had applied for early ill-health retirement under the NHS pension scheme; which was granted following her dismissal.

3. The Claimant asserts that she was ostracised by her radiography colleagues and harassed by virtue of her mental health condition and because she was a whistleblower in respect of (1) a patient x-rayed on 11 May 2016 and (2) a tuck shop run in the radiography department.

Issues

4. Following a telephone preliminary hearing on 27 September 2019 before Employment Judge S Davies, to discuss three specific areas of disagreement, the parties produced an agreed list of issues (15 pages in length and lettered from A – T); the document is attached to this judgment as appendix A.

Procedural history

5. The Claimant engaged in early conciliation with ACAS between 17 and 25 August 2017 [1] and brought a claim in the employment Tribunal on 22 September 2017 [2]. The Response was submitted by the Respondent on 31 January 2018 [26].

6. The Claimant was initially unrepresented, then assisted by Citizens Advice, was unrepresented again from April 2018 [41-44] and latterly represented by her current solicitors.

7. Preliminary hearings for case management were held on 13 April 2018 before Judge Cadney, 20 July 2018 before Judge Howden Evans, 1 October 2018 before Regional Employment Judge Clarke, on 27 November 2018 before Judge Sharp, 7 March 2019 before Judge Frazer, on 30 May 2019 before Judge Cadney, on 28 August 2019 before Judge Ward and 27 September 2019 before Judge S Davies.

Pleadings and amendments

8. A request for further information was made by the Respondent on 21 February 2018 [39], to which the Claimant responded [53].

9. At a preliminary hearing on 20 July 2018 Employment Judge Howden Evans ordered [59] that the Claimant further particularise her claims to provide:

    a. an annex to particulars of claim [63] dated 18 September 2018, setting out the basis of her ordinary unfair dismissal claim and further particulars of protected disclosures;

    b. a Scott Schedule setting out the PCPs for reasonable adjustments, acts of harassment and "something/s arising from disability" for section 15 EqA complaints.

10. The Respondents provided a response to the annex to particulars of claim dated 31 October 2018 [89].

11. At a preliminary hearing on 27 November 2018, Employment Judge Sharp [100] ordered the Claimant clarify the Scott Schedule in respect of harassment. The Respondent produced a "Final Further Updated Scott Schedule" [102a]. The Respondent provided comments on the Final Further Updated Scott Schedule dated 25 January 2019 [103].

12. The agreed list of issues did not precisely match the Final Further Updated Scott Schedule, which was somewhat confusing. For example item 16 (email of 27 December 2017) of the latter identified section 27 EqA, but we were not referred to the email a victimisation complaint was not pursued by the Claimant in the list of issues, in evidence or submissions. For clarity, we have adopted the structure of the agreed list of issues when addressing the complaints in this judgment. We note that this was also the approach adopted by counsel in their written submissions.

Directions following the hearing

13. By email of 25 October 2019, the Tribunal directed that the Claimant provide clarification with regard to reasonable adjustments (in particular the dates and nature of substantial disadvantage missing from Schedule of Loss and submissions). The Claimant's solicitor responded by email of 29 October 2019, referencing the Final Further Updated Scott Schedule and providing an additional table. The Respondent replied by email on 30 October 2019 indicating that the Claimant should only be permitted to rely upon matters advanced in evidence at the hearing.

14. On 19 November 2019 the Respondent was directed by the Tribunal to clarify whether the specifics of its 'legitimate aim' were pleaded (it seemed to the Tribunal that the particulars appeared in the agreed list of issues but not in the pleadings) and the parties views were sought on whether an amendment application was required.

15. In an email of 22 November 2019, the Respondent confirmed that particulars of the legitimate aim were not expressly pleaded, albeit the justification defence was pleaded in general terms (paragraph 76b Grounds of Resistance [43] and factual basis for justification appeared in broad terms in paragraph 61 [40]). The Claimant replied, by email on 27 November 2019, taking a neutral stance on amendment and noting its position on the evidence advanced at hearing.

Applications

16. The Claimant's application of 25 September 2019 to adduce a medical report was rejected by Judge A Frazer at a preliminary hearing in person on 30 September 2019.

17. The Respondent's email of 22 November 2019 was treated as an application to provide further particulars of the legitimate aim (as per the agreed list of issues) in respect of the generally pleaded justification defence in the grounds of resistance. The application was granted on the basis that the defence was pleaded in general terms already, the list of issues was an agreed document which included the wording of the legitimate aim, no point had been taken by the Claimant at the hearing or in submission and the Respondent would suffer significant prejudice were it not permitted to rely upon the legitimate aim in respect of dismissal.

The hearing

18. The hearing was originally listed over eight days but, due to the Employment Judge's unavailability, the Tribunal did not sit on 9 October 2019 reducing the length of the hearing to seven days.

19. The first day of the hearing was reserved for the Tribunal to read. A timetable for cross-examination was agreed and adhered to, completing during the morning of day seven (8 October 2019). Counsel indicated at the outset their preference for written submissions in light of the time available and number of witnesses.

20. Due to the number of witnesses and lack of particulars in the interim Schedule of Loss [70], it was agreed at the outset that the hearing would deal with the question of liability only.

Witnesses

21. The Claimant (previously called Catherine Kirk) was the sole witness in her case; the Tribunal read the Claimant's witness statement and disability impact statement [77].

22. The following witnesses gave evidence for the Respondent:

    a. Gareth Davies, Senior Radiographer and former nightshift colleague of the Claimant;
    b. Kathryn Houghton, Radiographer and former nightshift colleague of the Claimant;
    c. Victoria Hartley-Smith, (previously Hartley-Lyons), Clerical Assistant in the emergency radiology reception and former night shift colleague of the Claimant;
    d. Kirsty Huey, Superintendent Radiographer in CT;
    e. Thomas Phillips, GP and former Locum Senior House Officer;
    f. Aidan Kinsella, Radiographer and former nightshift colleague of the Claimant;
    g. George Oliver, Physiotherapy Service Lead, primary care – authored fact-finding report in respect of the nightshift radiography team;
    h. Judith Harrhy, Assistant Head of Workforce and Organisational Development for Capital, Estates and Facilities Service Board – panel member considering the Claimant's application for injury allowance;
    i. Ceri-Ann Lawless (previously Hughes) , seconded as Business Change lead for Velindre Cancer Centre (substantive post Head of Workforce and Organisational Development);
    j. Rhodri John, Clinical Board Operational Support Manager;
    k. Tracey Morris, Superintendent Radiographer and former line manager of the Claimant (identified by her full name in this judgment to avoid confusion with Samantha Morris, Ms Hartley-Smith's line manager);
    l. Carole O'Shea, Deputy Superintendent Radiographer – managed the Claimant's final period of sickness absence;
    m. Alison Bax, Site Superintendent Radiographer and Professional Head of Radiography – made the decision to dismiss the Claimant.

Bundle

23. An agreed bundle of approximately 1000 pages was referred to the Tribunal. Some additional documents were adduced and added to the bundle at the start of the hearing, without objection.

Adjustments

24. The Claimant requested adjustments to the hearing in light of her mental health issues, which were agreed and recorded in the case management order of 27 September 2019 (paragraph 14 - breaks on request, staggered arrival times, the Claimant to be settled in the hearing room prior to the Respondent and the Respondent to have a maximum of 4 witnesses present during the Claimant's cross examination). The parties were thanked for their cooperation in complying with these adjustments.

25. No request for adjustments was made on behalf the Respondent's witnesses.

Agreed matters

26. The Respondent concedes that the Claimant is a disabled person within the meaning of section 6 EqA by reason of mental impairment. The Respondent accepts that it had knowledge of the Claimant's disability from 19 September 2011.

27. The Claimant concedes that references to the "two patients issue", in section E of the agreed list of issues, should in fact be a reference to one patient only – the elderly femur x-ray patient of 11 May 2016.

28. The Respondent's radiology managers had not undergone mental health training [658] at the time relevant to the claim.

29. The agreed list of issues indicates where the parties are agreed on certain elements of legal tests (e.g. whether a matter amounts to a PCP).

30. In this judgment references in square brackets are to page numbers in the agreed bundle and references in round brackets are to paragraph numbers in the witness statements, which in turn are identified with initials.

Credibility

31. The Claimant conceded in respect of a number of matters, referenced below, that her witness evidence was wrong (e.g. the dose of medication she was prescribed by her GP). Just because a witness is wrong about one thing, does not necessarily mean they are wrong about another; however, the Tribunal formed the view on the totality of the evidence that the Respondent's witness evidence did not suffer from similar inaccuracies and was therefore more reliable.

32. Unfortunately, we came to the conclusion that the Claimant's perception and reporting of events was coloured by a deep seated grudge she held

with regard to Ms Hartley Smith. We reached the view that the Claimant engaged in acts of retaliation against her.

33. We also formed a view that the Claimant adopted a practice of submitting complaints to deflect blame in circumstances where she believed a complaint would be made about her. The Claimant was also willing to fabricate events to deflect attention from her shortcomings (e.g. the comment attributed to Mr Davies about his manager Ms Burns).

34. For these reasons the credibility of the Claimant's evidence was, we felt, undermined. Where there is a factual dispute between the parties, we prefer the account of the Respondent's witnesses unless specified otherwise.

Factual Background

35. The Claimant was a long serving member of staff, employed from 1 July 1982 until 6 December 2017. The Claimant's role was that of band 6 radiographer. She was also appointed as a trade union official. From 1985 onwards the Claimant worked nightshifts, initially at Cardiff Royal Infirmary and then latterly at Heath Hospital (UHW). The Claimant was dismissed with notice for capability by letter of 14 September 2017 [717].

Disability

36. The impact statement deals with factual matters that go beyond disability. The Claimant describes being diagnosed with anxiety and depression from 1984. The Claimant has taken prescribed antidepressant medication since then. The Claimant describes experiencing low mood, feelings of fear, confusion, memory cognitive problems and disturbed sleep. The Claimant describes her symptoms as fluctuating on a daily and hourly basis. The Claimant says that her symptoms are worse when she perceives she is under threat or intense pressure. In those circumstances she experiences a "fight or flight" response which gives her a heightened sense of panic, alarm and distress. The Claimant says she is more vulnerable to experiencing stress due to her mental impairment.

37. The Claimant says (paragraph 5) "my mental health illness has led to a lack of focus and concentration at times; this affected my judgement and the ability to make the correct decision. This then affects my confidence and self-esteem when things inevitably go wrong and mistakes occur, especially in relationships with colleagues." The Tribunal was not shown medical evidence that the Claimant's behaviours (of which her colleagues complained) were as a result of her mental impairment.

38. The Claimant describes becoming withdrawn and quiet in work (paragraph 13). In June 2016 the Claimant describes the reaction to an email sent by Tracey Morris about the tuck shop as precipitating a “nosedive into the depths of depression and despair” (paragraph 15). The Claimant describes being signed off on sick leave by her GP and her medication being increased. However this evidence was not accurate, and the Claimant conceded in cross-examination that her prescription (20 mg paroxetine) did not in fact increase [895].

39. The Claimant informed management of her mental impairment; telling Ms Bax in 2011 [178] and Ms Morris in 2015 [202]. Initially the Claimant was reluctant for her managers to speak with her night shift colleagues [202] but by 10 January 2017 the Claimant provided wording describing her mental impairment to Ms Morris for the purpose of sharing with her colleagues [373]. Ms Morris duly did so in one-to-one meetings with the team (e.g. paragraph 26 GD).

40. The information the Claimant provided by email of 10 January 2017 to be shared with her colleagues was “I suffer with mental health issues and have been of with work-related stress and that I need support, understanding and empathy in the workplace from my colleagues as I struggle when dealing with stress on occasion; as a result my demeanour and body language can often give the wrong impression.” [373]

41. There is no dispute that the Claimant had a mental impairment and experienced trauma as a child. However, the Tribunal finds that the behaviours of which the Claimant’s colleagues complained were not symptoms of her disability. There is no medical evidence to support that contention; only the Claimant’s own evidence. The Claimant’s evidence is undermined by the fact that she was able to modify her behaviour in the presence of senior colleagues. Furthermore our findings in respect of behaviour towards Ms Hartley Smith are that the Claimant engaged in poor behaviour towards her in acts of retaliation; not as a ‘flight or fight’ reaction to a stressful situation.

42. Additionally, the Claimant does not accept that she behaved badly towards her colleagues following her return to work in December 2016. Our findings below are that she did and that they raised legitimate complaints about her. Since the Claimant does not accept that she behaved in the way they complained of, she cannot assert that behaviour was due to disability.

43. Finally issues of credibility as a witness were taken into account when reaching our conclusions.

Working relationships

44. A recurring theme in the case was that the Claimant was involved in difficulties with her workplace relationships. The Respondent's radiographer witnesses described the Claimant as being and having a reputation of being difficult to work with and that she was the subject of informal and formal complaints due to her manner and tone. They described the Claimant as 'prickly' and difficult to work with, particularly when they were of the same or lower band than the Claimant.

45. Ms Bax describes a history of the Claimant falling out with her colleagues (paragraph 23 - 27 AB). When instances of falling out with colleagues Angela Dew and Sharon Fanning was put to the Claimant in cross-examination, she did not deny it.

46. The Claimant had an altercation with a casualty nurse/doctor in 2011, for which the Claimant faced disciplinary investigation. Whilst this process was ongoing there was a further altercation between her and a nurse in the Emergency Unit (EU). Ms Bax supported the Claimant at the time, which led to the Claimant writing her a letter of thanks, undated but received on 19 September 2011 [178]. In it, the Claimant said, "I'm ashamed of myself and some of the behaviour I've exhibited in the past". In this letter the Claimant disclosed her depression and trauma experienced in her childhood. The Claimant said, "I'm not good with dealing with conflicts in the workplace I tend to panic inside, and fluster and it comes out appearing rude and defensive". The Claimant also refers to going through the menopause.

47. A further issue arose at a meeting on 14 February 2013 scheduled as part of a dignity work process with the Claimant's then line manager Helen Burns [187]. The meeting was held as a result of Ms Burns raising with her, complaints about the Claimant received from other staff. During this meeting the Claimant alleged that other staff had issues with Ms Burns including Mr Davies; telling Ms Burns "even Gareth wants to punch your lights out" (Paragraph 29 GD). The Claimant accepted in cross-examination that she did say words to this effect to Ms Burns and that her allegation regarding Mr Davies was false. The Claimant asserted in her witness statement that Ms Bax disclosed to colleagues what the Claimant said to Ms Burns during the meeting. However, the Claimant accepted in cross-examination that this was not correct and that Ms Burns herself had spoken to the relevant staff [200].

48. From this point onwards relationships between the Claimant and Mr Davies were particularly strained. Attempts were made by management (Sue Bailey) to resolve the interpersonal relationship difficulties, including by speaking with Mr Davies and Mr Kinsella about their relationship with

the Claimant [192] in June 2013. The Claimant indicated in an email of 18 July 2013 that her relationship with Mr Davies was causing anxiety but had been better during the nightshift on 15 July 2013 and the Claimant hoped that "we had turned a corner" [200].

49. On 5 October 2015, Ms Morris held a meeting with the Claimant to discuss complaints received with regard to her being rude and obstructive. The Claimant was informed that no disciplinary action would be taken at that point, but any future complaints would be investigated. During the meeting the Claimant indicated that her anxiety led to a coping mechanism of being blunt which could be perceived as rudeness [202]. The Claimant thanked Ms Morris for their discussion by email the next day [205].

50. Although he did not work on the nightshift with the Claimant in 2017, Mr Kinsella's evidence was that she was a difficult colleague to work with and that he was very relieved when his shifts were changed, and he did not have to work with her again.

Performance

51. No formal action was ever taken in respect of the Claimant's performance.

52. The Respondent's radiographer witnesses described the Claimant as adopting practices so as to avoid work, such as not getting up to take her turn when jobs came in by phone and absenting herself from the department for extended periods of time. The Respondent's radiographer witnesses reported noticing this issue when working as the Claimant's peer, but those who have been promoted into more senior roles observed that the Claimant's approach to work was more enthusiastic when working with them as managers (TM paragraph 4 & 5 and CO'S paragraph 3).

Nightshift radiology team

53. The Claimant worked on nightshift with two other radiographers. There were at least two Band 6 radiographers present on every nightshift. There was no regular line management presence during night shift, but the team had access by telephone to an on-call manager. This telephone access to management was used only infrequently. The Claimant's line manager worked predominantly day shifts but would overlap with the Claimant on some days, in the period towards the end of the Claimant's shift and the start of the manager's shift.

54. In their experience, the Tribunal non legal members wish to comment that workplace relationships might have been more effectively monitored and managed, had there been a manager on shift at night.

55. There is a difference between day and night shift in terms of the type of work performed by radiographers; night shift involved emergency work and did not involve performing some specialist procedures.

56. If night radiographers were required to do a 'portable' they were sent on to the wards to carry out work. Initially cassettes were used to obtain images but latterly this changed to digital imagery. The Claimant's colleagues describe the Claimant as avoiding work (e.g. AK paragraph 4) such as only taking out one imaging cassette on portables so that she could only complete imaging for one patient, whereas other staff would take out more than one cassette in case other jobs on the wards came up whilst they were away from the radiography department (AK paragraph 6).

Relationship with Victoria Hartley Smith

57. The Claimant worked with Ms Hartley Smith's mother at CRI. The Claimant knew Ms Hartley Smith for many years; as a child Ms Hartley Smith used to ride the Claimant's horses.

58. Ms Hartley Smith commenced work with the Respondent in 2013 and described her working relationship with the Claimant as having deteriorated over time. A particular issue arose in 2013, when during a night shift the Claimant refused to let Ms Hartley Smith go to the toilet (paragraph 15 VHS). This led to management involvement following a complaint by Ms Hartley Smith.

