# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss E Bor**

**Respondent:** **Ashford & St Peter's Hospitals NHS Foundation Trust**

**Heard at:** London South Croydon

**On:** **16 to 19 September 2019 and in Chambers on 20 September 2019**

**Before:** Employment Judge Tsamados
Mrs J Jerram
Mr M Walton

**Representation**

Claimant: In person and through Ms M Oyeyele, a Hungarian interpreter
Respondent: Mr A Ross, Counsel

# RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

The Claimant's complaints of disability discrimination, failure to make reasonable adjustments, victimisation, detrimental treatment and unfair dismissal for making protected disclosures fail and her claim is dismissed.

# REASONS

**Claims and issues**

1. Miss Erika Bor, the Claimant, presented a Claim Form to the Employment Tribunal on 21 May 2018 following a period of ACAS Early Conciliation from 30 March to 30 April 2018. This contained complaints of unfair dismissal, disability discrimination and detrimental treatment for having made protected disclosures and for health and safety reasons. The claim is against the Respondent, her ex-employer, Ashford & St Peter's Hospitals NHS Foundation Trust. In its Response, received by the Tribunal on 24 August 2018, the Respondent denied the complaints. The Respondent provided an amended Response on 19 December 2018.

2. A Preliminary Hearing on case management was held on 2 October 2018 conducted by Employment Judge ("EJ") Martin. At that hearing the Claimant was ordered to provide further information of the missing parts of a draft list of issues drawn up by the Respondent, from which the Respondent was to then prepare a final list of issues to be agreed with the Claimant. The Respondent was ordered to provide an amended Response, if so advised, in the light of the Claimant's further information. Various case management orders were also made in order to prepare the case for final hearing which was set for five days commencing 16 September 2019.

3. The issues to be determined by the Tribunal are as set out in the list of issues at pages 71 to 75 of the bundle of documents. This is appended to this Judgment. At the start of the hearing we ascertained that the issues were agreed between the parties. In a nutshell, the Claimant's complaints are of direct disability discrimination, victimisation, failure to make reasonable adjustments, detrimental treatment following protected disclosures, and automatic unfair dismissal following protected disclosures. There are also potential time-limit issues in respect of any complaints based on incidents occurring before 31 December 2017.

4. The Claimant clarified that there was no separate health and safety dismissal/detriment complaint, but this was part of her public interest disclosure claim. She also clarified that she was not bringing a complaint of ordinary unfair dismissal given her lack of two years' continuous employment with the Respondent.

5. In addition, it also became apparent that there was a dispute between the parties as to whether the Claimant was an employee or not. This was of relevance only to the complaint of automatic unfair dismissal.

**Documents**

6. The Respondent provided a bundle of documents, comprising of two lever arch files. The first of these contained pages 1 to 452A (which we refer to as "R1") and the second contained pages 452 to 555 (which we refer to as "R2").

7. We heard evidence from the Claimant by way of a written statement and in oral testimony. Her witness statement had appendices which together ran to 186 pages. Her witness statement consisted of testimony as to the matters of which she complains but also references to law and what in effect are submissions rather than evidence. Many of the appendices are cut and paste versions of original emails, letters and other documents with her added commentary. As a result, it was difficult to know just how accurate these versions were unless we were cross-referenced to the original formats within R1 and R2.

8. The Claimant had only brought one copy of her witness statement and appendices with her. Fortunately, the Respondent had two spare copies and I directed our clerk to make a further two copies rather than put the Claimant to the expense and time of copying these herself at an external print.

9. We heard evidence on behalf of the Respondent from eight witnesses: Ms Emma Clark (nee Hill); Mrs Lisa Punter; Ms Louise Fox; Ms Colleen Sherlock; Miss Kelly Irvine; Ms Sakina Jeffrey; and Mrs Elaine Beaumont. This was by way of written statements and in oral testimony. Whilst a witness statement had been provided for Ms Pegah Keyhan it became apparent during the hearing that she was on maternity leave and unable to attend to give evidence. I indicated that this would affect the weight if any we would give to the contents of her statement.

10. The Respondent also provided the Tribunal with an Opening Note, Chronology and Cast List.

**Preliminary matters**

11. The Claimant had requested the provision of a Hungarian interpreter. Ms Oyeyele was present as the interpreter provided by the Tribunal. The Claimant explained that she speaks English but may require the interpreter to interpret anything that she does not understand. Mr Ross, Counsel for the Respondent, asked the Tribunal to emphasise to the Claimant that she must not engage in side conversations with the interpreter. I explained to the Claimant that whilst it was tempting to ask the interpreter questions such as, why is the Judge asking me this and so forth, she must not do so. Ms Oyeyele clearly understood that this was not acceptable.

12. I explained for the benefit of the Claimant, that the Tribunal would assist her as far as possible in order to make up for the fact that she is unrepresented whereas the Respondent is represented. I went through the issues involved in her complaints, the procedure that we would follow and the timetable of events.

13. The Tribunal then adjourned until after lunch to read the witness statements and referenced documents within the bundle and the Claimant's appendices.

**The Claimant's evidence**

14. The Claimant speaks and reads English but had the services of a Hungarian interpreter at our hearing until dispensing with those services on the afternoon of the last day of the hearing prior to submissions.

15. It is fair to say that the Claimant hardly used the interpreter during the course of the hearing. She spoke in English and looked at and referred to the documents which were all in English. Indeed, there were a number of occasions on which the interpreter proactively intervened because it was evident to her (and to the Tribunal) that the Claimant had not understood questions or answers given by witnesses or what we had said to her. It was also evident on numerous occasions that the Claimant did not appear to be listening or to understand what was said even after the interpreter had intervened and repeated matters in Hungarian to her. Much of the time the Claimant did not even look up when she was asking questions, when answers were given or look up or even answer when she was being spoken to.

16. At the end of the evidence and just before the start of submissions, the interpreter, Ms Oyeyele, asked to speak to the Tribunal. I invited her to do so in front of everyone.

17. We found out that over lunch the Claimant had asked her to translate the written submissions that Mr Ross had provided at the close of evidence. It appeared that the Claimant had expected Ms Oyeyele to translate every word of that 15 page document, reacted badly to what was being translated and put her case to Ms Oyeyele in response to each point.

18. Ms Oyeyele expressed her concern that having attempted to do so and heard her answers, it had become very clear that the Claimant had not understood what was happening during hearing and had said yes to questions without understanding them, despite our explanation. However, she had formed the view that this was not because of any language barrier, but because the Claimant simply did not understand even when she had interpreted matters to her. She felt that her role was compromised because she was in effect expected by the Claimant to take on the role of her guardian rather than court interpreter. The Claimant in turn then said that she no longer required the services of an interpreter but did not give clear reasons why.

19. Whilst the Claimant was not prepared to continue using the interpreter, we had no concerns about Ms Oyeyele's conduct or professionalism during the hearing. We felt that she had gone beyond what was normally expected of an interpreter by intervening when she felt the Claimant did not understand and even (as we belatedly found out) being called upon to translate the Respondent's written submissions for her.

20. We formed the view that the Claimant had simply not been listening during the hearing and that she failed to understand matters even when they were explained repeatedly in English and Hungarian.

21. The Claimant on many occasions simply continued by repeating the same question even after I had explained to her that either the question was not relevant or that she had got an answer. She asked repeatedly for clarification of matters even after the clarification had been given repeatedly in straightforward terms. She continued to speak whilst being spoken to with apparent disregard for what had been said to her. From this we had formed the view that she simply was not listening.

22. I had attempted to find out why on a number of occasions, asking if it was because she was tired or it had been a long day or whether that was simply how she was. She did not offer any answer each time.

23. I had ensured that we had regular mid-morning and afternoon breaks, an hour for lunch and finished by 4.00 pm each day, save for one day when we had a later lunch and so a shorter afternoon session. The Claimant did not raise any issues relating to her Diabetes, ask for any breaks or take them when additional breaks were offered.

24. It was only after lunch and prior to the start of submissions on the fourth day of the hearing that she said that her blood sugar level was low and she

needed to eat. The Tribunal adjourned for half an hour after which the Claimant indicated that she was able to proceed.

25. The Claimant was tearful on a number of occasions and she was offered the opportunity to have breaks to compose herself but she indicated on almost all of these occasions that she wished to continue and did so unless we insisted because it was clear she was too distressed to do so.

**Findings**

26. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.

27. The Claimant is from Hungary. She has type 1 Diabetes. She has many years' experience of working in the healthcare sector in her own country and qualified as a trained nurse there. Her CV setting out the extent of her qualifications and experience is at R1 289-293.

28. Through a recruitment agency called PCQ (now called PCA Nursing), the Claimant applied for and was given a conditional offer of employment with the Respondent health Trust, as a Staff Nurse Band 5 Maple Ward (acute medical ward specialising in Diabetes) on 20 April 2016. She was interviewed by Mrs Lisa Punter, Lead Nurse Recruitment and Development. The offer letter is at R1 215-217 and a clearer version of this letter is at R1 212-214).

29. The offer was conditional on a number of factors including an occupational health check and proof of registration with the Nursing and Midwifery Council ("NMC") and the Health and Care Professions Council ("HPC"). Provision was made for staff to start work prior to receiving NMC registration but as a Band 4 Health Care Assistant until proof of registration was received (R1 213). At this time the Claimant was not so registered.

30. The Claimant attended an Occupational Health appointment on 29 April 2016 and the Respondent was then provided with a report. This is at R1 219-220 and is headed Occupational Health Clearance Certificate. This document states as follows:

*"I am pleased to advise you that the above individual has been health cleared to commence work, subject to the following restrictions due to her underlying health condition which falls under the remit of the Equality Act 2010.*

*Ms Bor has an underlying health condition of Type I Diabetes Mellitus which is being treated and under the care of the Specialist that reviews her condition regularly.*

*In view of the above condition, she is advised not to undertake lone working, long day and night shifts initially for 6 months following her initial phase of nursing post.*

*She needs to take her full entitlements to break necessary food breaks and checking her blood sugar in order to maintain safe levels.*

*She has been advised by OH to discuss her condition with her team member and manager should hypoglycaemic episode occur and to consider wearing medi-alert indicating details of her condition.*

*Ms Bor has not been assessed for EPP."*

31. As a result of this report, Ms Louise Fox, Divisional Chief Nurse for the Division of Medicine and Emergency Services decided to withdraw the offer of employment because the shifts that the Claimant could work were not compatible with the service needs of Maple Ward. Ms Fox explained in evidence that the Claimant could not work long and night shifts and there were safety concerns about her not being able to work alone. She further explained that Maple Ward was extremely busy with a number of high acuity patients. It required staff to work a mixture of long day and night shifts and if a staff member could not work a full shift this would create increased work pressure and give rise to a clinical risk. Staff would not be able to work purely night shifts and would need to work a mixture of shifts. This is because night work involves less staff and supervision and support which could result in clinical risk and knowledge deficit. We accepted her evidence.

32. Ms Fox explored alternative roles for the Claimant, for example a Clinical Nurse Specialist role in the Diabetes Team given the Claimant's stated interest in Diabetes Medicine on her CV. This role offers the flexibility of shorter shifts and a more structured way of working. However, it appears that on meeting with the Claimant, the Diabetes Team had concerns as to the Claimant's knowledge and experience given that she had not worked in the NHS or a specialist team and that she needed to gain general NHS experience first.