59. In or around early 2016 the Claimant and Ms Hartley Smith participated in mediation between them, with Sue Bailey (referred to in an email of 12 May 2016 [214]).

60. Ms Hartley Smith describes the relationship as deteriorating quickly in 2016 when she "started to stand up to (the Claimant) a little more" (paragraph 16 VHS). This deterioration of the relationship is evident from the Claimant's side also; in her impact statement she states "Ms Hartley Smith could manipulate and embellish information and was persuasive in getting staff to believe her version of events" and "I was being humiliated in work as the "other party" was vocal in her glee getting the support from management and relating her story to anyone that would listen" (paragraph 11 & 12 impact statement).

Incident of 11 May 2016

61. Towards the end of the nightshift of 10/11 May 2016 an incident occurred which led the Claimant to make a complaint, and which the Claimant asserts as her first protected disclosure.

62. An elderly patient with dementia on one of the wards, required an x-ray prior to surgery on a break to her femur caused by cancer. Dr Phillips was on duty overnight on the ward and realised that the patient had not been taken down to emergency radiography (ER) by a porter for her x-ray. Dr Phillips' professional opinion was that it was imperative that the x-ray was done overnight (paragraph 6 TP). With the help of a student nurse, Dr Phillips made a call to reception to explain that an x-ray was necessary and then wheeled the patient down, in her bed, to ER.

63. The preferred method of transport for patients on the ward to ER, is for them to be transferred from their bed on the ward on to a trolley, via a slide. This procedure is usually performed by porters.

64. Dr Phillips describes arriving in ER and looking to find someone to assist; the Claimant walked past, and Dr Phillips spoke to her and explained that a femoral x-ray was required. Dr Phillips describes the Claimant as being "short but civil" with him but "let loose" at the receptionist using an unnecessarily unpleasant tone.

65. This occurred towards the end of the Claimant's night shift. Ms Huey had arrived to start her day shift and together with the Claimant they carried out the x-ray. Instead of transferring the patient onto a trolley, Ms Huey recommended rolling the patient in order to place an x-ray cartridge underneath her. Ms Huey concedes that this method was not optimal for achieving the best x-ray but there was no way of achieving the x-ray with less handling of the patient (paragraph 19 KH). The rolling manoeuvre was performed in the presence of Dr Phillips, who did not perceive there to be a risk to the patient. Dr Phillips felt that although there was a risk of pain this was inevitable with moving a patient with a break and that even if porters had been available, there would have been the need to transfer the patient to a trolley and then back from the trolley onto her bed. The way in which the x-ray was performed on the bed meant the least amount of manoeuvring for the patient (paragraph 14 and 15 TP).

Alleged protected disclosures

66. This incident of 11 May 2016 led the Claimant to document her concerns in what she asserts are her first, third and fifth protected disclosures:

    a. the Claimant's email to Tracey Morris of 11 May 2016 [213];
    b. the Claimant's letter to Tracey Morris of 23 May 2016 [218]; and
    c. the Claimant's written statement of 13 February 2017 and subsequent meeting [397] and [400].

Claimant's email of 11 May 2016 (alleged protected disclosure 1)

67. The email starts with "I'm sorry to forward my moans to you, but I feel very strongly about something happened at 7:20am this morning concerning Victoria sending for ward patients without discussing the matter with me/Kate"

68. The extract from the email relied upon as a protected disclosure is as follows "the other was for a full length femur view due to NOF because of metastases. We had to roll the patient 3/4 times to get the detector underneath her which caused excruciating pain. It was good that the doctor was there but her whole experience would be better if she had been on an x-ray trolley. Also, as she had mets we could have given her another injury. I did suggest to patslide her onto the x-ray table but Kirsty Huey suggested we roll her."

69. Ms Hartley Smith reported her concerns about the Claimant in an email to Samantha Morris of 11 May 2016 [214] asserting that the Claimant was "verbally nasty, having a go at me… Shout and berate at me in front of Dr Phillips and a nurse "

70. Samantha Morris discussed the issue with Ms Hartley Smith and emailed Ms Bax and Tracey Morris as follows "Victoria therefore agreed for the ward staff to deliver the patient ER not realising that it was for a femur and therefore should be have been on a care trolley… Victoria fully acknowledges the error. The incident of Cathy's admonishment was witnessed by the patient, doctor and nurse which in my opinion is totally inappropriate."

71. In an email of 13 May 2016, Tracey Morris acknowledged the Claimant's email of 11 May 2016 [216]: "Victoria has acknowledged her mistake with the mode of transport for the patient. I do not have a problem with the clerical staff using their initiative and arranging urgent patients to come to the Department or asking the ward to bring patients down themselves if there are portering problems. What does need to be discussed with the radiographers is the mode of transport. I note that Kirsty suggested rolling the patient onto the detector, however I think for image quality and patient comfort pat sliding is always the best option."

72. In an email of 18 May 2016 from the Claimant to Tracey Morris the Claimant asked whether Ms Hartley-Smith was pursuing a formal complaint. The Claimant then referred to "Victoria's obsession with the x-ray tuck-shop" and indicated if the matter was being pursued formally "I shall have to make a counter complaint about the above that Victoria's actions with the ward patients situation directly led to a patient being put through extreme pain and discomfort… I shall also enter it on datix".

Claimant's letter to Tracey Morris of 23 May 2016 (alleged protected disclosure 2)

73. The Claimant prepared a written statement in respect of the incident on 11 May 2016, at the request of Tracey Morris. The extract relied upon as a protected disclosure is: "I had no opportunity to establish her (the femur patient) position on the theatre list and the level of pain relief she required prior to transfer, the manual handling needs given the level of pain she was in. My other concern was that the nature of her already documented pathology indicated that inappropriate and unnecessary manual handling could have resulted in further injury".

74. The Claimant concluded her statement with the following: "where she was positioned on the theatre list, it may have been more advantageous for her if she had been transferred to the main x-ray department only 20 minutes later. There she would have been dealt by a team of x-ray porters that would have ensured her transfer had taken place on an appropriate trolley and her manual handling needs would have been supervised by nurses on the ward who could have also assessed and acted on her analgesic requirements".

Ms Hartley Smith's complaint

75. Ms Hartley Smith formal complaint about the Claimant included her version of events of the 11 May 2016 [219]. In her account she described taking the call from Dr Phillips in respect of two patients for x-rays as they were in theatre the following morning and saying that if Dr Phillips needed the patients to be x-rayed prior to the main department opening, due to a lack of porters, they would have to bring the patients down themselves from the ward. Ms Hartley Smith says she heard nothing more from the ward until the patient arrived on a bed. She complained that the Claimant then "erupted" shouting at her "what was I thinking, I should not let them come down" and humiliated and belittled her. "Cathy Kirk could plainly see that what she was doing was rude, condescending argumentative and very humiliating but she continued with this behaviour. This is not the first time this has happened with her and I had hoped after the mediation session we had she would think twice before bullying or victimising me".

Witness statements regarding 11 May 2016

76. Dr Phillips provided a statement on 25 May 2016 [221] in which he refers to the Claimant's exasperated tone to the receptionist, suggesting that she had done something wrong in telling them to bring the patient down and gesticulating frustration by throwing her hands in the air. Dr Phillips says

he was “a little dismayed at the tone of voice used by the radiographer when she spoke to the lady at the desk”.

77. Ms Houghton was also asked to provide a statement, which she did on 27 May 2016 [223]: (the Claimant) “loudly blamed Victoria for ‘ordering them to come on a bed’” and that Victoria was “visibly very upset and close to tears”; “she told me that Cathy had been very angry with her and told her off in front of the patient, doctor and NA about the patient being on a bed”.

78. Ms Huey provided a statement on 8 June 2016 [238] in which she states that because the patient was on the bed it made the x-ray more difficult to perform to a diagnostic standard. With reference to the Claimant she states “the radiographer also said that moving the patient could cause significant distress” but the doctor said he would supervise moving the patient. Ms Huey also recalled “there was some discussion as to the distress caused to the patient by taking her back to the ward, transferring her onto a trolley and then bring her back to the Department”.

79. The Claimant placed the blame for the mode of transportation of the femur patient from the ward on Ms Hartley Smith. However there was no direct evidence that she had requested that the patient come down on her bed and Ms Hartley Smith denied it.

Tuck shop

80. During the nightshift at UHW there were no facilities to purchase food and drinks apart from vending machines. With stock left over from a Christmas party, Mr Kinsella established an unofficial tuck shop in /around 2015 in the radiology department, selling crisps, sweets and cans of drink. The tuck shop operated on the basis of an unattended honesty box for payment and the proceeds were used to purchase items for the staffroom including a fridge and kettle.

81. At some point in 2016, Ms Hartley Smith became involved in the tuck shop and in her own time purchased a wider variety of stock for it. Ms Hartley Smith would stock the tuck shop before the start or after the end of her shift, or when she left the reception desk to make a cup of tea or coffee whilst the kettle was boiling. Ms Hartley Smith only left reception at times where there were no patients waiting and she asked one of the radiographers to cover for her (paragraph 24 VHS).

82. The presence of the tuck shop became common knowledge and at times staff from different departments working on the nightshift would come to the radiology staffroom to purchase food and drink.

Alleged protected disclosures 3 and 4 – tuck shop

83. The Claimant asserts she made the following protected disclosures with regard to the tuck shop:

    a. email from the Claimant to Tracey Morris of 2 June 2016 [228]; and
    b. letter from the Claimant to Tracey Morris of 7 June 2016 [234].

84. The extract from the email of 2 June 2016 [228] relied upon as a protected disclosure is: "as a result of the matter being handled formally I am now making a formal complaint about Victoria Hartley Lyons (now Smith) as concerning her conduct on 11 May 2016 and use of work time to run a profit-making tuck shop".

85. The Claimant followed with an email of 7 June 2016 [233] attaching her formal complaint of the same date [234] headed "Formal concern re-: Victoria Hartley Lyons band 2 clerical officer emergency radiology department". The extract relied upon as an alleged protected disclosure is: "it also concerns me that Victoria takes a significant role in running a profit-making tuck shop in ER whereby she buys stock i.e. crisps/chocolate/coke and frequently leaves the ER reception desk unattended to attend to stocktaking duties, sometimes asking radiographers to man the reception desk in her absence."

86. In response to the Claimant's concerns expressed in the email of 2 June 2016, Tracey Morris sent an email to nightshift radiographers (excluding the Claimant) on 3 June 2016 [231] posing the following questions:

    "When on shift does Victoria leave the desk unattended to deal with the tuck shop?
    If yes is this when there are patients in the Department?
    If yes does she inform a radiographer?
    Any other additional comments/information"

87. The email from Tracey Morris did not mention the complaint by the Claimant. Mr Davies and Ms Houghton's evidence, which we accept, was that they were not aware of the Claimant's complaint about the tuck shop and had not noticed who was included in the list of recipients. Mr Davies' evidence in response to cross examination was that the Claimant did not use her work email. Other tuck shops had been established in other parts of the hospital and Mr Davies understood that management were making enquiries to find out what was going on. We accept this explanation and conclude that the Claimant's colleagues were not aware of the complaint at the time in question. The fact that the Claimant's name was missing from the recipient list, in and of itself, is not sufficient basis on which to

infer that colleagues would conclude that she had made a complaint, particularly in circumstances where she did not use a work email.

88. Mr Kinsella, Mr Davies, Ms Mafongoya and Ms Houghton provided responses to Tracey Morris [231, 232, 240, 242] dated between 6 and 10 June 2016.

89. The Claimant was informed by a colleague that Ms Morris had sent a "round-robin" email enquiring about the tuck shop (paragraph 48 CD). Subsequently the Claimant emailed Tracey Morris on 8 June 2016 [244] noting observations from the nightshift which she said had led her to suspect that Ms Hartley Smith had knowledge of the Claimant's concerns about her.

Datix

90. More than a month after it occurred, the Claimant submitted a datix incident report on 17 June 2016 regarding the incident on 11 May 2016 [251].

Sickness absence (June to December 2016)

91. The Claimant commenced long-term sickness absence on 16 June 2016 [253]. The Claimant attended a meeting in the human resources department on 12 July 2016 with Tracey Morris and Mr John of HR. The Claimant attended with a trade union representative, Mr Monks.

92. The Claimant was accompanied by trade union representatives (Mr Monks and latterly Mr Roach**)** at all meetings, save for a meeting in December 2016 with Tracey Morris and a sickness meeting with Ms O'Shea in May 2017, where no HR representative attended either.

93. The purpose of the meeting on 12 July 2016 was to discuss the Claimant's sickness absence and also the complaints between the Claimant and Ms Hartley Smith. The Claimant agreed to undergo mediation again with Ms Hartley Smith and this was recorded in a follow-up email from Tracey Morris [257].

94. The Claimant was referred for occupational health assessment [252]; in the referral form Tracey Morris indicated that alterations / adaptions had not been made to her role: "unable to modify duties on nights due to the reduced number of staff. Duties could be modified if staff member worked days" [254].

95. The Claimant attended sickness absence meetings with Tracey Morris on 11 August 2016 and 8 September 2016. The Respondent offered to meet at the Claimant's home (CD paragraph 63) but she declined.

96. The Claimant asserted that she was uncomfortable with the attendance of Mr John from HR. Subsequently the Claimant requested a female HR officer attend instead of Mr John. Tracey Morris asked the reason for the request [292]; the Claimant replied that "there are some reasons I would feel less anxious if you are accompanied by female HR officer". Tracey Morris and Mr John discussed this request in an email exchange on 3 October 2016 [291], the outcome of which was that Mr John asked Tracey Morris to inform the Claimant that "we cannot get a female HR representative to attend and the meeting will be an opportunity to discuss her concerns". The Claimant mentioned her request for female HR officer during occupational health assessment and it was recorded in the OH report of 3 October 2016 [293], without giving a specific reason, referring only to discussion of "other symptoms".

97. The Tribunal does not consider that the Respondent 'lied' about the availability of a female HR representative as submitted by the Claimant. We accept the evidence of Mr John (RJ paragraph 13-14) where he explains the reasoning for his approach to the Claimant's request. Mr John did have female HR colleagues but they had their own workload and the Claimant had not provided a clear explanation for her request. Mr John suspected that the request was made due to him personally rather than his gender. The fact that the Claimant was accompanied to meetings by male trade union representatives lends credence to Mr John's evidence in this regard.

98. In any event, a female HR representative, Theodora Angelova, attended the next long-term sickness interview on 10 October 2016 in place of Mr John. It was only at that meeting that, the Claimant indicated the reason for her request was that she felt more comfortable discussing menopause symptoms in the presence of female HR representative**.** Ms Angelova then attended further meetings as the HR representative in place of Mr John.

Occupational health

99. In the sickness absence period commencing 16 June 2016 the Claimant attended occupational health assessments on:

- 1 August 2016 [260]
- 5 September 2016 [276]
- 3 October 2016 [293]
- 1 November 2016 [314]
- 26 November 2016 [344]

100. The occupational health reports noted that the Claimant would be vulnerable to stress due to underlying mental health condition and noted her need for support and empathy. Return to work was envisaged with managerial support and the resolution of her outstanding concerns. Occupational health recommended a phased return to work with a stress risk assessment.

101. The Claimant changed her mind about whether she wished to inform colleagues about her mental health condition over time, but ultimately asked that Tracey Morris share details with colleagues from her written statement sent on 10 January 2017 [373].

Mediation

102. The Claimant and Ms Hartley Smith attended a further mediation on 7 October 2016, at which it was agreed that Ms Hartley Smith would have a safe word which she could use if she found the Claimant's behaviour upsetting. The action plan following use of the safe word was that the Claimant and Ms Hartley Smith would take a break from each other for 20 minutes and then meet to discuss the issue that had arisen [299a].

Stress risk assessment

103. A stress risk assessment (SRA) was undertaken with Tracey Morris on 23 November 2016 [335-343]. The guidance on completing the assessment form, dated 2008, states that the risk assessor should be someone who has undertaken stress awareness training e-learning. Tracey Morris accepts that she had not undertaken this training.

104. The Claimant did not identify demands of her job or control in the way that she did the work as being stress factors [337]. The Claimant indicates contributory stress risk factors included; support, relationships, role and change. Agreed actions are recorded [338] including introducing a) a monthly night email group and b) a staff location section on the existing white board in ER. The other actions noted were by way of reminder to staff of processes and indicated the Claimant's own understanding of processes and what to do if she wished to raise concerns.

105. The existing white board in ER was given a location section to pass information about staff whereabouts; this action was implemented. However uptake by staff was not good and the Claimant herself conceded that she did not use it. When the Claimant conceded that she herself was not using the whiteboard in this way, Tracey Morris suggested that she should start doing so and others may follow.

106. The suggestion of a monthly group email was not implemented before the Claimant went off on long-term sickness absence again.

107. Prior to the Claimant's return to work, Ms Hartley Smith raised her concerns about the return with Tracey Morris by email of 7 December 2016 noting that she was due to work with the Claimant on 2 January 2017 and stating that she was worried about the shift [354].

Return to work

108. The Claimant indicated that she was well enough to return to work over the Christmas period 2016 [358]. Staff took it in turns to have every other Christmas period off. Christmas 2016 was the Claimant's turn to work. The Claimant was allocated half shifts at her request but complained that she had been allocated more Christmas shifts than her colleagues. In response the Respondent explained that this was not the case and offered to defer the Claimant's participation in Christmas shifts until the next year [333]. In the end the Claimant did work but gave some of her Christmas shifts away. She returned to work on 26 December 2016 by working from home on call. Her first shift physically present at UHW was on 29 December 2016.

109. Tracey Morris was not working on 29 December 2016, but arrangements were made for a colleague to meet the Claimant and communicate updates [358]; so the Claimant was afforded a shift specific handover. The possibility of Tracey Morris not being available had been foreshadowed in sickness absence meetings prior to the Claimant's return to work.

110. Tracey Morris emailed the Claimant the day after her first shift on 30 December 2016 [370] to arrange a meeting: "if you want to come in next week we can meet or we can leave it until the week after and I can see you at the end of your shift, whichever you prefer. If you need anything in the meantime please ring or email me". The Claimant responded on 3 January 2017 [369] saying "I do not think I shall be able to get in this week to see you, will catch up next Wednesday morning if that's okay?" The email does not indicate the Claimant had experienced any issue with colleagues upon her return.

111. Upon her return to work the Claimant worked the following shifts: 29 December 2016, 3, 10, 13, 17, 19, 24, 26 and 31 January and 2, 7, 9 and 10 February 2017 (Paragraph 85 CD) before being signed off on long-term sickness absence again.

Allegations of incidents during night shifts

112. The Claimant and the other staff working on the night shift, following her return to work give, different accounts of the interpersonal relationships.

113. The Claimant asserts (paragraph 85 – 90 CD) that the following behaviours were displayed towards her on each of the 12 shifts she worked from 29 December to 10 February 2017: not greeting the Claimant at the start of his shift, little or no verbal communication, ostracising the Claimant and huddling around reception for most of the shift, deliberately placing high demand for portable patients compared to others, deliberately withholding details and information for the Claimant to carry out a job, refusing to answer questions about work-related information, undermining the Claimant professionally by discussing her work with other professionals in front of her, discussing the Claimant behind her back and glaring at the Claimant to show disapproval and disgust.

114. Ms Houghton recounts attempting to engage with the Claimant upon her return to work on 29 December 2016 and being rebuffed by the Claimant (paragraph 31 KH).

115. Mr Davies accepted that he would at times respond to queries from other healthcare professionals who wanted to discuss patient images. We accept Mr Davies' evidence that he would usually be logged onto the viewing system, whereas the Claimant would not usually be logged on. The unchallenged evidence of Mr Davies was that the identity of the radiographer whose image was being enquired about would be unknown until the viewing system was accessed. We conclude on the weight of the evidence, including that of the Claimant, that it is likely that health care professionals from other departments chose to present queries to Mr Davies because he was more approachable that the Claimant.

116. Ms Hartley Smith had adopted a particular way of working by colour coding forms to identify which radiologist was working on which patient. Her evidence was that the Claimant deliberately ignored her method of working and scribbled on forms, despite her request to comply with it. Ms Hartley Smith also asserts that the Claimant threw x-ray forms at her through the window at the reception desk rather than placing them on her desk (paragraph 37 – 39 VHS). In cross examination, Ms Hartley Smith's evidence was clear about her systems of work and the long history of poor behaviour displayed towards her by the Claimant. Her account of the latter is supported by the fact that mediation was deployed on two occasions in order to attempt to improve working relationships.

117. During the nightshift of 31 January 2017, the Claimant attempted to require Ms Hartley Smith to take a break at a particular time and complained when Ms Hartley Smith refused because she wished to complete her filing. Ms Hartley Smith was sufficiently upset by relationships with the Claimant that she was signed off sick from work from 1 February 2017.

118. The Tribunal has reviewed the split of work between the radiographers over the period after the Claimant returned to work in December 2016 [153-176]; no challenge was made in respect of this information and we accept it as accurate. It is evident from the data that the Claimant was not assigned a disproportionately heavy workload. During this period, no one particular radiographer took on more work than others. We accept the evidence of Ms Hartley Smith that she had no control over the work that came into the department; patients would arrive, and she would receive calls from wards and jobs were allocated randomly to whichever radiographer responded first. We reject the suggestion that Ms Hartley Smith manipulated or controlled the work given to the Claimant. In fact, if anything there is evidence of the reverse, the Claimant attempted to control Ms Hartley Smith's work by asking she go on break during the night shift of 31 January 2017 (CD paragraph 85), in circumstances where she had no managerial responsibility for Ms Hartley Smith.

119. The Claimant's animosity towards Ms Hartley Smith, was evident from the way in which the Claimant wrote about her in her complaints e.g. her 'obsession' with the tuck shop [228]. Also we conclude that the Claimant was motivated to complain about Ms Hartley Smith in an act of retaliation 'As a result of the matter being handled formally I am now making a formal complaint about Victoria' [228].

120. The Claimant admits her historical poor behavior in her 2011 letter to Ms Bax [178] in which she says she is 'ashamed' of herself. The evidence from Mr Kinsella, who is one step removed from the events which are subject of the claim, is that the Claimant's behaviours were difficult over many years. Ms Houghton wrote an email on 27 May 2016 detailing her concerns about the Claimant, after working with her for only 2 months [224]. Our overall assessment of the evidence is that we prefer the accounts of Mr Davies, Ms Houghton and Ms Hartley Smith where they conflict with that of the Claimant. The weight of evidence before us was that the Claimant's behaviours were the source of conflict and upset for many colleagues over many years. We are also mindful that the Claimant's evidence has proved to be unreliable or inaccurate in a number of respects mentioned in this judgment, which whilst not conclusive in itself, is a factor we weighed in determining which version of events to prefer.

121. We will return to the detail of the allegations relied upon as acts of discrimination and/or detriment in our conclusions.

Occupational health

122. The Claimant attended an occupational health review on 23 January 2017 [380]. Their report records the Claimant's return to work and that the stress risk assessment has been completed with an action plan but notes that the outcome is yet to be fully implemented (without specifics).

123. The report also refers to the mediation with Ms Hartley Smith and the Claimant expressing concern regarding comments that Ms Hartley Smith made in a recent meeting between her, the Claimant and Tracey Morris. Other than that, no comments are recorded about workplace relationships.

124. The report does not recommend additional adjustments, other than fortnightly meetings and regular review of the stress risk assessment.

Shift of 31 January 2017

125. Workplace relationships were particularly strained again during the shift of 31 January 2017. This led to Ms Hartley Smith raising concerns with Samantha Morris [385] and being signed off on sickness absence from 2 February 2017. Samantha Morris' opinion was that the situation was untenable, and she was concerned for Ms Hartley Smith's well-being.

126. Both Mr Davies and Ms Houghton submitted separate complaints with regard to the Claimant's conduct on 7 February 2017 [497 and 499]. Mr Davies had never raised a complaint against a colleague before but felt moved by the Claimant's poor behaviour to do so. Mr Davies described the Claimant's demeanour and behaviour as getting worse and affecting his health; he indicated that he had been requesting Tuesday nights as annual leave to avoid working with the Claimant that this was not sustainable and he wished to avoid going on sickness absence. Ms Houghton described the Claimant as "difficult, obstructive, lazy, accusatory, confrontational and not a team player" suggesting that the Claimant's behaviour impacted on the health and well-being of the rest of the staff.

127. Mr Davies and Ms Houghton accept that they sent text messages to each other about the situation at work prior to submitting them, but deny colluding to present coordinated complaints. The content of the complaints is distinct. The fact that Mr Davies and Ms Houghton were in contact about

a difficult work situation does not lead the Tribunal to conclude that they colluded against the Claimant; they set out their particular concerns by way of grievance which they were entitled to do.

128. Ms Bax was concerned about the well-being of the night shift team and made the decision that the Claimant should be moved; she asked Ms O'Shea to convey the message to the Claimant [389].

Meeting with Carole O'Shea on 13 February 2017 (alleged protected disclosure 5)

129. A meeting [400] was convened at the request of the Claimant to address her concerns following her return to work. The Claimant had requested a different line manager deal with matters and accordingly Ms O'Shea was assigned to chair the meeting; this was not for 'an unknown reason', as conceded by the Claimant – (paragraph 94 CD) The meeting was also attended by Ms Angelova, the Claimant and her trade union representative.

130. Ms O'Shea informed the Claimant that the current situation was not sustainable, and that management were going to look into working relationships by a fact-finding exercise. That exercise was not being conducted under any policy. Ms O'Shea gave her view that it would be unsafe for staff to continue to work together until issues were resolved and that it was the intention to move the Claimant; the options presented to the Claimant were to change to work day shifts at UHW or to transfer to Llandough Hospital on night shifts. The option of transfer to Llandough was with flexibility on start time and travel expenses and work as a supernumerary position for a week, whilst the Claimant familiarised herself with the new workplace.

131. This proposal to move the Claimant from nightshift at UHW was made without prior warning and was to be implemented with immediate effect. Ms O'Shea agreed to give the Claimant some time to digest the information and to call Ms O'Shea the following day to respond. The Claimant rejected both options proposed by Ms O'Shea as incompatible with her caring commitments for her elderly mother. The Claimant enquired whether she could be suspended but was informed that this was not an option on the basis that the situation did not amount to a disciplinary matter at that stage.

Alleged protected disclosure 5 – statement of 13 February 2017

132. The Claimant asserts that her statement of 13 February 2017 [397] headed "official concern regarding the behaviour and conduct of Victoria Hartley Lyons Band 2 clerical assistant" amounts to a protected disclosure

in respect of the femur patient on 11 May 2016. The extract relied upon is: "a patient underwent unnecessary pain, due in my opinion, to Victoria acting outside of her scope of practice and not seeking the advice of professionally qualified staff when appropriate."

Sickness absence (February 2017 to dismissal)

133. The Claimant then commenced her final period of long-term sickness absence from 14 February 2017, after which she never returned to work. During this period the Claimant's absence was managed by Ms O'Shea; who conceded that she did not review the OH reports regarding the Claimant's absence during 2016 prior to managing her final absence.

134. The Respondent's absence management process is formal, in the sense it is governed by the Sickness Absence Policy [818]. Long-term sickness absence meetings were held between the Claimant and Ms O'Shea on 9 March 2017, 5 April 2017, 18 May 2017, and 27 June 2017 and 27 July 2017. Save as specified, representatives from HR and the Claimant's trade union were also in attendance. The meetings took place in a variety of meeting rooms; in HR offices, seminar rooms and in a social club.

135. The Claimant describes meeting with Ms O'Shea in the hospital social club on 5 April 2017 (paragraph 111 CD) with her trade union representative but without HR being present; at that meeting she discussed whether a 'buddy' could be made available to her (see below). Ms O'Shea met with the Claimant again in the social club on 18 May 2017 (paragraph 117 CD) and then on 27 June 2017 and 27 July 2017 in the medical physics room which the Claimant agreed was a quiet location (paragraph 125 CD).

136. From the emails that the Tribunal has seen, the Claimant and Ms O'Shea appear to have had a cordial relationship. Ms O'Shea appears to have been supportive, for example by checking that the Claimant was okay when she had not heard from her for a few days [470], which the Claimant said that she appreciated [469]. The Claimant sent an email of 25 May 2017 to Ms O'Shea which demonstrates warmth between them as it concluded "PS I appreciated your understanding and hug at our meeting x" [479].

137. Ms O Shea also appears to have been flexible to requests, for example where the Claimant asked to meet with her without HR and a trade union representative (due to unavailability), she was willing to attend the meeting just to discuss sickness issues on this basis as indicated in the email of 12 May 2017 [471]. A meeting subsequently took place on 18 May 2017 without representatives for either side being present [475].

During the course of meetings with Ms O'Shea, the Claimant indicated she was content with being managed by Tracey Morris upon her return to work, from which we infer the Claimant also had a cordial working relationship with Tracey Morris. It appears to the Tribunal that both managers were supportive and showed empathy towards the Claimant.

Buddy

138. The Claimant raised the issue of a buddy after she was absent on long term sickness absence; firstly with Ms O'Shea on 5 April 2017 and it was also discussed with Ms Bax on 20 June 2017. During the latter meeting the Claimant made two suggestions of potential mentors but the individuals named had either retired and returned to work or were close to retirement. Ms Bax indicated that inquiries would need to be made to see if the arrangement would work. Ms Bax's unchallenged evidence is that the Claimant responded with 'see I can't have one' and her TU representative had to intervene to say that was not what Ms Bax was saying (AB paragraph 52)

139. In a subsequent meeting on 27 June 2017 the Claimant asserted that Ms Bax had dismissed the idea of the buddy but Ms O'Shea stated that if they could agree how a buddy would work logistically it could be put into an updated stress risk assessment [553].

140. Discussions about a buddy system were hypothetical in nature because the Claimant remained absent on long-term sickness and in fact never return to work.

141. We find that the Respondent would have considered a buddy system. To make any system work there would need to be agreement as to how it might work and a suitable and willing buddy had to be identified with implementation upon the Claimant's fitness for work.

Application for ill-health retirement

142. Of her own volition, the Claimant completed an application for ill-health retirement (IHR) dated 21 April 2017 [456-462] and presented the form to Ms O'Shea during a sickness absence meeting on 1 May 2017.

143. The Claimant accepted that she completed the IHR application form before she knew whether OH would support IHR; additionally she accepted she made errors in completing the form.

144. On 18 May 2017, the OH report records that the Claimant was considering her options of redeployment and IHR [474]. On 21 June 2017 the Claimant chased Ms O'Shea to submit her IHR form; Ms O'Shea

responded the same day to say that her understanding of the process was that she must await paperwork from OH and this had not arrived. The Claimant contacted OH and passed on information to Ms O'Shea about the process in an email of 22 June 2017 [536].

145. At a meeting on 27 June 2017 with Ms O'Shea [608], the HR representative gave advice about the IHR process and promised to send the Claimant a flowchart [585]. The flowchart was provided by Ms O'Shea by email of 13 July 2017 [584]. Following HR advice and assistance the Claimant resubmitted her IHR application.

146. The Claimant sent an email on 23 August 2017 to Ms Lawless [625] chasing up the progress of IHR and noting "it has been from 1 May until 27 July for the correct procedure to be established". The Claimant also says: "however if the final sickness meeting is delayed and the PENSION DECISION IS MADE, the statutory notice period will be lost as it is no longer dismissal but a retirement". The Claimant accepted in cross-examination that she raised the issue of dismissal on notice to avoid loss of pay and pension contributions [626].

147. Ms Lawless responded the following day [622] pointing out that HR had provided advice on IHR during long-term sickness meetings on 27 June and 27 July and that OH had not supported IHR until their report of 28 June 2017 [562]. Ms Lawless went on to say that it was important for the final long-term sickness meeting to be held before a decision is made on IHR by the pensions agency, in order that the Claimant received payment for the statutory notice period. If the decision to approve IHR was made by the pensions agency prior to the final long-term sickness meeting taking place, termination was treated as retirement. In the latter circumstance, statutory notice was lost and contributions to the pension pot during what would be notice period would not be made [624].

148. The Claimant's IHR application was initially rejected by the NHS pensions agency but was granted on appeal, after dismissal.

149. In light of the above contemporaneous evidence and the Claimant's concessions in cross-examination, the Tribunal finds that the Claimant actively sought and drove the IHR application process, electing to make an application without input from management or HR and prior to obtaining OH support for the application, contrary to the process. We also find that the Claimant herself raised the issue of wishing to be dismissed, rather than retiring, as this outcome was financially advantageous to her.

George Oliver fact-finding report

150. Mr Oliver was approached to engage in the fact-finding exercise and to produce a report. He is independent of the radiology department. Terms of reference [493] were agreed by Ms Bax, who commissioned the report.

151. Mr Oliver met with the Claimant and those colleagues who had complained about her during March 2017. The report of 25 May 2017 [488] summarised the position of all four staff. A consistent theme emerged, which was issues with team dynamics on night shift and the conduct of individuals. The Claimant asserted that she felt isolated, victimised and discriminated against. Whereas the other staff described the breakdown in departmental relationships to be as a direct consequence of the Claimant's behavior [490], in her interpersonal behavior and because she avoided work. Mr Oliver summarised:

> "the concerns of all the staff interviewed as part of this fact find describe a clear impact of the current departmental working environment on their health and well-being. Both Catherine Davies, who remains on sickness absence, and Victoria Hartley Smith have required periods of long-term work absence at least in part related to the breakdown in working relationships. Negative impact on staff health and well-being outside of the nightshift radiology team has also been reported, as well as a reduction in departmental workflow, clinical governance concerns and issues with patient care."

152. Mr Oliver made general recommendations:

> "the breakdown in relationships appears to have reached a tipping point and in my view has in all likelihood become irreparable. The impact, from the interviews conducted, of this breakdown encompasses staff health and well-being, departmental workflow, clinical governance and patient care. It is therefore my recommendation that consideration be given to the methods by which a restructuring of the night staff team, within ER could be completed."

153. Mr Oliver also made individual comments in respect of the Claimant and Ms Hartley Smith; he suggested that disciplinary investigation may be required with regard to the Claimant's delivery of her professional role and a particular patient seen in January/February 2017 [492]. Mr Oliver identified a potential dignity at work issue with regard to the Claimant's behaviour towards Ms Hartley Smith. Additionally Mr Oliver suggested a period of supervised practice in respect of Ms Hartley Smith in response to

concerns about her working outside the scope of her role. Mr Oliver made it clear in his report that he was unaware whether these were matters that had already been dealt with informally or formally within the radiology department.

154. The Tribunal considers that the commissioning of the fact finding report was a reasonable management action aimed at discovering what was happening in terms of working relationships and their impact on service delivery, in circumstances where there was no line management present in the department at night.

155. The outcome of Mr Oliver's report was communicated to the Claimant by Ms Bax and Ms Lawless during a meeting on 20 June 2017 (CAL paragraph 21/22). The Tribunal considers that meeting the Claimant face to face was an appropriate management action which demonstrated care for the Claimant in circumstances where the report was critical of her alleged actions.