33. Mrs Punter was aware of the situation and was keen to retain the Claimant's services for future nursing posts.

34. It is unclear from the evidence who told the Claimant that the offer had been withdrawn, but it is clear that she was told of it. There is no correspondence in the bundle as to this communication. On or around 4 May 2016 Mrs Punter contacted PCA Nursing and via that organisation she gave the Claimant the option of signing up for Bank Working (ie casual work) as a Health Care Assistant ("HCA") and explained the difference between a substantive post and a Bank post. We can see from the emails at R1 221 that Mrs Punter had written to Ms Colleen Sherlock, Head of Workforce Planning and Resourcing, explaining the position and expressing her keenness to retain the Claimant

35. On 18 May 2016, Mrs Punter emailed the Claimant in which she indicated that she had spoken to another member of staff and had been told that the Claimant was still under the impression that she was going to work as a Staff Nurse on Maple Ward. In her email she further states that she was not sure where this confusion came from because she was aware that the agency had spoken to the Claimant about it. She then reiterated that the Claimant will be working a Bank Health Care Assistant and once she had her NMC registration they would review the position. The email is at R1 223.

36. The Claimant replied to this email on 19 May 2016 at R1 222-223. She acknowledged that she was a bit confused by the offer of the Staff Nurse post and then Bank HCA but having contacted the agency they had explained the position to her. Mrs Punter responded on 20 May 2016 further explaining

why the original offer had been withdrawn and the nature of the Bank Work pending the Claimant's DBS clearance. We note that Mrs Punter ends the email by telling the Claimant that she must ask her questions if she does not know something or for clarification as the agency does not always know.

37. On 6 June 2016 Mrs Punter wrote to the Claimant regarding the offer of the post of Bank HCA (R1 225 -226). We have some sympathy for the Claimant in her confusion as to her employment status, the Claimant believing that she was an employee and not a casual worker. We can see from this document that it would cause confusion because of the references to "employment" on a number of occasions and the reference to an "employment start date" in the first paragraph. This of course is at odds with the offer of Bank Work.

38. However, it is clear that the Claimant was from 14 June 2016 onwards until 20 February 2018 working a variety of shifts at different wards (R1 227-235) and declining shifts for different reasons (R1 235A- C). This indicated that she was aware that the nature of her work was casual in as far as she could choose when and where to work and could and did decline shifts.

39. Whilst it is unfortunate that the Claimant did not receive the terms of engagement for Bank workers until 27 September 2016 (R1 188-195 at page195 and at page 20 of her witness statement), she would already have been aware from what she had been told, her work pattern and payment of wages, that she was employed on a casual basis and not as an employee. This document merely reinforces that status.

40. On 3 September 2016, the Sister Kingfisher Ward, emailed Banks Request raising a concern about the Claimant carrying insulin pens in her pocket whilst working (R1 235DB). She had seen the Claimant take 2 insulin pens out of her pocket, established that they were for the Claimant's use because she is Diabetic and advised her that it was not safe to carry them whilst working. However, the Claimant refused to put them in her bag as requested, saying that she may need to inject. The email continued that whilst the Sister appreciated that the Claimant is diabetic, it is not safe for her or the patients to be carrying medication around in her pocket. She would need to go out of the clinical area to give herself medication and the Ward was quite happy to accommodate this.

41. From an email sent on 4 September 2016 we can glean that the Deputy Sister (we think on Swan Ward, as that was where the Claimant was working that day) had a long conversation with the Claimant about carrying insulin pens on her person. The Claimant had said she was not aware that she could not do so within the clinical setting and agreed she would keep them in the staff room. This email is at R1 235DA.

42. The top email on R1 235DA indicates that there might be some further discussion with the Claimant by Bank on Call. Ms Emma Hill (now Mrs Emma Clark but we will refer to her as Ms Hill) met with the Claimant about this issue on or about 8 September 2016. We were referred to her handwritten notes at R1 235D which were prepared in preparation for the meeting.

43. In her written evidence Ms Hill denied that she had subjected the claimant to discrimination by informing her that her insulin pens must be stored and locked away safely when there were not enough lockers in which to do so. Her evidence was that she had received feedback from Kingfisher Ward that the Claimant had been carrying her insulin pen with her on the ward and that there were safety concerns about this. She met with the Claimant on 8 September 2016 and asked her to put her pen in her locker, to let the Nurse in Charge know when she needed to leave to take her insulin and that the Ward Clerks had a desk with a drawer in it and it also could be left in there. Her recollection is that it was a relatively positive meeting, it did not get heated, and the Claimant seem to take on board what she was saying to her. Her primary focus was the risk that vulnerable patients on the ward could grab the insulin pen and stab themselves or others with it. She does not work on the wards and was not in a position to comment on the sufficiency of lockers.

44. The Claimant accepted that she did meet with Ms Hill, but she did not recall the exact date. She accepted broadly that the conversation was as described by Ms Hill but did not accept it was a positive meeting but rather that it was, as she put it, "bullying". She was unsure whether Mrs Punter was there at time, although both Ms Hill and Mrs Punter gave evidence that she was not.