156. The Claimant was told that disciplinary investigation would be commenced. Ms Lawless suggested that Lesley Harris (Ms Bax's equivalent at Llandough Hospital) would carry out an initial assessment under the disciplinary policy. The Claimant objected to this suggestion noting her concerns in writing via her trade union representative, two weeks later, on 4 July 2017 [588-9]. Ms Lawless outlined her response to these concerns on 5 July 2017 and suggested that assessment should be carried out by Ms Bax or Ms Harris. Ms Lawless does not believe she received a response to the email (CAL paragraph 26).

Grievance

157. The Claimant raised a grievance on 26 July 2017 alleging disability discrimination [602-606]. A management response was drafted by Ms O'Shea with Ms Bax [643-660]

158. Ms Lawless contacted the Claimant's trade union representative on 17 August 2017 [616] chasing dates of availability for three hearings in respect of the grievance, long-term sickness absence and meeting with Ms Harris for disciplinary initial assessment. The following dates were agreed: 13 September 2017 for long-term sickness meeting, 14 September 2017 disciplinary initial assessment and 19 September 2017 grievance meeting [641].

159. Although the Claimant attended the long term sickness meeting, she did not attend the initial assessment for disciplinary or grievance meetings as notified by a trade union representative [720].

160. The Claimant subsequently withdrew her grievance [733] (AB paragraph 61).

161. Due to her non-attendance the disciplinary initial assessment process was not completed (CAL paragraph 40).

Occupational health

162. The Claimant attended occupational health assessments on:

- 13 April 2017 [444]
- 18 May 2017 [473]
- 28 June 2017 [562]

163. The OH report of 13 April 2017 records the Claimant's position that the stress risk assessment actions were not implemented, and her psychological ill-health was aggravated during a meeting with her manager the day before her sickness absence began. The report states "I'm concerned that changing work environment will have a negative impact upon her mental health" [446].

164. The OH report of 18 May 2017 notes that the Claimant is due to attend a long-term sickness absence meeting later that day and that from her perspective her work-related issues had not been addressed. The report notes that Mr Oliver's fact-finding outcome is outstanding, the Claimant remains unfit for work and is looking at options for the future including redeployment and ill-health retirement.

165. The OH report of 28 June 2017 notes the Claimant has been "deeply affected by details of the complaint made about her and the outcome of a fact-finding investigation. This has had a further impact on her psychological health.… The impact of this is that she does not think she could ever return to her substantive post and that she is not well enough for redeployment." The opinion of OH is that the Claimant was not fit for work in any capacity, not fit for redeployment and that ill-health retirement should be considered.

166. The Claimant did not contest the content of any OH reports. Whilst the OH reports indicate the Claimant's view that the recommendations in the stress risk assessment had not been implemented, the OH reports do not specify in what way. The Tribunal findings above about the implementation of the stress risk assessment are not affected by these self-reported comments from the Claimant.

Application for Injury Allowance

167. The Respondent's documents in respect of injury allowance are:

168. **Agenda for change** section 22: injury allowance [798-9]

> 22.1 this section contains provision for an injury allowance to be paid to eligible employees who, due to a work-related injury, illness or other health conditions are on authorised sickness absence or phased return to work with reduced pay or no pay.
>
> 22.7 the following circumstances will not qualify for consideration of injury allowance:
> … Sickness absence as a result of disputes relating to employment matters, conduct or job applications

169. **Injury allowance – a guide for employers** dated 31 March 2013 (updated November 2016) [802]:

> **Introduction** – 4: Eligible staff will have contractual right to the new injury allowance where they are covered by the NHS terms and conditions of service Handbook…
>
> **What is injury allowance**? – 6: injury allowance is a top-up payment and tops up sick pay, or reduced earnings when on a phased return to work, to 85 per cent of pay…
>
> **Are there circumstances where injury allowance cannot be considered**? – 12: injury allowance cannot be considered where a person:… Is on sickness absence as a result of disputes relating to employment matters such as investigations or disciplinary action, or as a result of a failed application for promotion, secondment or transfer

170. **Industrial Injury Claims Procedure** dated 5 November 2018 at point 2.3 provides [778]:

> **<u>Injury allowance cannot be considered in the following circumstances</u>**:
>
> …
> where an employee is on sickness absence as a result of disputes relating to employment matters such as investigations or disciplinary action, or as a result of a failed application for promotion, secondment or transfer

171. The Claimant made two applications on 18 January 2017 [375] and 15 April 2017 [452] for injury allowance in respect of the two periods of long-term sickness absence referred to above. The applications were made in respect of loss of unsocial hours enhancement. The Claimant asserted the specific trigger for her psychiatric injury was the email sent by Tracey Morris of 3 June 2016 [231].

172. In evidence the Claimant said there was a national agreement that staff at her level (band 6) would not be entitled to unsocial hours enhancements whilst absent on sickness leave.

173. The application for injury allowance was considered by a virtual panel made up of HR representative, corporate health and safety representative, OH representative and two trade union representatives. Ms Harrhy was the HR representative on the panel. The decision to refuse the Claimant's application was made unanimously on the basis that it was not clear that her absence was wholly or mainly because of work-related stress, it appeared the origin of the stress was the investigation into the complaint, which was a HR issue and there was some delay in mediation (although mediation point was less relevant) (JH paragraph 11).

174. The management position in respect of the application [396] reported a history of strained working relationships with colleagues and absence for stress/depression with some instances following the same pattern as arising post complaint.

175. The refusal of the Claimant's application was communicated in a letter of 31 May 2017 [485]; no reasons for the decision were given to the Claimant.

176. The union complained about the appeal mechanism on 5 July 2017 [565]. This complaint was general in nature rather than specifically in respect of the Claimant. The Claimant's appeal was suspended pending the outcome of the union's complaint. A new appeal process was agreed in July 2018. The Respondent contacted the Claimant's union representative and then the Claimant to see whether she wanted to proceed with her appeal [744-746]. On 30 November 2018 the Claimant confirmed that she did wish to appeal [747].

177. An appeal was convened on 13 September 2019 and the Claimant's appeal was rejected [749h-i]. The reasons for rejecting the appeal were that no new substantial information was provided by the Claimant and the original decision was reviewed and the appeal officer agreed that there was insufficient evidence to determine the Claimant's injuries were wholly or mainly attributable to her employment.

Dismissal

178. The Claimant was dismissed by Ms Bax at a meeting on 13 September 2017. Dismissal was confirmed in a letter of 14 September 2017 [717]. The Claimant confirmed the following details from the dismissal letter were accurate:

> '1. this (absence) has been due to ill health related to your confirmed history of depression with ongoing active symptoms aggravated by work-related stressors;
>
> 2. that you have met with Tracey Morris and Carole O'Shea throughout your period of absence to assess your progress;
>
> 3. that Dr Smallcombe's report dated 28 June 2017 advises return to your substantive post would have a further detrimental impact on your psychological health, that you remain unfit for work in any capacity and are not fit for redeployment;
>
> 4. that you advised that your symptoms have not improved;
>
> 5. that you could not give any assurances that you would be able to return to work in the future;
>
> 6. that redeployment was explored but was not an option because of your mental health condition and your caring commitments to your mother;
>
> 7. ill-health retirement was considered and has been supported by your GP and occupational health;
>
> 8. you went on to half sick pay of February 2017 and nil sick pay in August 2017'

179. The Claimant's employment terminated with effect from 6 December 2017. The Claimant did not appeal her dismissal.

Law

180. The Tribunal referred to the following legislation in respect of:

- Unfair dismissal - sections 98 (ordinary) and 103A (automatic) ERA 1996;
- 'Whistleblowing' detriments - section 47B ERA 1996;

- Failure to make reasonable adjustments - s.20 and 21 EqA;
- Discrimination arising from disability - s.15 EqA;
- Disability related harassment - s.26 EqA;
- Unauthorised deduction from wages - section 13 and 23 ERA.

181. The Tribunal is grateful to counsel for comprehensive submissions on the law; we do not include reference to all authorities referred to but note only those of key importance and necessary in light of our factual findings.

Ordinary unfair dismissal

182. In deciding whether a dismissal is fair, the Tribunal considers two stages. First, the Respondent must establish a potentially fair reason for the dismissal. Second, the Tribunal must be satisfied, in the circumstances, the Respondent acted reasonably in treating the reason as a sufficient ground for dismissing the employee.

183. In this case the Respondent relies upon capability s.98(2)(a) ERA. In cases of ill health capability dismissals we must consider the question of whether a reasonable employer would have waited longer to dismiss and if so, how much longer (**BS v Dundee City Council [2014] IRLR 131**). This question must be addressed in all the circumstances particular to the case (**Spencer v Paragon Wallpapers Ltd [1976] IRLR 373)** including '*the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do*'.

184. We must be satisfied that the Respondent's decision and the process in reaching that decision fell within the band of reasonable responses open to the reasonable employer (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**).

185. The Claimant referred us to an ET decision; **Langley-Ingress v Governing Body The Grove School case no 2901908/2006** referred to in the IDS Handbook on Unfair Dismissal (para 5.82). We were not provided with a copy of the ET judgment. We do not find this reference persuasive or of assistance in our decision making. It is a first instance decision and therefore not binding upon us and it appears from the information included in the IDS Handbook that the factual circumstances of Ms Langley-Ingress's dismissal were different to those of the Claimant in this case.

Whistleblowing – qualifying and protected disclosures

186. We must consider the elements of a "qualifying disclosure"; there must be *'disclosure of information'* by the Claimant, which, in her '*reasonable belief'* is made in the '*public interest'* and tends to show one of the relevant failures in section 43B (1) ERA.

187. **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** confirms the approach to adopt when considering whether there has been a protected disclosure: (a) identify each disclosure by reference to date and content; (b) identify the employer's alleged or likely failure to comply with a legal obligation and/or the matter giving rise to the endangering of an individual's health and safety; (c) address the basis upon which the disclosure was said to be protected and qualifying; (d) separately identify each failure; (e) identify and verify the source of the obligation by reference to statute or regulation. It was not enough for the Tribunal to lump together a number of complaints, some of which might not show breaches of legal obligations; (f) determine whether the Claimant had the necessary reasonable belief; (g) where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act; (h) determine whether the disclosure was made in the public interest (para.98)

188. Unfortunately the agreed list of issues did not conform with the requirements of **Blackbay;** it was not clear which failures in respect of legal obligation/ health and safety were relied upon. Clarity on the Claimant's case in this regard was not provided until day 6 of the hearing.

189. The repeated bringing of information to another's attention, as well as telling another person something already known to them, can both be considered as a disclosure of information.

190. The Claimant needs to show that she held a reasonable belief that her disclosure was made in the public interest (not that it necessarily was in the public interest). It is possible that the Claimant might reasonably believe that making the disclosure is in the public interest whilst being motivated to make the disclosure by reason of a personal grudge against another employee.

191. The Claimant, as a whistleblower, does not need to be correct about what she contends regarding the relevant failure. A belief may be reasonably held, even if it is wrong (**Babula v Waltham Forest College [2007] ICR 1045**).

192. The statutory test of belief is subjective; there must be a reasonable belief of the worker making the disclosure. The individual characteristics of the Claimant need to be taken into account including her particular field of expertise and knowledge (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4** - paragraphs 61 & 62).

193. The Claimant made all her alleged qualifying disclosures to her employer and as such, if we find that she made a qualifying disclosure, they would automatically amount to protected disclosures (section 43C(1)(a) ERA).

Detriment

194. As to 'whistleblowing' detriment it was held in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** that detriment is established if a reasonable worker would or might take the view that they have been disadvantaged (or in other words a justified sense of grievance).

195. There must be a causal link between the protected disclosure and the detriment in question.

196. Employers are vicariously liable for detriments occasioned by work colleagues (s.47B(1A)(1B) and (1C) ERA**)**. The Respondent does not rely on the statutory defence that it took reasonable steps to avoid discrimination.

Harassment

197. In order for conduct to amount to harassment it has to be unwanted; we must ask did the employee find the conduct unwelcome and/or uninvited?

198. The conduct complained of must relate to the protected characteristic. It is necessary to consider whether the actions or omissions of the Respondent, via its employees, were for a reason related to the Claimant's disability. The Tribunal has to apply an objective test in determining whether the conduct was related to disability. This will include consideration of the intention of decision makers.

199. This is a case in which the Claimant primarily asserts that the conduct was occasioned with the purpose of creating a prohibited environment. A claim based on acting with the 'purpose' to harass must consider the alleged perpetrator's motive or intention.

200. If the Tribunal concludes that there was no intention to harass and instead considers the 'effect' of the conduct, the Tribunal must consider the test in s.26(4) EqA. This is both a subjective and an objective test, with the latter looking at all the circumstances to assess the reasonableness of the Claimant's reaction. In **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] IRLR 542** at paragraph 88 Underhill LJ revisited the guidance that he had given in the EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** and reformulated it as follows: 'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a Tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

Discrimination arising from disability

201. As for unfavourable treatment, **Trustees of Swansea University Pension & Assurance Scheme v Williams [2015] IRLR 885,** upheld by the Court of Appeal **[2017] EWCA Civ 1008**, it was held that when assessing whether an act is 'unfavourable' requires consideration of *'an objective sense of that which is adverse as compared to that which is beneficial*.'

202. As for the correct approach when determining section 15 claims we refer to **Pnaiser v NHS England and others UKEAT/0137/15/LA** at paragraph 31. The relevant steps to follow are summarised as follows:

a. the Tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;
b. the Tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;
c. motive is irrelevant when considering the reason for treatment;

d. the Tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;
e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;
f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;
g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;
h. it does not matter precisely which order these questions are addressed. Depending on the facts the Tribunal might ask why the Respondent treated the Claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment.

203. As to the justification defence, the Tribunal must consider whether the Respondent has a legitimate aim which it seeks to achieve by proportionate means. Whether an aim is 'legitimate' is a question of fact for the Tribunal (**Ladele v London Borough of Islington [2009] EWCA Civ 1357**).

204. When considering proportionality, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

205. **O'Brien –v- Bolton St Catherine's Academy [2017] EWCA Civ 145** we note that the case is authority for the proposition that despite differences in statutory wording and the burden of proof in unfair dismissal and Section 15 discrimination, the outcome should rarely be different in the context of a long term sickness absence dismissal.

Failure to make reasonable adjustments

206. The guidance given in **Environment Agency v Rowan [2008] IRLR 20** provides that there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer;

(b) the identity of non-disabled comparators (where appropriate); and

(c) the nature and extent of the substantial disadvantage suffered by the Claimant.

207. The EHRC Code provides guidance that the phrase 'provision, criterion or practice' should be "construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" (paragraph 6.10).

208. A like-for-like comparison is not required in complaints of reasonable adjustments. The duty to make reasonable adjustments allows an employer to take positive steps to the advantage of disabled employees. The Respondent referred us to guidance on the approach to comparators given by Simler LJ in **Sheikholeslami v The University of Edinburgh [2018] IRLR 1090** (paragraphs 48 and 49):

> *"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.*
>
> *The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see para 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

209. A ‘substantial disadvantage’ means something which is “more than minor or trivial”; a relatively low threshold.

210. If the duty to make adjustments arises, the Tribunal must consider what adjustments would have been reasonable. In this case the Claimant specified a single adjustment in respect of each PCP. The Tribunal may consider whether the steps taken as a whole by the Respondent have discharged the duty placed upon it (**Burke v College of Law [2012] EWCA Civ 37).**

211. The purpose of making adjustments is to avoid substantial disadvantage, with a view to maintaining or accessing employment. In **Doran v Department of Work & Pensions UKEATS/0017/14** the EAT upheld the ET's judgment that whilst the employee was unable or unwilling to give a return to work indication, any adjustment would be futile and consequently the duty to make an adjustment had not been triggered.

212. As to the reasonableness of any adjustment it is an objective test to be judged against the Respondent's circumstances. The adjustment contended for need not remove the disadvantage entirely but if there was a 'real prospect' of removing the disadvantage a step may be reasonable. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10** it was emphasised that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage there does not have to be a 'good' or 'real' prospect of that occurring.

213. A consideration of whether a step is reasonable needs to be based on evidence and or submissions advanced during the hearing upon which both parties have had the opportunity to comment. In **Hereford and Worcestershire County Council v Neale [1986] IRLR 168** at paragraph 175 it states:

a. *“It is however necessary to add that it would be unwise and potentially unfair for a Tribunal to rely upon matters which occur to members of the Tribunal after the hearing and which have not been mentioned or treated as relevant without the party, against whom the point is raised, being given the opportunity to deal with it unless the Tribunal could be entirely sure that the point is so clear that the party could not make any useful comment in explanation. Further, if a point has not been mentioned, or if little or no weight has been attached to it, the Tribunal is entitled and should have regard to the point according to their own assessment of it but, in forming that assessment, the industrial Tribunal should, in my judgment, pay careful and proper attention to the course of the hearing and the*

way in which and the extent to which a point has been made or relied upon."

214. The Respondent refers us to **Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09** and submits that the duty to make adjustments should not extend to matters which would not assist in preserving the employment relationship, such as decisions relating to compensation for being unable to work, such as Injury Allowance.

Unauthorised deduction from wages

215. Pursuant to section 13 ERA it is unlawful for an employer to "make a deduction" from "wages", unless statutory exemptions are made out. "Wages" are defined as "Any fee, bonus, commission, holiday pay or other emolument referable to the worker's employment, whether payable under their contract or otherwise." (s27(1)ERA).