45. The Claimant's evidence at paragraph 12 of her witness statement is that Mrs Punter victimised and bullied by telling her after the Kingfisher Ward incident:

*"I am unhappy to be a nurse at the Trust. If you don't have time to go break to take your insulin or have some meal, your blood sugar levels will be unstable, you can be in coma, and this is the risk in the patient care. You and me can lose our pin I don't want to lose my nursing pin. Why do you risk your health? Why are you not looking for another job? Why are you not working at souvenir shop?".*

46. The Claimant also appears to relate the words alleged to have been said to her by Mrs Punter in her letter to the NMC dated 27 December 2017 at page 43 but in slightly different terms:

*"You won't be a nurse here, because I don't want to lose my nursing pin… If you cannot go break for insulin injection or having some meal because we are so busy, your blood sugar level will be unstable this could lead to risk of your coma and the patients are not in safety. Sometimes nurse can go for lunch break at 4:00 pm for and this is too late for you. Why do you risk your health!? Why are you not working at shop. Why are you not looking for a job somewhere else."*

47. The Claimant also refers to the words said to her by Mrs Punter in what appears to be a Facebook message at R1 357 again in slightly different terms:

*"You won't be a nurse. I won't loose my nursing pin, if we are short staff or busy and you can't go break to take your insulin or have some meal. Therefore your blood sugar level will be unstable. Why your insulin pen was in your pocket? (24 hour baywatch) Why risk your health? Why are you not working at souvenir shop?"*

48. The Claimant also refers to the words alleged to have been said to her by Mrs Punter in her later grievance letter addressed to Ms Suzanne Rankin, the Respondent's Chief Executive at R1 315-316, in which she alleges that she was reported, later bullied and discriminated by Mrs Punter. Again, this is in slightly different terms:

*"I don't want to lose my nursing pin, because of your diabetes you won't be a nurse here. If you cannot go to break for taking your insulin or having some meal, because we are busy, your blood sugar level will be unstable (you could be in a coma) and the patients are not safety in your duty…*

*If you can't take your insulin injection, why do you want to risk your health? Why are you not for another job that is suitable for you… (Note: I quoted her not word by word)"*

49. Ms Punter denied emphatically saying such things both in her written evidence and in cross examination.

50. On balance of probability we prefer the Respondent's evidence as to the meeting which is broadly accepted by the Claimant. We do not see that it was a bullying meeting as the Claimant states. We find that the alleged comments by Mrs Punter were not made. They are repeated in various documents in broadly the same terms but there is nothing to support what is simply a bare assertion by the Claimant. Given the lengths Mrs Punter had gone to so as to retain the Claimant's services and we note to find accommodation for her (although this is not something that beyond noting it in this context going to the issues before us) this seems unlikely in any event.

51. On 14 September 2016, the Claimant sent a number of emails to Ms Hill.

52. The first of these is in response to Ms Hill's email as to provision of a uniform for the Claimant (R1 235F). The Claimant's response requested cancellation of her Kingfisher Ward shift set for 17 September 2016:

*"Please, could you cancel my Kingfisher shift on Saturday 17/09, because I don't want any problem with the ward manager because of my diabetes and pin using, storaging.*

*Last time I was hurt verbally by the ward manager because… I won't complain.*

*Anyway, diabetics work more harder and healthier, I think and we have bills to pay then the healthier… I read about disability act, equality… I don't want any more the Kingfisher manager angry with me just because I have diabetes and need to storage correct way my insulin injection.*

*Actually, when I go to the wards no locked storage for my pens, I always ask them."*

53. This email makes a broad reference to disability and relates to the incident with the insulin pen on Kingfisher Ward. It also indicates that the Claimant had difficulty finding locker storage for her pens.

54. The Claimant's position is that there were not enough lockers available because the permanent staff took the locker keys away with them. She was directed to store her insulin pens in the Ward Manager's Office, but this was sometimes locked, she was told it was Bank's responsibility to provide storage and in turn Bank said it was the Ward's responsibility. She was further told that she had to buy her own lockable box.

55. We heard evidence from Miss Kelly Irvine, the Matron on Swan Ward as to availability of lockers on Swan Ward at paragraph 4 her witness statement and that the Claimant did not raise it as a concern to her. She explained that there were around 10 lockers on the Ward, there would be around nine members of staff working at a given time and therefore there was sufficient provision of lockers. She further explained that the Claimant would have been able to use those lockers when working on the ward to store her belongings

and could access her insulin relatively easily and within a quick period of time when she needed to take her medication. We accept this evidence.

56. Whilst the issue of lockers appears to have been a live concern for the Claimant at that time, it appears to have gone away in as far as she does not raise it again until she begins to document her concerns in various letters and emails and she is not picked up for carrying the pens on her person again. We did wonder where the Claimant was storing the pens if as she says there was no storage. We find that the Claimant was given sufficient suggestions and options as to storing her pens but at the end of the day it was her responsibility to find safe storage outside clinical areas and readily accessible when required.

57. The second email which the Claimant sent on 14 September 2016 is at R1 235H and the attachment to it at R1 235I. the subject box of the email is "kingfisher Ward Manager knows this?" and the attachment is a page from Healthline entitled "Your employer must make reasonable accommodations" and it relates to diabetes.

58. The third email sent on 14 September 2016 is at R1 235J and the subject box says "Health and Safety" and contains a hyper link to www.hse.gov.uk\disability\largeprint.pdf.

59. The fourth email sent by the Claimant on 14 September 2016 is at R1 235K and the subject box says "Disabilaty" (sic) and contains a hyperlink to www.diabetesUK/upload/Howwehelp/Advocacy/Advocacypack_EmploymentV3-Jan1016.pdf.

60. The fifth email sent by the Claimant on 14 September 2016 is at R1 235L and the subject box states "for Kingfisher manager" and contains a hyperlink www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf.

61. The Claimant also sent an email to Ms Hill on 14 September 2016 which is at R1 236 and says as follows:

*"if the healthy people have rights to work 4-5 long days per week, according to equality I should have the same rights to work as non diabetics.*

*Diabetics have bills to pay not just for non diabetics.*
*Equality is about the same rights for diabetics and nondiabetics for working same working hours.*

*Just because somebody diabetics doesn't mean she can work less hours.*
*Thank you for your understanding."*

62. In her witness statement Ms Hill said that she was unclear what the Claimant meant by her five emails sent on 14 September 2016. She thought that they were spam emails because of the number received early in the morning in quick succession some of which contained nothing but hyperlinks. She said she was confused why the Claimant was sending emails when she had already met with her to discuss the storage of insulin and she believed the matter had been dealt with. She further stated that she was unclear what the fifth email on 14 September 2016 meant.

63. We note from an email to the Claimant from Ms Hill dated 27 September 2016 that by this date the Claimant had obtained her Nursing PIN (at R1 237). This

email also mentions arrangements regarding a further Occupational Health appointment.

64. The Claimant saw the Occupational Health Adviser on 10 October 2016. The outcome of that assessment was sent to Ms Hill and copied to the Claimant and Mrs Punter on the same date. It can be found at R1 246-247. In particular, the report refers to the Claimant's Diabetes. It states that the Claimant is fit for working long days and only require standard breaks. During a long day shifts she would be using her insulin pen three times. In response to a specific question from the Respondent the report said:

*"Is the individual fit to carry out the full range of duties relating to their contracted job?*
*The employee is fit for all aspects of her role, bar night working. She had been advised to abstain from night working from treating specialist in her home country (whom she has provided her care since she was diagnosed). Reason being night working would interfere with the prescribed insulin regime which is set for day administration."*

65. After receiving the Occupational Health report, Ms Hill emailed the Claimant on 10 October 2016 which is at R1 244. In this she states that having read the report she and Mrs Punter required her to work one week of short shifts (i.e. an early or a late shift each day brackets) from 10 to 17 October and after that date, provided she has made suitable arrangements for her insulin to be stored appropriately, she would be allowed to commence working long days.

66. However from the work schedules at R1 227-228 we find that the Claimant was already working long shifts during the day (from the start of her Bank work in fact and on 23 July 2016 on Maple Ward) and whilst during the week prior to 17 October 2015 she did work short shifts, she then reverted back to long day shifts.

67. We had assumed that the insulin storage issue had been resolved before now, but in any event, we heard no further evidence that it was still a live issue and the shifts worked appear to suggest that, if it was as at 10 October, it was not after 17 October 2016.

68. On 21 June 2017 Ms Hill received an email from the Surgical Assessment Unit ("SAU") DSR raising concerns about the Claimant and her behaviour towards patients and work colleagues. The email asked for any further shifts in SAU to be cancelled and for her not to be booked in the future. This email is at R1 259A. In an email dated 27 June 2017, Mrs Punter, having seen the SAU email, stated that personally she did not think this was enough to remove the Claimant from Bank Work and suggested simply restricting the Claimant from working on SAU and on weekdays for a short period. This email is also at R1 259A.

69. On 29 June 2017 Ms Hill sent an email to the Claimant with regard to feedback that had been received from SAU regarding shifts that she had worked with them in the past. As a result of this feedback and in discussions with Human Resources, Ms Hill told the Claimant that she would no longer work on SAU and she would only work dayshifts on weekdays, so as to ensure sufficient support whilst she was on duty. The email is at R1 260.

70. We note from the work schedules that the Claimant was working weekends prior to 21 June 2017 and thereafter only worked one day during the week which was 31 December 2017.

71. On 21 September 2017, the Matron for Maple Ward, May Ward and Endoscopy sent an email to Ms Hunter (at R1 269A-B Heron Annex). This related to an incident between the Claimant and a Staff Nurse. The gist of the incident is that the Staff Nurse had told the Claimant that she was not being effective with the usage of disposal pads and wipes of which supplies were limited. The Claimant had reacted badly to the comment and argued with the her in response. In addition, the Staff Nurse said that the Claimant answered her mobile phone whilst taking a patient's blood pressure and left the unit without asking permission from the Nurse in Charge. When the Staff Nurse later questioned her behaviour, she started an argument with him. There was a further issue involving the Staff Nurse asking the Claimant to help him move a patient from a chair to a bed using a hoist. The Claimant was washing another patient at the time and refused to assist the Staff Nurse and argued with him. The Staff Nurse hoisted the patient on his own. The email also referred to an earlier incident three months before where the Claimant had an argument with the Staff Nurse because she was asked to do something that she did not like.

72. It would appear that whilst the Staff Nurse was asked to reflect upon his own actions in not escalating the issue with the Claimant's mobile phone to the Matron, no action was taken against the Claimant.

73. We note the letter from the Staff Nurse at R1 269C which appears to be his report of the incident on 21 September 2017. In particular, we note that he complains that the Claimant had not been listening to his instructions and kept arguing with him.

74. The Claimant alleges that she left a handwritten letter for Ms Pegan Keyhan, the Manager of Swan Ward, on her office table on 26 December 2017 which raised her concerns that she did not receive help for a patient re-position as the Ward was busy and short-staffed. The Claimant did not have a copy of this letter and none was produced at the hearing. Whilst Ms Keyhan was not present to give evidence, we did have her written statement which was signed with a statement of truth and dated. In that statement at paragraph 7 she denied ever receiving such a letter. We are entitled to attach what weight we believe appropriate to a statement in the absence of the witness. We believe it is appropriate to take into account that the signed statement denies what is no more than an assertion by the Claimant. One balance of probability we find that such a letter was not left on Ms Keyhan desk has alleged.