216. The question for the Tribunal is whether the 'wages' claimed were 'properly payable' which involves consideration of the Claimant's contractual entitlement. The Tribunal must make findings of fact as to the contractual entitlement to pay to identify whether there has been a shortfall. A Tribunal can construe the terms of a contract of employment in determining whether an unlawful deduction from pay has occurred (**Agarwal v Cardiff University [2018] EWCA Civ 1434**).

217. In **Coors Brewers Ltd v Adcock [2007] IRLR 440** the court held that in order for the ET to have jurisdiction to hear an unlawful deduction claim, the claim must be in respect of an identifiable sum. The employees in **Adcock** were unable to quantify their loss under a share scheme and required the ET to do so, which rendered their claim one for damages for breach of contract rather than a quantifiable claim for unlawful deduction of wages. Claims for unquantified sums of damages do not fall within part II of ERA, which was designed to deal with straightforward cases where an employee could point to quantified loss. Accordingly, it was held that an unquantified claim to payment could not be brought as an unauthorised deductions claim.

218. The Claimant challenges the exercise of a discretion by the Respondent, so must establish that the exercise of discretion was **Wednesbury** unreasonable or in other words irrational (**Braganza v BP Shipping Limited 2015 IRLR 487**).

Submissions

219. Counsel for the parties are thanked for their helpful and detailed written submissions and written replies to each other's submissions

submitted together on 22 October 2019. Aggregated, their submissions and replies amounted to around 200 pages in length and therefore are not repeated in this judgment but are incorporated by reference.

Conclusions

Whistleblowing

220. The Tribunal found it helpful to consider first, whether the Claimant had made any protected disclosures (section E of the list of issues).

221. We make these initial comments of general application to all five alleged protected disclosures.

222. The Claimant submits she made five protected disclosures, each under section 43B(1)(b), (d) and (f) ERA. The parties agree that in each case there was a disclosure of information made to the Claimant's employer. The Tribunal's focus is on whether the Claimant had a reasonable belief that disclosure was in the public interest and whether the disclosures tended to show a relevant failure.

223. As regards section 43(B)(1)(f) ERA, the Claimant avers that managerial inaction or acceptance of the practice she complained about amounted in effect to concealment. We reject this submission in respect of each of the five alleged protected disclosures. We do not consider that, even if established, inaction or acceptance amounts to concealment. In any event management did take steps in respect of the complaints made by the Claimant. The Claimant's alleged protected disclosures do not reference any alleged concealment.

224. As for the nature of the "legal obligation" (section 43 (B)(1)(b) ERA), the Claimant asserts that the failures complained of could have led to legal liability to herself or others (paragraph 16 annex to particulars of claim regarding the patient issue). It was suggested during the hearing that there was a legal obligation to transport patients on trolleys but the Claimant resiled from this suggestion by the point of submissions.

225. The Tribunal does not consider that the risk of a claim can be construed as a legal obligation.

226. Whilst we note that there is no requirement for there to be an actual legal obligation, the Tribunal does not accept that the Claimant had a reasonable belief that she or others would be subject to legal action (or there was a risk to health and safety) in respect of the x-ray patient in circumstances where the manoeuvre was supervised by a doctor and performed by two radiographers.

227. There is no legal obligation that patients are to be x-rayed on trolleys and we do not accept that the Claimant reasonably believed there to be.

228. With regard to the tuck-shop issue, the pleaded case is that nature of the legal obligation was that Ms Hartley Smith was not complying with a legal obligation 'to take reasonable care of the health and safety people may be affected by her work' (paragraph 22 annex to particulars of claim). This 'legal obligation' is really an alternative expression of a failing with regard to health and safety.

229. Section 43(B)(1)(d) ERA (health and safety) is dealt with below.

Protected disclosure 1 - email to Ms Morris of 11 May 2016

230. The Tribunal does not consider that the Claimant had a reasonable belief that the disclosure of information in relation to manoeuvring the femur x-ray patient was in the public interest. Further, the Tribunal does not consider that the Claimant reasonably believed the information disclosed tended to show a relevant failure for the reasons given above.

231. The Tribunal notes that the alleged disclosure is prefaced as being a 'moan'; we think it unlikely that a serious matter, such as breach of a legal obligation or health and safety, would be characterised in such a manner. Although not conclusive to our determination, this use of language gives some indication of the Claimant's state of mind.

232. Taking into account the Claimant's experience and knowledge and the circumstances on 11 May 2016, we do not consider she held the requisite reasonable belief. In her witness statement the Claimant failed to acknowledge the fact that had the patient been transferred onto a trolley for x-ray, that would have required more manoeuvring, and consequent pain, than the pragmatic solution of rolling adopted by Ms Huey. It was necessary for the patient to be x-rayed. The Claimant was assisted by Ms Huey with the procedure under the supervision of Dr Phillips. Had there been a significant risk to the patient, all healthcare professionals involved had a responsibility to speak up and advocate for adopting a different approach.

233. Claimant's counsel submitted throughout the hearing that the Claimant was a stickler for procedure. As such, the Tribunal finds it telling that the Claimant did not complete the datix incident report for over a month; this delay was not explained and undermines the suggestion the Claimant now makes about her state of mind and the seriousness of the incident on 11 May 2016.

234. The Tribunal found assistance in Dr Phillips' account of the Claimant's behaviour towards Ms Hartley Smith. Dr Phillips did not work in the department and was not involved in the workplace issues on the radiology nightshift; as such we view him as an independent witness who was dismayed by the Claimant's behaviour. We find that the Claimant did behave rudely by berating Ms Hartley Smith in the presence of Dr Phillips. We consider that on balance of probabilities that the Claimant anticipated a complaint being made against her and sent the email to Tracey Morris to deflect criticism.

Protected disclosure 2 - letter to Tracey Morris of 23 May 2016

235. This document was prepared at the request of Tracey Morris, at a time when the Claimant knew an investigation was being conducted into a complaint about her. The Claimant's comments towards the end of this letter are telling of the Claimant's mindset, where she indicates her view that it would have been better for the patient to have been dealt with by the radiography day shift. This indicates to the Tribunal that the Claimant was 'put out' by having to be involved in manual handling a patient towards the end of her shift.

236. For the reasons given above under protected disclosure 1 and the additional factor that the Claimant was aware that she had been complained about, the Tribunal concludes that the Claimant did not have a reasonable belief that the disclosure was in the public interest or showed a relevant failure.

Protected disclosure 3 – email to Tracey Morris of 2 June 2016

237. The Tribunal finds that the Claimant did not have a reasonable belief that the disclosure was in the public interest. The Tribunal considers that the complaint about the tuck-shop was motivated by a desire to retaliate against Ms Hartley Smith's complaint about the Claimant. The Claimant made her motivation clear by stating that she was making a formal complaint 'as a result' of the formal investigation into her conduct.

238. Although the witnesses were unable to give a precise date of when Ms Hartley Smith took over managing the tuck-shop, the timing of the Claimant's complaint is telling. If the Claimant had genuine concerns about the tuck-shop it begs the question why had she not raised them previously? Why pick this moment in time? The Tribunal is drawn to conclude that it was an act of retaliation.

239. The allegation that Ms Hartley Smith was running the tuck-shop for personal profit in her working time is a serious one. The Respondent's

radiography witnesses asserted that it was understood within the department that the profit from the tuck-shop went to pay for white goods for the staff room; it was conceded however that there was no signage to indicate how the white goods had been paid for. The Claimant may have been unaware of this arrangement but it is unclear how she drew the conclusion that Ms Hartley Smith was making a profit; this appears to have been an assumption without evidence and the fact that the allegation was made is indicative of the Claimant's attitude towards Ms Hartley Smith.

240. We also find that the Claimant did not like the fact that staff from other departments were coming into the radiographers staffroom to purchase items from the tuck-shop and disturbing her. That this was the case, was evidenced by the fact that Tracey Morris agreed that a 'do not disturb' sign would be made available for use on the staffroom door.

241. The Tribunal finds that the Claimant did not reasonably believe that the disclosure tended to show a relevant failure. We do not consider that the Claimant reasonably believed there was potential risk of a legal claim. We accept Ms Hartley Smith's evidence that she stocked the tuck-shop before or after a shift and otherwise was only away from the reception for short periods of time to restock the tuck-shop whilst making a cup of tea or coffee. It is not credible that the Claimant reasonably believed legal action would arise against her or others in respect of the short absences from reception that were covered by other radiographers on duty. Similarly the Tribunal does not conclude that the Claimant genuinely believed there was a risk to health and safety.

Protected disclosure 4 – letter to Tracey Morris of 7 June 2016

242. The Claimant's disclosure is factually inaccurate, as we have accepted that Ms Hartley Smith was not "frequently absent" from reception desk in ER.

243. For the reasons provided in respect of the alleged protected disclosure 3, the Tribunal concludes that the Claimant did not reasonably believe her disclosure to be in the public interest nor that it tended to show a relevant failure.

Protected disclosure 5 – (a) statement of 13 February 2017 and (b) meeting regarding patient issue

244. The Claimant relies on the extract from the written statement referred to above related to the elderly femur x-ray patient; repeating this information nine months after the incident took place and identifying Ms Hartley Smith's actions being at fault.

245. According to the minutes of the meeting with Ms O'Shea [400] the Claimant presented a document detailing incidents with Ms Hartley Smith but the 'patient issue' was not verbally raised by the Claimant. The Claimant's evidence was that she was allowed to go through the document [397] (Paragraph 94 CD). We are not clear that there was an oral disclosure of the information related to the femur patient (i.e. third paragraph [397]), as this is not recorded as a matter verbally outlined by the Claimant in meeting minutes [400].

246. In any event, the Tribunal concludes that the Claimant did not have reasonable belief that the disclosure was made in the public interest nor that it tended to show any relevant failure. The Tribunal considers that the repetition of the allegations with regard to Ms Hartley Smith, was the Claimant resurrecting matters to seek to deflect criticism from herself where she was aware that complaints against her were likely due to further instances of conflict with colleagues on the night shift.

247. In summary, the Tribunal concludes that the Claimant has not made any protected disclosures and the complaints of whistleblowing detriment (section 47B ERA) and automatically unfair dismissal (section 103A ERA) are dismissed.

Harassment

248. Before turning to the individual allegations of harassment, the Tribunal concludes that even where the Claimant has established the facts she relies upon as the basis for her harassment complaints, the Claimant has failed to establish a link between those acts and the protected characteristic of her disability. There is no overt reference to her mental impairment nor is there any indirect link that the Tribunal can discern from the established facts. This point is applicable to all allegations but is not repeated below.

249. The Tribunal concludes that allegations made about Ms Hartley Smith cannot have occurred after 1 February 2017, as she was signed off work on sickness absence.

250. The allegations of harassment are at G1 – 21 in the list of issues:

G1 **In June 2016, Tracey Morris emailed [231] all staff for statements regarding Victoria Hartley Smith (VHS)'s behaviour and colleagues allegedly changing their behaviour towards the Claimant as set out below in G2-18**.

The Claimant had made a complaint about the running of the tuck shop; in doing so she must have expected the Respondent to take some action which would include investigation. The Respondent accepts that in hindsight it would have been preferable to send individual emails to potential witnesses, however Tracey Morris's action was as a direct result of the Claimant raising the complaint and was designed to address it; as such we do not think the email can be considered unwanted conduct. There is no basis on which to conclude that this management response to establish the facts following receipt of a complaint was an intentional act of harassment, nor can it objectively be viewed as having such effect in all the circumstances.

G2 VHS's unhelpful and hostile attitude to mediation and approach on 7 October 2016.

There are no minutes of the mediation, which was a confidential process. The Claimant's evidence with regard to Ms Hartley Smith's behaviour (paragraph 64 CD) was that she held a tissue to her nose and sniffed in it and asked if the Claimant could leave the room. We do not consider that this amounts to a 'hostile attitude' rather it is indicative that Ms Hartley Smith was upset. Nevertheless Ms Hartley Smith and the Claimant participated in the mediation and agreed an action plan; the fact that an action plan was agreed undermines the suggestion that Ms Hartley Smith was unhelpful. There is no basis on which to conclude that Ms Hartley Smith's actions were intended to or had the effect of harassing the Claimant.

G3 VHS's attempt to organise the Claimant's work on 30 January 2017.

The Tribunal concludes that there was no attempt by Ms Hartley Smith to organise the Claimant's work; work was allocated as it came into the department to the next available radiographer. X-ray forms were completed and placed upside down in two piles. Radiographers responded to one ring on the telephone from Ms Hartley Smith to take the next job. Ms Hartley Smith had no control over who would respond to her call or what work came into the department. In any event, Ms Hartley Smith denies working with the Claimant on the night in question. The allegation is not factually established.

G4 VHS's complaint against the Claimant on 2 February 2017.

The Tribunal concludes that it would be unwanted conduct; a complaint made in relation to the way in which the Claimant treated Ms Hartley Smith. The content of the complaint focuses on the Claimant's behaviours towards Ms Hartley Smith (persistently accusing her of unfair allocation of work and holding back work [385]). There is no medical evidence of a link to her disability. The behaviours were born of a long held grudge against Ms Hartley Smith and a groundless perception that Ms Hartley Smith was attempting to control her work. Ms Hartley Smith's complaint made in this particular context cannot, in our view, be construed as either having the purpose or effect of harassment.

G5 Kate Houghton (KH) and VHS not greeting the Claimant upon first seeing her at the start of the shift, on the shifts worked between 29 December 2016 and 10 February 2017

The Tribunal concludes that this allegation is not factually established. The unchallenged evidence of Ms Houghton and Ms Hartley Smith was that they had different start times to their shifts than the Claimant and it would have been unusual to go out of their way to greet her. We accept Ms Houghton's evidence that she attempted to engage with the Claimant on 29 December 2016 but was rebuffed by the Claimant.

G6 KH, VHS and Gareth Davies (GD) had little or no verbal communication with the Claimant throughout 12.5 hour shifts, on the shifts worked between 29 December 2016 and 10 February 2017

This allegation is accepted as factually accurate. The Tribunal finds that there was work-related verbal communication but there was little or no social communication with the Claimant. This was as a result of the workplace relationship issues and, as noted above, that the Claimant rebuffed Ms Houghton's attempt to engage with her on her return to work.

Whilst this may have been unwanted conduct, viewed objectively in all the circumstances the Tribunal cannot conclude that it had the purpose or effect of harassment.

G7 GD and KH deliberately ostracising the Claimant by huddling around the reception desk with VHS for most of the shift, instead of adhering to the usual practice of waiting to start work in the staff viewing area, on the shifts worked between 29 December 2016 and 10 February 2017

We find that Mr Davies and Ms Houghton would have had to approach the reception desk if they wished to have any discussions with Ms Hartley Smith as she was unable to leave the reception area save for short breaks. The reality of the situation was that working relationships had broken down and Mr Davies and Ms Houghton did not engage in social discussions with the Claimant and as such may not have wished to sit in the viewing area. This was as a result of the poor working atmosphere due to the Claimant's behaviour. This may have been received as unwanted conduct but viewed objectively in all the circumstances cannot be considered to have the purpose or effect of harassment.

G8 VHS deliberately placing high demand of ward patient x-rays onto the Claimant compared to others on duty (VHS), on the shifts worked between 29 December 2016 and 10 February 2017

As referred to above the Tribunal rejects this allegation, the Claimant was not deliberately given a high number of ward patient x-rays, as the work was handed out on a first-come first-served basis. Additionally the breakdown of work provided by the Respondent does not support the Claimant's contention [153-177]. The allegation is not factually established.

G9 GD, KH and VHS deliberately withholding details and information in order for the Claimant to carry out her job, on the shifts worked between 29 December 2016 and 10 February 2017

The Claimant failed to provide clear evidence of the way in which her colleagues were said to have deliberately withheld information or details in respect of her job. The Tribunal rejects the Claimant's evidence that Ms Hartley Smith passed an x-ray form over her head to Mr Davies, from her position behind glass at the reception area through a rectangular window. We accept Ms Hartley Smith's evidence that it was not physically possible to do so from her position at the reception desk through the aperture available. This allegation is not factually established.

G10 KH refusing to answer questions the Claimant asked about work-related information, on the shifts worked between 29 December 2016 and 10 February 2017

This allegation was denied by Ms Houghton and we have found that the Claimant's colleagues did have work-related verbal communication. The Claimant has not provided specifics and has failed to factually establish this allegation.

G11 GD undermining the Claimant professionally by discussing her work with other professionals in front of her, but without consulting her as part of the conversation, on the shifts worked between 29 December 2016 and 10 February 2017

Mr Davies accepted that he may have discussed the Claimant's images, if approached by other colleagues with queries. The Claimant has failed to provide evidence of specific incidences. Professional etiquette may be such that the radiographer taking the images should be included in discussions and this may be unwanted conduct, but we are without details of the incidents the Claimant alleges occurred. There is no basis on which to conclude this was a deliberate action by Mr Davies and even if the unintended effect was to create impression of being undermined, we do not consider this was sufficient to amount to harassment in all the circumstances.

G12 GD, KH and VHS discussing the Claimant behind her back, on the shifts worked between 29 December 2016 and 10 February 2017

The Claimant's colleagues acknowledged they would discuss the Claimant at times; this is due to the breakdown in workplace relationships. Whilst this may have been unwanted conduct, the Tribunal declines to conclude that it amounted to harassment.

G13 VHS glaring at the Claimant to show disapproval and disgust, on the shifts worked between 29 December 2016 and 10 February 2017.

The Tribunal was not presented with cogent evidence of such behaviour; the Tribunal is unclear how it could conclude that a look was intended to show 'disapproval and disgust' based on a bare assertion only. In light of the poor working relations between the Claimant and Ms Hartley Smith, the Claimant may have interpreted interactions in a negative way regardless of intent. Ms Hartley Smith denies behaving in such manner and the Claimant has failed to demonstrate on balance that it occurred. The allegation is not factually proven.

G14 On Tuesday 10th January 2017, VHS refusing to give the Claimant an x-ray for a patient who arrived in the department from a ward, thereby withholding information the Claimant needed to do her job.

Ms Hartley Smith disputes this allegation and we have concluded that she did not pass an x-ray form over the Claimant's head to Mr

Davies. The Claimant's assertion is not proven and, in any event, could not be considered to have the purpose or effect of harassment.

G15 On Tuesday 31st January 2017, KH/VHS placing an unreasonable amount of ward patient portable work on the Claimant despite KH and GD being available.

As the Tribunal has already concluded the Claimant was not given an unreasonable amount of portable work on this shift. The allegation is not factually proven.

G16 On Tuesday 31st January 2017, VHS demanding that the Claimant complete a ward patient portable that she said was urgent, even though this left the x-ray department empty and a ward patient waiting. When the Claimant got to the patient, it was not an urgent matter.

The Tribunal concludes that this allegation is not factually proven. On an assessment of the evidence we prefer Ms Hartley Smith's account and find it an improbable that she would have 'demanded' the Claimant carry out work, particularly as she was 4 bands senior to her. Ms Hartley Smith passed on information from other health care professionals about the urgency of radiography work.

G17 On Tuesday 31 January 2017, VHS refusing to go and have her break when the Claimant asked her to do this as it was quiet.

Ms Hartley Smith explained that when the Claimant requested that she go for a break she was in the middle of filing and wish to complete that task prior to taking a break. The Claimant was not Ms Hartley Smith's line manager and it was not for her to determine when the receptionist should take a break. This incident demonstrates to the Tribunal the Claimant attempting to exert control over Ms Hartley Smith; there is no basis on which to conclude that Ms Hartley Smith's refusal to take a break at the Claimant's instruction is an act of harassment against the Claimant.

G18 Gareth Davies and Kate Houghton complaining regarding the Claimant by email to Tracey Morris on 7th February 2017

It is accepted that this is factually accurate. The complaints were Mr Davies and Ms Houghton's response to the Claimant's behaviour, which they felt could no longer continue. This may have been unwanted conduct but there is no basis for concluding the contents of the letters of complaint amounted to acts of harassment.

G19 Carole O'Shea's ultimatum to the Claimant on 14th February 2017 that she would have to come back to work but at Llandough Hospital instead when she was fit

The Respondent concedes that the Claimant was given the choice, on a temporary basis, of either moving to Llandough hospital or moving on to day shifts. This was unwanted conduct and, due to personal circumstances, the Claimant refused both options.

The Respondent's explanation for presenting these options to the Claimant was that the working relationships on the ER nightshift had become untenable; Ms Hartley Smith had gone on sick leave and Mr Davies was using up annual leave to avoid working with the Claimant and had informed the Respondent that working with her was affecting his home life. The Tribunal accepts this explanation as genuine (whilst having some concerns about the Claimant being presented with these options without warning to take place with immediate effect). The Respondent was reacting to a situation where workplace relationships had broken down completely.

The Tribunal concludes that there was no intent to create a prohibited environment and when viewed objectively in the circumstances, concludes that was not the effect.

G20 George Oliver's fact-find and subsequent decision and report regarding relationships in the night team for Radiology from February to May 2017.

The Claimant participated willingly in the fact-finding investigation and conceded that the investigation was required; accordingly the Tribunal does not consider the fact find was unwanted conduct.

The decision and report could be seen as unwanted conduct as the content was potentially critical of the Claimant. The report was drafted in a balanced fashion and indicated potential actions which may flow from it, not only for the Claimant but also for Ms Hartley Smith; as such it cannot be considered to have had the purpose or effect of creating a prohibited environment.

G21 The Claimant's dismissal.

For the reasons detailed above we consider that the Claimant actively sought dismissal by the Respondent, as it was to her financial advantage in circumstances where she was seeking ill-health retirement. We do not consider that dismissal was an act of

unwanted conduct in these particular circumstances, nor that it has the proscribed effect.

Failure to make reasonable adjustments

251. In the list of issues the 14 alleged provisions, criteria or practices (PCPs) correspond with the 14 alleged adjustments by number (for example reasonable adjustment 1 is claimed in respect of PCP 1 only and so on).

252. We take into account that the adjustments recommended by OH and Stress Risk Assessment actions were implemented (save for the monthly group email). The Claimant had regular meetings with line management both when she was in work and during her sickness absence. The managers were supportive of the Claimant and showed empathy. She was signposted to wellbeing services. The Claimant was offered the option of not working over the Christmas period but decided that she wished to do so. She was also offered an earlier return to work meeting with Tracey Morris on 30 December 2016, which she declined. Staff were informed of her mental health condition once the Claimant had provided the requisite information.

253. The Claimant was more susceptible to stress, than non disabled colleagues, due to her mental impairment [260]. We consider that the steps taken to address her stress were sufficient, taken together, to provide the necessary support and empathy to allow her to sustain a return to work. Unfortunately we consider that the factors which prevented the Claimant from sustaining a return to work were the poor interpersonal relationships with colleagues, which was a situation largely of her own making.

254. The Claimant asserts a continuing course of conduct in respect of failure to make adjustments. The Claimant's solicitors reply of 29 October 2019 (to Tribunal questions), provided after the hearing concluded, asserts that a reasonable period for implementation of adjustments "on any sensible analysis, would have been shortly after meetings with the Claimant or shortly after receipt of OH reports suggesting that such support was required".

255. A 'substantial disadvantage' means something which is "more than minor or trivial"; a relatively low threshold. We note that the Claimant did not advance evidence of the substantial disadvantage she experienced in respect of a number of her complaints of failure to make reasonable adjustments and her position was not confirmed until after the hearing had concluded. Reference below to "substantial disadvantage" in the pleaded

case, is taken from the column headed “detriment suffered by the Claimant” in the Scott schedule.

Not providing individuals with mental health problems support from managers or individuals who had undergone mental health training.

256. The Respondent accepts that this was the factual situation within the ER department as managers had not undergone mental health training. Ms Bax acknowledged that “mental health first aid” training has now been implemented by the Respondent. Managers signpost staff to well-being services available to them; Tracey Morris and Ms O’Shea both signposted the Claimant to well-being services.

257. We conclude that the provision of untrained managers is capable of amounting to a PCP and in doing so, take into account what is said about construing the phrase widely in paragraph 6.10 EHRC Code of Practice 2011.

258. The Claimant asserts in her reply of 29 October 2019 that the provision of untrained managers was a PCP applied from 26 January 2016 onwards; her email of 26 January 2016 to Tracey Morris [208] indicates that she had been “feeling particularly low with my depression in case you get any comments from staff”. No specific mention is made of training at point 3 (sic) of the Final Further Updated Scott Schedule. The Final Further Updated Scott Schedule indicates lack of training was a failing from 21 February 2017 [102c], when whilst on sickness absence, the Claimant emailed Ms O’Shea [409-10], asking for clarification of pay slips and wages as well as confirming her attendance at a stress management course, in it she says “I just wondered if there was anyone in the Department/clinical board that has had mental health training that could help me at all?” Ms O’Shea did not respond to this question in her email reply [409].

259. The Claimant can only rely on her pleaded case; the Claimant has not pleaded this as a PCP from 26 January 2016. Furthermore there was no clear evidence from the Claimant as to the impact on her of such a PCP in the period from 26 January 2016. However we comment on all points for completeness.

260. In respect of the email to Tracey Morris on 26 January 2016, the substantial disadvantage pleaded was “no support measures given – distress” [102a].

261. No substantial disadvantage is pleaded in respect of the email of 21 February 2017 [102c].

262. In counsel's submission, the Claimant asserted managers were 'unable to deal properly with and address her problems' and that this was 'a managerial rather than a clinical issue'.

263. We reject the assertion that no support measures were given or that managers were unable to deal with and address the Claimant's problems; both Tracey Morris and Ms O'Shea gave appropriate and empathetic management support at meetings with the Claimant, by making appropriate referrals to OH and signposting well-being services. Flexibility was shown with the arrangements made for meetings. Tracey Morris was supportive of the Claimant in facilitating the communication of information about the Claimant's mental health to colleagues in early 2017, in a bid to increase understanding and improve working relationships; this was sensitively handled by obtaining wording from the Claimant and then meeting colleagues on a one-to-one basis to share that information. Ms O'Shea's management style was appreciated by the Claimant as noted in the emails between them (e.g. [479])

264. In light of our factual findings about the management of the Claimant we conclude that she was not placed at substantial disadvantage (which is not pleaded in any event). Accommodations were made for the Claimant as noted above. In evidence, the Claimant did not identify the disadvantage to her or how training could assist, simply stating in her witness statement that she had found information that recommended such training (CD paragraph 105). The Claimant has not particularised the nature of mental health training required to address her particular needs as a disabled individual. In her email 21 February 2017, she does not specify how a trained person might assist her to avoid disadvantage. Without some detail of the training required, we are unable to conclude that training managers would have avoided substantial disadvantage. Although not conclusive of the issue, we note that the Claimant did not raise the issue of mental health training herself until she was absent on the second period of sickness absence in 2017.

265. We note that the Respondent has now implemented mental health first aid training. This is a welcome development. We comment that even with such training in place there is the prospect of a manager being fully trained but not having a particularly empathetic disposition; in those circumstances an untrained but empathetic manager might be better placed to support the Claimant. When taking into account the approach of the Claimant's managers we do not find that they dealt with the Claimant with a lack of empathy despite not being trained. In the all the circumstances of this case, this complaint is dismissed.

Holding formal, rather than informal meetings, to manage those on sick leave

266. In the Claimant's reply of 29 October 2019, she asserts this PCP was applied during every period of sickness absence from 26 January 2016 onwards. This detail regarding dates does not appear on the Final Further Updated Scott Schedule.

267. Although the Claimant's pleadings are not specific, it appears from her witness statement that the Claimant considers a meeting to be "informal" if HR are not present.

268. It is common ground that this was capable of constituting a PCP. Sickness absence management is a formal procedure of the Respondent and HR were in attendance at meetings. As for the location of meetings, the Respondent offered some flexibility but the Claimant rejected a suggestion of a meeting at her home. When she requested a quiet room for a meeting (CD paragraph 108), the Respondent changed the location of the meeting to a room in the HR Department and then subsequently to a small seminar room. Ms O'Shea also held some meetings to discuss sickness absence without HR being present. Thereby the Respondent made adjustments with regard to the location and the presence of HR to accommodate the Claimant's wishes.

269. The Claimant submitted, although it was not pleaded, that the substantial disadvantage due to the formal meetings was that they affected her ability to maintain a relationship with the Respondent generally and her managers in particular. On a factual basis we do not consider this disadvantage has been established; the Claimant was able to attend meetings with managers and contact them by email and telephone during sickness absence periods. The Tribunal's findings above indicate that the Claimant had a good, cordial working relationship with Ms O'Shea, whose supportive approach was acknowledged by the Claimant [479].

270. The Claimant contends that the reasonable adjustment would have been 'open, honest and practical conversations between the Claimant and her manager to discuss on an informal basis how her mental health issues might impact on her ability to carry out her work'. The Claimant was able to have conversations of this nature with her manager during her absence both during and outside of formal and "informal" meetings; the Claimant did not present evidence that she was inhibited from having open honest and practical conversations.

271. The complaint is dismissed, as it is not made out on a factual basis.

Not implementing each and every aspect of stress risk assessment plans, or implementing such plans inadequately or inefficiently

272. We refer to our findings above and consider that the only respect in which the stress risk assessment was not implemented was the failure to establish the monthly night email group. This must have been considered a reasonable step for the Respondent to adopt as it was an agreed action.

273. We do not consider that this can amount to a PCP; it was an isolated failure to implement one element of a stress risk assessment action plan, rather than a "practice" of the Respondent. We take into account the fact that the Claimant only returned to work for a few weeks which gave a short window within which to make this change. Whilst it is regrettable that the email group was not set up as indicated, the Claimant has failed to provide evidence of how this particular step created substantial disadvantage for her as a disabled person.

Distancing those with mental health problems from other colleagues and not providing a forum in which to allow them to speak openly about their needs and requirements

274. The Claimant has not established on a factual basis that the Respondent did distance people with mental health problems from their colleagues; even taken at its height the Claimant's evidence is that she was personally ostracised by colleagues. Further the Claimant has not established that the Respondent has a practice of failing to provide a forum in which employees can speak about their needs and requirements related to mental health problems. Again the Claimant's evidence taken at its highest is that she felt inhibited personally during long term sickness absence meetings due to the presence of HR, but for the reasons already given above we reject the suggestion

275. Following the Claimant's return to work, Tracey Morris took steps to inform the Claimant's colleagues about her mental impairment in order to increase understanding. This step was taken at the Claimant's request, she did not indicate she wanted to speak to her colleagues personally to 'inform them of her difficulties and requirement for empathy and understanding'.

276. The Claimant has failed to establish that the PCP asserted was implemented by the Respondent in respect of the Claimant personally or its employees generally.

Managing difficult or strained working relationships between colleagues in a formal and divisive manner, including through formal investigations and interviews.

277. It is common ground that this was capable of constituting a PCP.

278. The substantial disadvantage identified in the Scott Schedule is 'distress and injury to feelings' [102d] and in respect of Mr Oliver's report specifies 'recommendation for a dignity at work investigation and a possible disciplinary into the Claimant's alleged behaviour'. In submissions, the Claimant asserts that measures which compounded interpersonal workplace issues meant that the environment remained strained and stress triggers were not dealt with.

279. The Respondent had attempted to manage relationships within the ER team informally, by implementing mediation and informal discussions with the Claimant about her tone and approach to colleagues over the preceding years.

280. As for the fact-finding report by Mr Oliver, this was an investigation outside of any formal process. The Claimant conceded in cross-examination, and the Tribunal concludes that faced with complaints and counter complaints between staff within ER, the Respondent had to take steps to resolve matters. The course of action adopted involved an independent investigator commissioned to make recommendations. The Claimant willingly participated in the process, speaking with Mr Oliver at some length. Faced with such a serious situation, it was necessary to investigate by meeting with the staff concerned. The process had a formality about it, as was appropriate to the seriousness of the issues. It was a preliminary step in order to determine the way forward. The Tribunal declines to conclude that adopting this approach was 'divisive'; matters had already reached a tipping point within the department, to the extent that Mr Oliver concluded that working relationships were likely to be irreparable [491].

281. The Claimant has failed to establish that the Respondent has a practice of managing relationships in a "formal and divisive" manner. The Claimant has failed to establish that the way in which strained working relationships were managed by the Respondent created substantial disadvantage to her as a disabled person; the isolation the Claimant perceived was an unfortunate feature of the state of the interpersonal relationships between her and ER colleagues.

282. The Tribunal concludes that it was appropriate for Mr Oliver's investigation and report to be commissioned. Following its publication, and in light of Mr Oliver's view that relationships were irreparable, the time had

passed for teambuilding. The adjustment contended for 'proactive management support by engaging in team building exercises and repairing deteriorating work relationships' was not, by that time, a reasonable step to take in light of the potential disciplinary and dignity at work matters raised (which appeared to be an appropriate recommendation in light of the evidence of the Claimant's colleagues).

Refusing to consider and/or implement a buddying or mentoring system where this is requested and/or required.

283. We refer to our findings above that the Respondent would have considered a buddy system. The Claimant has failed to establish factually that the Respondent refused to consider or implement a buddy or mentor system.

284. The first point in time that the possibility of a buddy was raised was 5 April 2017. By this point in time the Claimant was not in work; all such discussions were hypothetical and dependent on identifying a willing and available buddy.

285. Even if the alleged matter was capable of constituting a PCP, the Respondent did not apply it.

286. The Claimant failed to plead a substantial disadvantage in the Scott schedule [102d&e].

Not going beyond 'phased return' recommendations and listening to the individual, when considering any possible reduction in working hours.

287. The Claimant asserts that this PCP was applied from 27 December 2016 onwards (reply of 29 October 2019). The OH report recommended a phased return which was implemented.

288. The Claimant has not established evidence that the Respondent failed to listen to her. No request was made by the Claimant for reduction in working hours other than the change to the Christmas shifts which was acceded to by the Respondent.

289. On a factual basis this assertion is not established; the Claimant has not established that the Respondent applied this to her, let alone to its employees generally.

290. The Claimant did not identify demand or control issues in relation to her job in her stress risk assessment [337]. The Claimant has not established a substantial disadvantage in respect of her working hours.

The issues the Claimant faced were interpersonal in nature rather than relating to her working hours.

Not considering and/or implementing schemes that allow for temporary reallocation of duties to assist those on sick leave with a return to work.

291. The Claimant asserts that this PCP was applied from 27 December 2016 onwards (reply of 29 October 2019).

292. The Claimant has failed to establish that this was a PCP applied by the Respondent either to her or to its employees generally. The Respondent reasonably followed the advice of the OH report.

293. The OH report does not make a recommendation for adjustment in respect of a temporary reallocation of duties. The Claimant has failed to specify what tasks were alleged to cause her disadvantage; we conclude that the Respondent was unaware of disadvantage because there was none. We repeat our findings with regard to her stress risk assessment; it does not appear to us that the demands of the Claimant's role produced substantial disadvantage to her as a disabled person.

Refusing to consider or provide practical assistance for individuals struggling to prioritise their work for ill health reasons.