75. On 12 February 2018 the Claimant sent an email to the Freedom to Speak Up Guardian ("FTSU Guardian") within the Respondent Trust. This is at R1 319-325. The FTSU Guardian is a person within the Trust that staff can raise concerns with. This email seems to have been prompted by the Claimant's removal from shifts and sets out a series of concerns that she has commencing with her appointment as Staff Nurse Band 5, the subsequent withdrawal of the offer and its replacement with a Bank HCA position and the alleged remarks made by Mrs Punter (although not attributed to her in this

email) regarding the use of insulin. The email is lengthy and difficult to follow. But essentially the Claimant is stating that she has been discriminated against because of her Diabetes and that she has been bullied and victimised. She points to her educational background and nursing experience and qualifications. She expresses concern as to why she was not appointed to the Staff Nurse role but instead only offered Bank HCA duties and further her removal from weekend shifts following concerns raised by SCU.

76. On 15 February 2018 the FTSU Guardian sent an email to the Claimant in which she thanked the Claimant for raising her concerns, but said on reading her story she felt the best person to deal with her request around practising as a registered nurse in this country and her diabetes would be the Deputy Chief Nurse. She further stated that with her permission she'd like to forward her email and documents to him as a way of starting a dialogue around her current position within the hospital. This email is at R1 318.

77. On 15 February 2018 there was an incident on Swan Ward involving the Claimant. The Deputy Sister notified Mrs Punter that this incident had been witnessed by patients. She further notified Mrs Punter that the Claimant had placed inappropriate posts on Facebook and sent inappropriate messages to colleagues.

78. In response to these concerns, Mrs Punter discussed the matter with Ms Colleen Sherlock, the Head of Workforce Planning & Resourcing, who determined given their seriousness, it was best to restrict the Claimant from booking further Bank shifts pending investigation.

79. It would appear that on 20 February 2018 Mrs Punter advised the Claimant of the allegations and told her that she was restricted from booking any further Bank shifts pending the outcome of the investigation. We can see from the schedules at R1 235 that this was the last shift that the Claimant worked for the Respondent.

80. We also note the contents of an email which the Claimant sent to Ms Hill on 20 February 2018 at R1 373B regarding her personal mug:

*"I'M KINDLY ASK ONE OF THE STAFF MEMBERS AT AMU WHO IS BROUGHT 'ACCIDENTALLY' MY GREEN MUG WITH LIGHT PINK COLOUR SMALL ROSES ON IT (VINTAGE STYLE) FROM THE DESK OF THE LOCKED STAFF ROOM YESTERDAY AND FEEL THAT IT IS NOT YOURS AND THEREFORE YOU CANNOT SLEEP, PLEASE' ACCIDENTALLY' RETURN IT BACK WHERE YOU HAVE 'FOUND' IT ASAP!!!*

*I AM VERY UPSET NOT BECAUSE OF THE VALUE OF THE MUG, SIMPLY I HAD PERSONAL MEMORIES TO THIS MUG!*

*SHAME YOU!*
*LORD CAN SEE EVERYTHING IDIOT!*

*I'm incredibly disappointed!"*

81. We also note the contents of an email from Mrs Punter to the Claimant at R1 325A dated 21 February 2018, which refers to the Claimant having been in contact with staff from the Swan Ward when Mrs Punter had told her the day before not to discuss the complaints about her with anyone in the Trust other than herself and WG. The email also stated that this was also referred to in

the attached letter (which would appear to be the one which we refer to below).

82. On 21 February 2018, Mrs Punter wrote to the Claimant requesting her to attend an investigatory meeting on 9 March 2018 regarding the following allegations:

*"On 15 February 2018 whilst on Swan Ward your behaviour was inappropriate in that you were arguing with the nurse in charge of the ward which was also witnessed by a patient's relative.*

*On 16 and 17 February 2018 you made inappropriate comments on Facebook which would be in breach of the Trust's Social Media Policy."*

83. The letter, which is at R1 309-310, also advised the Claimant that she was not subject to the Respondent's disciplinary procedure as a Bank Worker, but nevertheless the Respondent had a duty to investigate any concerns raised about Bank Workers. The letter further advised that the investigation would be carried out under the Temporary Staffing Policy, a copy of which was enclosed. The letter continued that following investigation one of the potential outcomes was that the Claimant may be removed from the Bank Register. The letter further continued that due to the serious nature of the allegations the Claimant was restricted from working in a role with direct patient contact until the investigation was concluded. The letter also instructed the Claimant not to contact anyone within the Trust with regard to the allegations against her.

84. On 21 February 2018 the Claimant sent two letters of grievance to Ms Rankin in which she made a number of complaints about Mrs Punter in relation to disability and of bullying and harassment. These are at R1 311-317. They raise the Claimant's concerns about the removal of the offer of employment as a Staff Nurse Band 5 and the offer of employment as a Bank HCA, the issue around her use of her insulin pen on the ward and the comments made by Mrs Punter to her in this regard and the reduction of her shift allocations. The first of these letters is lengthy and quite difficult to follow.

85. On 22 February 2018, the FTSU Guardian referred the Claimant's letter to her of 15 February 2018 to the Deputy Chief Nurse. In response, in his email dated 23 February 2018 he indicated that he had asked the FTSE Guardian to refer the matter to HR and further had on his mind that he would raise it himself and asked Ms Sherlock and BP to review the matter and give any thoughts on the situation. In his email he states:

*"On reading the long mail from EB (staff member) it looks as though this could be quite a serious HR issue. In simple terms there is no reason why she should not be able to work as a staff nurse, as she has a valid (as of the 23rd Feb 18) PIN number with the NMC. The NMC website also notes no restrictions on practice. There are obviously questions to raise on her ability with English language but the overriding message is not positive in terms of recruitment."*

86. These emails are at R1 329A.

87. This appears a valid response on the face of it. However, we do not know whether the Deputy Chief Nurse was aware of the full circumstances regarding the Claimant or indeed what further action if any was taken.

88. The Claimant sent a further letter of grievance relating to Swan Ward to Ms Rankin dated 28 February 2018. This letter is at R1 335-342. This essentially addressed the Claimant's concerns about the incident on 15 February 2018 for which she was being investigated and her general concerns at work relating to staff levels in health and safety. Again the letter is very lengthy and quite difficult to follow.

89. On 6 March 2018 the Deputy Chief Nurse sent an email to Ms Sherlock and Mrs Punter attaching the Claimant's grievance letter regarding Swan Ward, the Claimant's grievance relating to the failure to make reasonable adjustments, a letter that she had sent to the Diabetes Organisation and the letter to Ms Rankin entitled no salary during investigation. The email is at R1 343A and asks for an update on the situation.

90. On 8 March 2018, in consequence of the grievance against Mrs Punter, a decision was taken to remove her as the investigation officer. She was replaced by Ms Sakina Jaffrey, Clinical Nurse Leader. Ms Jaffrey was unable to attend on the day that had been set by Mrs Punter for the investigatory meeting and a further date was set for 19 March 2018 (R1 379).

91. On 12 March 2018 Ms Jaffrey carried out interviews with a number of staff from Swan Ward: SL, the Deputy Sister; DS, the Staff Nurse; and Ms Pegah Keyhan, the Swan Ward Manager. She did not feel it appropriate to interview patients or relatives because she had reports from the staff members regarding the Claimant's conduct on Swan Ward with regard to the incident in question. Copies of the notes of interviews are at R1 347-369.

92. On 12 March 2018 the Claimant sent an email to the Care Quality Commission ("CQC"). This is at R1 370-371. In this letter the Claimant raises concerns about the standard of patient care at the hospital. In response on 13 March 2018, the CQC responded with what appears to be a standard response but stating that the information provided had been passed on to the Inspector for the hospital and that they may be in touch to ask for more details. This email response is at R1 372. There is a further response from the CQC Inspector dated 16 March 2018. This identifies the Claimant's complaint as centring around delivery of care, staffing and communication and that the Claimant has raised a grievance and feels discriminated against by staff at the hospital. However, the Inspector indicates that the CQC cannot take up the complaint directly and that Ms Rankin, the Chief Executive, is best placed to deal with the concerns raised. This response is at R1374.

93. On 16 March 2018 Mrs Elaine Beaumont, the Workforce Resourcing Manager, wrote to the Claimant in response to her letter to Ms Rankin dated 21 February 2018 and her further letters of concern. The letter stated that as manager of the Trust Bank she would be investigating the concerns and will be in touch in due course. The letter further indicated that although the Claimant had specified in her letters that she was submitting a formal grievance, the concerns will not be addressed under the Trust's Grievance Policy and will be addressed as a complaint, as per the processes in place to address the concerns raised by the Trust's Bank staff.

94. On 19 March 2018 Ms Jaffrey and WG met in readiness for the scheduled investigation meeting with the Claimant. However, the Claimant did not attend.

95. WG attempted to rearrange the meeting in April 2018. The Claimant responded by an email dated 4 April 2018 in which she stated that she was unable to attend because of the diabetes discrimination and whistleblowing has affected her mental health and without income she has to return to Hungary. The email continues "I don't know how I will go to the employment tribunal or I can go to Hungary to be sorted?!" This email is at R1 378.

96. In response, WG suggested that in order to enable the investigation to be concluded would it be possible to email the Claimant some questions and then she could provide a written response to the allegations (at R1 378) and the Claimant responds "yes, please" (at R1 411).

97. The Respondent sent the questions to the Claimant with an email dated 9 April 2019 (at R1 410). The questions are those which Ms Jaffray and WG had prepared as part of the investigation meeting template which is at R1 376-377. The Claimant's answers to the questions appear to be the attachment to your email to the Respondent dated 9 April 2019 (at R1 410) which is at R1 393-405.

98. Mrs Beaumont gave evidence as to her investigation into the Claimant's grievances. She considered the grievance letters which the Claimant had sent to Ms Rankin dated 21 and 28 February 2018. In addition, she received an email from the Claimant dated 3 April 2018 in which the Claimant stated that she intended to bring an Employment Tribunal claim and referred to disability discrimination by Mrs Punter and whistleblowing of the short-staffed problem/safeguarding issue at the Swan Ward (R1 381). Mrs Beaumont responded asking who she had raised the whistleblowing concerns with of which she had not been aware. Mrs Beaumont then received a further three emails from the Claimant on 4 April 2018 which are at R1 383-387. These expanded on the Claimant's whistleblowing complaints. The Claimant sent further emails on 9 April 2018 and a further email on 10 April 2018 (R1 408-410 and 412-413). She sent further emails on 10 April and 13 April 2018 (at R1 for 416, 421 and 425). Mrs Beaumont took all of these documents into account.

99. By a letter dated 13 April 2018 to the Claimant, Mrs Beaumont set out her response to the various letters of complaint which had been submitted to the respondent. This letter is at R1 418-420. Mrs Beaumont's findings are summarised within her witness statement at paragraph 9. In essence, she addressed all of the Claimants concerns but could not find any evidence of bullying behaviour or discrimination.

100. It is not our role to reopen the investigation undertaken by Mrs Beaumont. But we could find nothing untoward in her findings or conclusions.

101. On 23 and 24 April 2018 the Claimant emailed her responses to the allegations being investigated by Ms Jaffrey to Mrs Beaumont (these are at

R1 429-430 and 431). Ms Jaffrey was on annual leave at the time and did not see them until a return after 8 May 2018.

102. Ms Jaffray produced an Investigatory Report which is at R1 443-448. Mrs Beaumont received the report and the appendices from Ms Jaffrey in either April or May 2018 for her consideration. Whilst Mrs Beaumont states that she received the report in May, there is an email from WG to her dated 13 April 2018 attaching the report (at R1 420A). However, nothing turns on this point.