294. The Claimant asserts that this PCP was applied from 27 December 2016 onwards (reply of 29 October 2019).

295. We repeat our conclusions at 7 and 8 above. The Claimant has failed to establish this was a PCP applied by the Respondent. The Claimant did not indicate to OH or the Respondent that she was struggling to prioritise work at the relevant time nor did she ask for support in this regard. The Claimant has failed to give evidence of specifics of how and what aspects of her work caused her disadvantage; we conclude that it did not.

Requiring individuals to only perform the job role they are employed to do.

296. The Claimant asserts that this PCP was applied from 27 December 2016 onwards (reply of 29 October 2019).

297. It is common ground that this was capable of constituting a PCP. We find that it was applied by the Respondent to the Claimant following her return to work.

298. We rely on our conclusions above at 7, 8 and 9. The Claimant has not demonstrated how being required to do her job, whether on a full-time or part-time basis, created substantial disadvantage to her as a disabled person. At no point did she request job sharing on a temporary or permanent basis. The Respondent complied with OH recommendations.

299. Had job sharing been offered to the Claimant it would not have addressed the interpersonal issues which were the root of the problem experienced by the Claimant and her colleagues at work.

Allowing pre-agreed review meetings for those on sick leave or returning to work to be unilaterally postponed or cancelled.

300. The Claimant asserts that this PCP was applied at all material times from 26 January 2016 onwards (reply of 29 October 2019).

301. The Claimant has not factually established that review meetings were unilaterally postponed or cancelled; no occasions or dates of such meetings being cancelled were referred to by the Claimant in her evidence. The Tribunal notes that there were regular meetings whilst the Claimant was absent on sick leave and in anticipation of her return and that these were arranged at mutually convenient times.

302. We conclude that even if capable of constituting a PCP, this was not applied by the Respondent to the Claimant personally nor to its employees generally.

Not always holding return to work meetings promptly when individuals return from sick leave.

303. The Claimant has not established any evidence that this was a PCP applied by the Respondent. The only occasion the Claimant adduced evidence of a return to work where she did not meet her manager was on 29 December 2016. we do not consider that this single occasion over the Christmas period is sufficient to amount to a “practice” of the Respondent.

304. Regular meetings were held with the Claimant in anticipation of her return to work and she was made aware that Tracey Morris may not be available to meet her during the first shift. The Claimant was in contact with Tracey Morris by email immediately following her return to work; who offered to come in to meet the week after her return but the Claimant did not take up that option. Instead the Claimant met with Tracey Morris during her third shift after returning to work.

305. The Claimant has failed to establish how this short delay in meeting has produced substantial disadvantage to her as a disabled person,

particularly since she indicated by email of 30 December 2016 to Tracey Morris that the meeting could wait.

306. In their industrial experience, the non legal members' view was that it would be good practice for a line manager to be present upon return to work after an extended absence, although we note that arrangements were made for a shift specific handover during the first shift. This point does not affect our conclusion in respect of this complaint overall.

Signposting, rather than proactively referring those with mental health difficulties to organisations, course providers, therapists, networks or external groups for support.

307. The Claimant asserts this PCP was applied at all material times from 26 January 2016 onwards (reply of 29 October 2019).

308. The Tribunal concludes that this is capable of constituting a PCP and it was applied by the Respondent.

309. The Claimant has failed to establish substantial disadvantage; she accessed the support that she required and she reported this back to her managers. The Tribunal concludes that it was appropriate for the managers to signpost resources and make referrals to OH. The OH report did not recommend further referrals but would have been an obvious source for such interventions. Proactive referrals, even if possible, would not have been a reasonable step in the circumstances of this case. The Tribunal considers that referrals would need to come from a medical professional rather than a line manager.

Requiring regular and sustained attendance at work from employees, and managing them in accordance with the Respondent's absence management procedures.

310. It is common ground that this was capable of constituting a PCP, and that it was applied to the Claimant, and that the application of it to the Claimant put her at a substantial disadvantage on account of her disability.

311. The reasonable adjustment contended for is 'extending the trigger periods for long term absence review meetings and/or discounting periods of disability-related absence under the Respondent's absence management procedures'.

312. The long term absence provisions of the Respondent sickness absence policy do not contain triggers or disability-related absence periods to discount, so the suggested adjustment would have had no impact. By the point of dismissal, the Claimant had confirmed with

supporting medical evidence that she was permanently unfit to work and that no adjustments could be made to assist her.

Discrimination arising from disability

313. The Claimant asserts 5 instances of unfavourable treatment (C – agreed list of issues).

314. The Respondent's 'legitimate aim' (D - agreed list of issues) is 'the need to maintain continuity of service and secure operational resilience within available resources, in the context of a busy hospital, by securing the attendance of employees in the workplace and upholding appropriate standards of behaviour'.

315. The legitimacy of the aim was not contested by the Claimant and we conclude that it is a legitimate aim. We note that the Claimant asserted (email to the Tribunal of 27 November 2019) there was a lack of real evidence led by the Respondent on this point. However Ms Bax gave evidence relevant to the aim (e.g. paragraph 38, 58, 59 AB). Whilst it is important that evidence is led, to an extent the legitimacy of the particular aim relied upon is self-evident.

C1 '**Supportive measures and adjustments recommended by Occupational Health were not implemented on the Claimant's return to work, stress risk assessment not followed, no meetings or conversations with line manager, no buddy, no reduction of hours, no temporary reallocation of tasks, job sharing or support'**.

316. We refer to our factual findings above. The Claimant has failed to establish this allegation on a factual basis, save for the monthly group email not being set up under the stress risk assessment. There were meetings and conversations with line management. A buddy was not suggested until well after the Claimant was on sick leave and would have been considered had matters moved to a return to work. A phased return to work was implemented, with the Claimant electing to work Christmas shifts of her choice rather than deferring Christmas working until the following year. Changes to the Claimant's job in terms of hours, tasks and job share were not required according to the Claimant's indication on the stress risk assessment and were not requested by her nor suggested by OH.

317. At its highest, the complaint is that the failure to set up a group email is unfavourable treatment. The nature of the treatment is omission by way of delay. Mr Davies gave unchallenged evidence that the Claimant did not use her work email. In all the circumstances, we struggle to view this as unfavourable treatment; it appears to us minor matter which would

have been addressed in time had the Claimant remained in work. For completeness we set out our conclusions on the basis it was disadvantageous to the Claimant.

318. The need for reasonable adjustment, in the sense required by the Equality Act 2010, will arise from a disability. However we reject the assertion that the group email was not set up because the Claimant sought reasonable adjustments; there was no evidence to support this suggestion. The Respondent made other adjustments (e.g. the white board, phased return to work) and recorded the intention to set up the group email in the stress risk assessment. We consider it more likely than not that the Respondent intended to make the adjustment but simply did not do it within the timeframe of the Claimant's return to work.

319. The Claimant's asserted 'need to take up staff members' time to accommodate her (specifically, the need for more informal meetings with her line manager and for a buddy/mentor)?' is not applicable to the setting up of the email group.

320. We reject the suggestion that the Claimant was unable to or had increased difficulty prioritising her work or was unable to fulfill the demands of her job. This assertion is unsupported by medical evidence and was not indicated as an issue by the Claimant.

321. The claim is dismissed; the delay in setting up the monthly email group was not treatment because of something arising from disability.

C2 '**An investigation was carried out by the Respondent into working relationships between Emergency Radiology night staff**.'

322. We refer to our findings with regard to Mr Oliver's investigation and report. The investigation was, as the Claimant submits, the 'start of a process' with an unknown outcome. The Claimant participated in it willingly. The aim of the investigation was to provide an independent review of working relationships and the situation in ER. In cross examination the Claimant conceded that something needed to be done. We conclude that the investigation was not unfavourable treatment.

323. For completeness, we reject the submission that the investigation arose because of the Claimant's absence; rather it was commissioned to deal with the complaints submitted by all staff working in ER on the night shift.

324. Finally, the investigation was justified action aimed at addressing workplace relations / standards of behaviour.

C3 '**The report into working relationships recommended a Dignity at Work investigation and possible disciplinary investigation into the Claimant's alleged behaviour'**.

325. Mr Oliver's report recommendations are conceded to be unfavourable treatment (paragraph 341 of counsel's submissions).

326. We reject the Claimant's submission that the recommendations arose in consequence of the Claimant's sickness absence; they arose as a consequence of Mr Oliver's investigation into multiple complaints and were unrelated to disability.

327. Mr Oliver was independent of the ER team. He recorded what he was told by staff and provided recommendations as to next steps in a balanced report.

328. The recommendations did not arise from the need for the Claimant to take up staff time or being unable to fulfill her role (which later assertion is not factually established).

329. Finally the recommendations were justified to address the workplace issues / standards of behaviour.

C4 '**The Claimant was dismissed on grounds of ill health capability'**

330. It is agreed that this occurred and it constituted unfavourable treatment as a result of the Claimant's long-term absence in consequence of her disability.

331. The Claimant did not make submissions in respect of those matters at C 4 b, c, d and e on the list of issues. We reject the suggestion that dismissal was for those reasons (i.e. the need for or the Claimant's desire for reasonable adjustments, to take up staff time, her inability or increased difficulty in prioritising work or being unable to fulfil the demands a role on a full-time basis).

332. We must balance the discriminatory impact of dismissal on the Claimant with the organisational needs of the Respondent. The Claimant was not able to offer any indication that alternative steps could or should be taken to avoid dismissal, in fact she positively encouraged dismissal. The dismissal letter accurately described the situation for the Claimant. There was no prospect of a return to work and, even if it had been suggested which it was not, waiting longer to dismiss would not have achieved a different outcome. As for the relationship difficulties, the Respondent had offered alternatives of day working and a move to Llandough but these options were rejected as unsuitable by the Claimant.

333. Our view is that in all the circumstances dismissal was a proportionate response to the situation.

C5 '**The Claimant emailed the Respondent's Assistant Director of Workforce regarding her application for a Temporary Injury Allowance and not paying the Temporary Injury Allowance'**

334. We were not taken to evidence regarding the Claimant emailing the Assistant Director; in any event this would be an action taken by the Claimant and not unfavourable treatment towards her.

335. It is common ground that the Claimant was not paid Injury Allowance and the Respondent concedes this was unfavourable treatment.

336. The Tribunal must consider why the Claimant was refused payment; this is not solely a "but for" test. Eligibility for Injury Allowance is predicated on some absence from work leading to a shortfall in pay. Absence from work, with a drop in remuneration, is a necessary precondition for application for Injury Allowance.

337. We find that the reason for the refusal of payment was not absence (or any of the other matters in the list of issues at C 5 c, d, e or f.); rather it was because the Claimant did not meet the eligibility criteria for payment. To the contrary disability related absence, without other contributing factors, would create the circumstances in which payment would be awarded

338. The action in refusing payment is justified as it was taken in accordance with policy and for the reasons detailed below.

'Ordinary' unfair dismissal

339. The Tribunal concludes that the reason for dismissal was capability for long-term sickness absence. The Claimant did not appeal the dismissal outcome.

340. We rely on, but do not repeat in full, our factual findings above.

341. By the point of dismissal the Claimant had been absent from work for the majority of the period from June 2016 to September 2017 (returning for only a few weeks in December 2016). The Claimant had indicated that she was no longer seeking redeployment and could not consider a return to work. At the point of dismissal she was awaiting the outcome of her application for ill-health retirement, a process which she

commenced of her own volition. The Claimant was actively seeking dismissal. There was no indication that the Claimant would become well enough to return to work in the foreseeable future.

342. The Respondent sought appropriate and up-to-date medical evidence from OH and had regularly met with the Claimant during the period of absence to obtain her input on her situation and the medical advice.

343. The Claimant had refused the alternative of working at Llandough Hospital and for personal reasons she wanted to work on nightshift rather than working on days. She would not consider redeployment. Alternative options to dismissal were therefore exhausted

344. In all the circumstances, the Respondent's decision to dismiss was within the range of reasonable responses. We do not consider that waiting longer to dismiss would have made a difference; there was no indication that the Claimant's health would improve (which was confirmed after the event with the grant of ill-health retirement).

345. Only limited challenge was made to the process adopted by the Respondent, in respect of the formality or informality of arrangements for meetings. We consider that overall the process adopted was fair and permitted the Claimant opportunity to provide feedback and input.

346. The Claimant relies upon the matters set out at paragraph 9 i -xiii of the annex to particulars of claim [65] as affecting fairness. We refer to our findings of fact, as the majority of the matters asserted were not factually established. Where facts are established, we do not consider that the matters pleaded were relevant to our consideration of the fairness of the dismissal.

Unauthorised deduction from wages

347. The Claimant submits that her unauthorised deduction claim is twofold: failing to pay unsociable hours enhancement during periods of extended sickness absence, both in and of itself, and by virtue of the Respondent's refusal of her Industrial Injury Claim. However the Claimant's case is pleaded as being in respect of the refusal of Injury Allowance payment (paragraph 8 particulars of claim [21]).

348. If the Tribunal were considering the claim as being in respect of the deduction of unsocial hours payment in and of itself, the only evidence before the Tribunal was the Claimant's response to Tribunal questions, when she indicated that staff of her grade and above were not entitled to such payments when off work on sickness absence.

349. The Claimant's witness statement is silent on the quantification of this claim, as is the interim Schedule of Loss dated 1 October 2018 [70]. We were not shown wage slips detailing what the Claimant was paid during sickness absence. The only indication of the amount claimed is "a minimum sum of £14,000" in the Claimant's response to request a further information [53]. There is no explanation of how this sum is calculated. The Tribunal raised the issue of the lack of particulars of the amount claimed during the hearing but no direct evidence was submitted or given orally by the Claimant. On or around day 6 of the hearing an estimated sum of just over £14,000 was provided, via counsel, without explanation of calculation.

350. The Claimant in effect required the Tribunal to make a calculation of what sum was due to her. In accordance with **Adcock** we do not consider that the complaint could be determined under section 13 ERA without some evidential basis for quantification. It is possible that this could have been expressed as a percentage of salary or a particular rate of deduction but the Claimant did not advance any evidence that could assist us. On this basis the claim must be dismissed.

351. Putting aside the issue of quantification, were the Tribunal able to determine the claim, the question for the Tribunal is whether the (unspecified) sum claimed is 'properly payable' as wages.

352. There was no dispute that the Injury Allowance was a contractual entitlement [803]**.** Having considered the applicable terms in Agenda for Change [799] and the Respondent's Industrial Injury Claims Procedure [778], we conclude that the Claimant did not fulfil the eligibility criteria for payment, as it was determined that her absence was as a result of disputes relating to employment matters such as investigations or disciplinary action.

353. In accordance with **Braganza,** we are to consider whether the discretion exercised by the virtual panel to unanimously reject the application for Injury Allowance was **Wednesbury** unreasonable. In our assessment we can consider both procedural and substantive unreasonableness.

354. We consider that substantively the decision was reasonable; we conclude that the Claimant was absent due to workplace relationships under investigation during both periods of absence for which claims were made.

355. From a procedural perspective, it is unsatisfactory that the virtual panel were not originally sent the email from Tracey Morris [231] which the

Claimant asserted was the trigger for her absence. However this omission was corrected when Ms Harrhy requested a copy; she was duly provided with the email in question and made her decision on the Claimant's application following its receipt. We reject the submission that one of the panel members communicating their decision twice affects the reasonableness of the decision. The panel member communicated twice as she was chased for a response and had deleted her previous response; we do not consider this is unreasonable.

356. Ms Harrhy's evidence of the reasons for refusing the application (paragraph 11 JH) were not challenged and we accept her evidence. The evidence in Ms Harry's witness statement is corroborated by contemporaneous reasoning provided by another virtual panel member [442a]. The Claimant was not provided with any reasoning for the rejection of her application in the outcome letter of 31 May 2017 [485]. Similarly no reasoning was provided in the document signed by Ms Harrhy of 10 July 2017 [577]. It is not helpful to fail to explain a decision when communicating an outcome. However an appeal mechanism was available which the Claimant made use of. We note the delay in providing an appeal outcome, which is regrettable. We do not consider that the procedural defects identified are sufficient to render the decision to refuse injury allowance as **Wednesbury** unreasonable.

357. The process for applying for Injury Allowance and appealing against outcomes has now changed (there was a challenge from the union as to the appeal process referred to above). The procedure in place at the relevant time for this claim was to raise a grievance if unsatisfied with the initial application outcome. We reject the submission by the Claimant that the status quo should continue pending appeal outcome under the grievance policy [753]. Agenda for Change and the Industrial Injury Claims Procedure Guidance do not incorporate the terms of the grievance policy to this effect.

Time limits

358. In light of our findings it is not necessary to deal with jurisdictional time limits in any detail. However had the Tribunal engaged in a consideration of whether it would be just and equitable to extend time, the Tribunal would have had no basis upon which to extend jurisdiction in the absence of any evidence from the Claimant to explain delay.

359. In summary, all claims are dismissed.

_____
Employment Judge S Davies
Dated: 2 December 2019

JUDGMENT SENT TO THE PARTIES ON 3 December 2019

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

ANNEX A
LIST OF ISSUES

Failure to make reasonable adjustments

A. The Claimant relies on the following alleged provisions, criteria or practices:

1. Not providing individuals with mental health problems support from managers or individuals who had undergone mental health training;
    a) Did this constitute a PCP? It is common ground that this was applied.
    b) If so did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

2. Holding formal, rather than informal meetings, to manage those on sick leave;
    a) It is common ground that this was capable of constituting a PCP.
    b) Was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

3. Not implementing each and every aspect of stress risk assessment plans, or implementing such plans inadequately or inefficiently;
    a) Was this capable of constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

4. Distancing those with mental health problems from other colleagues and not providing a forum in which to allow them to speak openly about their needs and requirements;
    a) Was this capable of constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

5. Managing difficult or strained working relationships between colleagues in a formal and divisive manner, including through formal investigations and interviews;
    a) It is common ground that this was capable of constituting a PCP.
    b) Was it applied by the Respondent?

c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

6. Refusing to consider and/or implement a buddying or mentoring system where this is requested and/or required;
    a) Was this capable of constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

7. Not going beyond 'phased return' recommendations and listening to the individual, when considering any possible reduction in working hours;
    a) Was this capable of constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

8. Not considering and/or implementing schemes that allow for temporary reallocation of duties to assist those on sick leave with a return to work;
    a) Was this capable constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

9. Refusing to consider or provide practical assistance for individuals struggling to prioritise their work for ill health reasons;
    a) Was this capable constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

10. Requiring individuals to only perform the job role they are employed to do;
    a) It is common ground that this was capable of constituting a PCP.
    b) Was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

11. Allowing pre-agreed review meetings for those on sick leave or returning to work to be unilaterally postponed or cancelled;
    a) Was this capable constituting a PCP?
    b) If so, was it applied by the Respondent?

c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

12. Not always holding return to work meetings promptly when individuals return from sick leave;
    a) Was this capable constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

13. Signposting, rather than proactively referring those with mental health difficulties to organisations, course providers, therapists, networks or external groups for support;
    a) Was this capable constituting a PCP?
    b) If so, was it applied by the Respondent?
    c) If so, did the application of it by the Respondent put the Claimant at a substantial disadvantage on account of her disability?

14. Requiring regular and sustained attendance at work from employees, and managing them in accordance with the Respondent's absence management procedures.

It is common ground that this was capable of constituting a PCP, and that it was applied to the Claimant, and that the application of it to the Claimant put her at a substantial disadvantage on account of her disability.

B. The Claimant relies on the following steps, which she alleges it would have been reasonable for Respondent to have taken but which she further alleges were not taken (in each case, subject to the answers for the relevant PCP identified in Paragraph A being "yes"):

1. Support from within the x-ray department from managers or individuals who had undergone mental health training;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

2. Open, honest and practical conversations between the Claimant and her manager to discuss on an informal basis how her mental health issues might impact on her ability to carry out her work;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?

b) Was the adjustment contended for made?
c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

3. The implementation by the Respondent of the agreed stress risk assessment plan;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) Was the adjustment contended for made?
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

4. The opportunity for conversations between the Claimant and her colleagues to inform them of her difficulties and requirement for empathy and understanding;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) Was the adjustment contended for made?
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

5. Proactive management support by engaging in team building exercises and repairing deteriorating work relationships;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

6. Provision and support of a buddy or mentor;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which

would involve consideration of all of the steps taken by the Respondent)?

7. Temporary reduction in hours for a longer period than for the phased return;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

8. Temporary reallocation of some tasks;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

9. Support to help the Claimant prioritise her work;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

10. Consideration and implementation, if appropriate, of job sharing (either temporarily or permanently);
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

11. Regular review meetings as agreed to consider the Claimant's health;

a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
b) Was the adjustment contended for made?
c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

12. Return to work meeting being held immediately upon return to work;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

13. Proactive referrals to training courses, therapies, support networks or external groups to help the Claimant manage her mental health issues;
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) It is common ground that the adjustment contended for was not made.
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

14. Extending the trigger periods for long term absence review meetings and/or discounting periods of disability-related absence under the Respondent's absence management procedures.
    a) Would the adjustment sought have avoided any substantial disadvantage to the Claimant?
    b) Was the adjustment contended for made?
    c) Did these amount to steps that it would have been reasonable for the Respondent to have had to take to avoid the substantial disadvantage to the Claimant (which would involve consideration of all of the steps taken by the Respondent)?

<u>Discrimination arising from disability</u>

C. The Claimant relies on the following alleged acts of unfavourable treatment:

1. Supportive measures and adjustments recommended by Occupational Health were not implemented on the Claimant's return to work, stress risk

assessment not followed, no meetings or conversations with line manager, no buddy, no reduction of hours, no temporary reallocation of tasks, job sharing or support.

a) Did it occur?
b) Did it constitute unfavourable treatment?
c) Was it because of the obligation or need, or the Claimant's desire to have reasonable adjustments made for her?
    i. It is common ground that this arose in consequence of the Claimant's disability
d) Was it because of the Claimant's need to take up staff members' time to accommodate her (specifically, the need for more informal meetings with her line manager and for a buddy/mentor)?
    i. If so, did this arise in consequence of the Claimant's disability?
e) Was it because of the Claimant's inability to, or increased difficulty in prioritising her work?
    i. If so, did this arise in consequence of the Claimant's disability?
f) Was this because of the Claimant being unable to fulfill all of the demands of her role on a full-time basis to the standard usually required by the Respondent?
    i. If so, did this arise in consequence of the Claimant's disability?

2. An investigation was carried out by the Respondent into working relationships between Emergency Radiology night staff.
    a) It is common ground that this occurred
    b) Did it constitute unfavourable treatment?
    c) Was it because of the Claimant's need to take up staff members' time to accommodate her (specifically, the need for more informal meetings with her line manager and for a buddy/mentor)?
        i. If so, did this arise in consequence of the Claimant's disability?
    d) Was this because of the Claimant being unable to fulfill all of the demands of her role on a full-time basis to the standard usually required by the Respondent?
        i. If so, did this arise in consequence of the Claimant's disability?
    e) Was this because of the Claimant's disability-related sickness absence?
        i. It is common ground that this arose in consequence of the Claimant's disability.

3. The report into working relationships recommended a Dignity at Work investigation and possible disciplinary investigation into the Claimant's alleged behaviour.
        a) It is common ground that this occurred
        b) Did it constitute unfavourable treatment?
        c) Was it because of the Claimant's need to take up staff members' time to accommodate her (specifically, the need for

more informal meetings with her line manager and for a buddy/mentor)?
    i. If so, did this arise in consequence of the Claimant's disability?
d) Was this because of the Claimant being unable to fulfill all of the demands of her role on a full-time basis to the standard usually required by the Respondent?
    i. If so, did this arise in consequence of the Claimant's disability?
e) Was this because of the Claimant's disability-related sickness absence?
    i. It is common ground that this arose in consequence of the Claimant's disability

4. The Claimant was dismissed on grounds of ill health capability
    a) It is common ground that this occurred.
    It is common ground that this constituted unfavourable treatment.
    b) Was it because of the obligation or need, or the Claimant's desire to have reasonable adjustments made for her?
        i. It is common ground that this arose in consequence of the Claimant's disability.
    c) Was it because of the Claimant's need to take up staff members' time to accommodate her (specifically, the need for more informal meetings with her line manager and for a buddy/mentor)?
        i. If so, did this arise in consequence of the Claimant's disability?
    d) Was it because of the Claimant's inability to, or increased difficulty in prioritising her work?
        i. If so, did this arise in consequence of the Claimant's disability?
    e) Was this because of the Claimant being unable to fulfill all of the demands of her role on a full-time basis to the standard usually required by the Respondent?
        i. If so, did this arise in consequence of the Claimant's disability?
    f) It is common ground that it was because of the Claimant's disability-related sickness absence.
        i. It is common ground that this arose in consequence of the Claimant's disability.

5. The Claimant emailed the Respondent's Assistant Director of Workforce regarding her application for a Temporary Injury Allowance and not paying the Temporary Injury Allowance.

    a) It is common ground that the Claimant was not paid a Temporary Injury Allowance.
    b) Did this constitute unfavourable treatment?
    c) Was it because of the obligation or need, or the Claimant's desire to have reasonable adjustments made for her?

i. It is common ground that this arose in consequence of the Claimant's disability

d) Was it because of the Claimant's need to take up staff members' time to accommodate her (specifically, the need for more informal meetings with her line manager and for a buddy/mentor)?
   i. If so, did this arise in consequence of the Claimant's disability?

e) Was it because of the Claimant's inability to, or increased difficulty in prioritising her work?
   i. If so, did this arise in consequence of the Claimant's disability?

f) Was this because of the Claimant being unable to fulfill all of the demands of her role on a full-time basis to the standard usually required by the Respondent?
   i. If so, did this arise in consequence of the Claimant's disability?

g) Was this because of the Claimant's disability-related sickness absence?
   i. It is common ground that this arose in consequence of the Claimant's disability.

D. If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The alleged legitimate aim relied upon by the Respondent is the need to maintain continuity of service and secure operational resilience within available resources, in the context of a busy hospital, by securing the attendance of employees in the workplace and upholding appropriate standards of behaviour.

<u>Protected Disclosures</u>

E. The Claimant relies on the following disclosures – it is common ground in each case that they constituted a disclosure of information, and were made to the Claimant's employer:

1. The email of 11 May 2016 to Tracey Morris, regarding the two patients issue.
   a) Did the Claimant have a reasonable belief that disclosure was in the public interest?
   b) Did the Claimant have a reasonable belief that the disclosure tended to show one of the relevant failures (see F below)?

2. The letter of 23 May 2016 to Tracey Morris, regarding the two patients issue.
   a) Did the Claimant have a reasonable belief that disclosure was in the public interest?
   b) Did the Claimant have a reasonable belief that the disclosure tended to show one of the relevant failures (see F below)?

3. The email of 2 June 2016 to Tracey Morris, regarding the tuck shop issue.
    a) Did the Claimant have a reasonable belief that disclosure was in the public interest?
    b) Did the Claimant have a reasonable belief that the disclosure tended to show one of the relevant failures (see F below)?

4. The letter of 7 June 2016 to Tracey Morris, regarding the tuck shop issue.
    a) Did the Claimant have a reasonable belief that disclosure was in the public interest?
    b) Did the Claimant have a reasonable belief that the disclosure tended to show one of the relevant failures (see F below)?

5. The written statement of 13 February 2017 and subsequent meeting, regarding the patient issue.
    a) Did the Claimant have a reasonable belief that disclosure was in the public interest?
    b) Did the Claimant have a reasonable belief that the disclosure tended to show one of the relevant failures (see F below)?

F. In each case, the Claimant relies on one or more of the following relevant failures:

    a) that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject (s43B(1)(b) ERA);
    b) that the health and safety of any individual had been, was being, or was likely to be endangered (s43B(1)(d) ERA); and/or
    c) that information tending to show any matter falling within either of the above had been, was being, or was likely to be deliberately concealed (s43(1)(f) ERA).

<u>Harassment based on disability / Protected Disclosure Detriment:</u>

G. The Claimant relies on the following alleged acts as harassment based on disability and/or detriment on the ground that she had made a protected disclosure. The "requisite purpose or effect" relates to the harassment claim and means the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant:

1. In June 2016, Tracey Morris emailing all staff for statements regarding Victoria Hartley Smith (VHS)'s behaviour and colleagues allegedly changing their behaviour towards the Claimant as set out below in G2-18).
    a) It is common ground that the email was sent.

b) Did the above constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
c) Did it amount to unwanted conduct related to the Claimant's disability?
d) Did it have the requisite purpose or effect?

2. VHS's unhelpful and hostile attitude to mediation and approach on 7 October 2016.
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

3. VHS's attempting to organize the Claimant's work on 30 January 2017.
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

4. VHS's complaint against the Claimant on 2 February 2017.
    a) It is common ground that this occurred.
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

5. Kate Houghton (KH) and VHS not greeting the Claimant upon first seeing her at the start of the shift, on the shifts worked between 29 December 2016 and 10 February 2017
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

6. KH, VHS and Gareth Davies (GD) having little or no verbal communication with the Claimant throughout 12.5 hour shifts, on the shifts worked between 29 December 2016 and 10 February 2017
    a) It is accepted that this occurred.

b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
c) Did it amount to unwanted conduct related to the Claimant's disability?
d) Did it have the requisite purpose or effect?

7. GD and KH deliberately ostracizing the Claimant by huddling around the reception desk with VHS for most of the shift, instead of adhering to the usual practice of waiting to start work in the staff viewing area, on the shifts worked between 29 December 2016 and 10 February 2017
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

8. VHS deliberately placing high demand of ward patient x-rays onto the Claimant compared to others on duty (VHS), on the shifts worked between 29 December 2016 and 10 February 2017
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

9. GD, KH and VHS deliberately withholding details and information in order for the Claimant to carry out her job, on the shifts worked between 29 December 2016 and 10 February 2017;
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

10. KH refusing to answer questions the Claimant asked about work-related information, on the shifts worked between 29 December 2016 and 10 February 2017;
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?

d) Did it have the requisite purpose or effect?

11. GD undermining the Claimant professionally by discussing her work with other professionals in front of her, but without consulting her as part of the conversation, on the shifts worked between 29 December 2016 and 10 February 2017;
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

12. GD, KH and VHS discussing the Claimant behind her back, on the shifts worked between 29 December 2016 and 10 February 2017;
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

13. VHS glaring at the Claimant to show disapproval and disgust, on the shifts worked between 29 December 2016 and 10 February 2017.
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

14. On Tuesday 10th January 2017, VHS refusing to give the Claimant an x-ray for a patient who arrived in the department from a ward, thereby withholding information the Claimant needed to do her job.
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

15. On Tuesday 31st January 2017, KH/VHS placing an unreasonable amount of ward patient portable work on the Claimant despite KH and GD being available.
    a) Did this occur?

b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
c) Did it amount to unwanted conduct related to the Claimant's disability?
d) Did it have the requisite purpose or effect?

16. On Tuesday 31st January 2017, VHS demanding that the Claimant completes a ward patient portable that she said was urgent, even though this left the x-ray department empty and a ward patient waiting. When the Claimant got to the patient, it was not an urgent matter.
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

17. On Tuesday 31 January 2017, VHS refusing to go and have her break when the Claimant asked her to do this as it was quiet.
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

18. Gareth Davies and Kate Houghton complaining regarding the Claimant by email to Tracey Morris on 7th February 2017;
    a) It is common ground that this occurred.
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

19. Carole O'Shea's ultimatum to the Claimant on 14th February 2017 that she would have to come back to work but at Llandough Hospital instead when she was fit;
    a) It is common ground that the Claimant was given the choice, on a temporary basis, of either moving to Llandough hospital or moving on to day shifts.
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?

d) Did it have the requisite purpose or effect?

20. George Oliver's fact-find and subsequent decision and report regarding relationships in the night team for Radiology from February to May 2017.
    a) It is common ground that George Oliver completed a fact-find and produced a report of the same.
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?
    c) Did it amount to unwanted conduct related to the Claimant's disability?
    d) Did it have the requisite purpose or effect?

21. The Claimant's dismissal (relied on as an act of disability discrimination save that the Claimant also claims automatic unfair dismissal under s.103A ERA 1996 - see issue H below).
    a) It is common ground that the Claimant was dismissed.
    b) Did it amount to unwanted conduct related to the Claimant's disability?
    c) Did it have the requisite purpose or effect?

22. Adjustments were not implemented on the Claimant's return to work (relied on as a protected disclosure detriment only)
    a) Did this occur?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?

23. The Claimant was not line managed by a manager who had undergone mental health training, as requested by an email of 21 February 2017 to Carole O'Shea (relied on as a protected disclosure detriment only)
    a) It is common ground that this occurred.
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?

24. The Claimant not being provided with the support of a buddy or mentor following her request to Carole O'Shea on 5 April 2017 (relied on as a protected disclosure detriment only)
    a) Did this occur, given that the Claimant was not able to return to work at any point after 5 April 2017?
    b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant had made a protected disclosure?

25. The refusal to grant the Claimant a Temporary Injury Allowance in respect of her absence (relied on as a protected disclosure detriment only)
    a) It is common ground that this occurred.

b) Did it constitute a detriment to the Claimant, and if so was it on the ground that the Claimant made a protected disclosure?

Unfair Dismissal / Automatic Unfair Dismissal

H. Was the reason, or principal reason, for the Claimant's dismissal any of her protected disclosures (para E above) meaning her dismissal was automatically unfair under s.103A ERA 1996?

I. If not, was the reason, or principal reason, for the Claimant's dismissal a reason falling within s.98 ERA1996?

The Respondent relies on the Claimant's capability (s.98(2)(a)).

J. If so, was the Claimant's dismissal fair or unfair, in the circumstances? In particular:

1. Did the Respondent follow a fair procedure taking into account its size and resources? The Claimant relies on the failures listed at paragraph 9 i-xiii of the Annex to Particulars of claim as the failures of the Respondent.
2. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses? The Claimant relies on the failures listed at paragraph 9 i- xiii of the Annex to Particulars of claim as the failures of the Respondent.

K. Did the Respondent discriminate against the Claimant in relation to her protected characteristic of her disability by dismissing her, contrary to s.39(2)(c) Equality Act 2010 and as set out above in A14, C4 and G21 in relation to the complaints under section 15, 20/21 and 26 of the Equality Act 2010?

Arrears of pay

L. Did the Claimant suffer an unlawful deduction of wages in relation to enhanced hours payments due to her during her period of sickness absence leading up to her dismissal, contrary to Part II ERA 1996?

Jurisdiction

M. If any of the Claimant's complaints are out of time, did they form part of a continuing course of conduct so as to allow them to be considered to be in time?

N. Alternatively (and if relevant) should time be extended on the basis that it was not reasonably practicable for the complaints to be presented in time, or on a just and equitable basis as appropriate?

Remedy

O. Should the Claimant be awarded compensation and, if so, in what sum?

P. Should there be an award for aggravated damages?

Q. Should there be any reduction in compensation under *Polkey* or for contributory fault?

R. Should there be any reduction or uplift for unreasonable failure to comply with the ACAS code?

S. In respect of the claims related to protected disclosures, should there be any reduction on the basis that the Claimant's disclosures were not made in good faith?

T. Should there be a declaration as to the parties' rights and/or any recommendations?