103. In essence Ms Jaffrey found as follows:

On 15 February 2018 whilst on duty on Swan Ward, the Claimant behaved inappropriately by arguing with SL, the Nurse in Charge in front of the patient's relative-

103.1 SL had asked the Claimant to prioritise putting a patient to bed, the Claimant became irate and said that she did not have anyone to help. SL asked the Claimant to get AJ, another HCA, to assist her and make it a priority to put that patient to bed before anyone else. The next she knew the Claimant was speaking loudly that she was busy. What she said was loud enough for patients to hear.

103.2 The Claimant's position was that she did not see anything wrong with her behaviour, she was on her own and needed assistance. She asked AJ for assistance, AJ argued with her and stated that he was busy. She simply told SL that she was busy, but SL argued with her.

103.3 SH provided a written statement (at R1 344) in which she states that she overheard and confirm the conversation between SL and the Claimant. She said that the Claimant appeared quite upset and stressed and said she was busy and that she would not be able to do what SL asked and felt that she was not receiving help or support. SL replied that she appreciated how busy the Claimant was, like everybody else, but told her to prioritise the patient and team up with another HCA, AJ. SH said that the conversation was partly in the treatment room and partly just outside, but it was all quite loud and would have appeared as an argument and quite unprofessional to a bystander.

103.4 Ms Jaffrey formed the view that the Claimant had exhibited a lack of insight into her behaviour and appropriate ways of resolving differences in communicating. She felt the differences of opinion should be handled sensitively and professionally, whereas calling someone down a corridor in front of a patient was not an appropriate way of behaving at any time. She also felt that this lack of understand of her behaviour was depicted in the Claimant's responses to her written questions and also within the posts that she had put on Facebook (which are dealt with below).

103.5 She concluded that there was sufficient evidence to uphold the allegation that the Claimant's behaviour had been inappropriate.

On 16 and 17 February 2018 the Claimant made inappropriate comments on Facebook which would be in breach of the Trust's Social Media policy-

103.6 The various Facebook posts and private messages to colleagues sent by the Claimant are at R1 353-367.

103.7 SL and DS had seen Facebook posts and had reported that they felt these were unprofessional. SL had requested the Claimant to remove a post that she had placed on Facebook in which she stated that no one had let her go for her break, but the Claimant declined to do so. SL knew that the Claimant had taken her breaks. The Claimant had not named Swan Ward in the post but people knew she worked there.

103.8 Ms Jaffrey was concerned that the Claimant's statement of response indicated a lack of understanding of the impact of her comments.

103.9 DS felt annoyed when she read comments that the Claimant had posted on Facebook because she knew that some of the posts were made up referring to a patient waiting five hours for medication. DS knew there may be some delay to medication at times but not five hours. She felt that some of the comments were inappropriate.

103.10 Ms Jaffrey determined that regardless of whether the Claimant's Facebook account was public or not, her friends and family and anyone connected to her via Facebook would have seen the posts which Ms Jaffray considered detrimental to the Trust. Posts that the Claimant sent on Friday at 10:43 pm and at 11 pm related to delays in medication administration (at R1 358 and 362) and a further post referred to a patient's dignity being questioned. It was possible to establish looking through the various posts that the Claimant worked for the Respondent Trust and she also referred to Swan Ward (at R1 359 and 360).

103.11 Ms Jaffrey concluded that the Claimant's behaviour in raising such matters on Facebook was inappropriate. There were appropriate means of raising concerns but it was not through Facebook. As a Registered Nurse, Ms Jaffrey believed that the Claimant ought to have been aware of such. She was further concerned that the Claimant did not appear to have insight into her comments and the detrimental impact of them.

104. Mrs Beaumont carefully considered the conclusions which had been drawn at R1 447 of the report and the Claimant's mitigating arguments set out in her written answers to the questions, including that she had stated that Swan Ward had been busy and lacking team working.

105. On 15 May 2019 Mrs Beaumont wrote to the Claimant inviting her to a meeting to take place on 21 May at which she wanted to discuss the outcome of the investigation report (at R1 441).

106. The Claimant did not attend the meeting on 21 May 2018 or notify in advance she was not attending. Mrs Beaumont therefore wrote to the Claimant on 25

May 2018 confirming the outcome of the investigation and notifying her that she had decided to remove her from the Trust's Bank Register. This letter is at R1 450-451. Whilst the Claimant, as a Bank Worker, was not subject to the respondent's disciplinary and grievance procedures and although there was no right of appeal against the decision, she was given the option of raising any concerns about the investigation and the decision to Ms Sherlock within 10 days of the date of the letter. However, the Claimant did not do so.

107. In her letter Mrs Beaumont dealt with each allegation. With regard to the incident on Swan Ward, she stated that Ms Jaffrey had established that the Nurse in Charge and a witness had confirmed that the Claimant had a conversation with the Nurse in Charge which was loud in tone and would have appeared unprofessional to bystanders. It was also confirmed that there were patients' relatives within close proximity who heard and witnessed the interaction. With regard to the Facebook posts and messages, she stated that Ms Jaffrey also established that the Claimant did post comments on Facebook about the NHS and particular staffing situations at the hospital as well as private messages to other colleagues about work related matters. When asked about this, the Claimant did not display any insight into her comments and could not see the detrimental impact of them. She also referred to previous complaints raised by colleagues as to the Claimant's behaviour, communication style and attitude that had led to her being restricted from certain areas of work within the Trust which had left it only possible to book her on Swan Ward. Mrs Beaumont also said that she had reviewed the emails and correspondence that the Claimant had sent to members of staff in recent months and she felt that this style of communication used and the way in which she addressed colleagues was not acceptable.

108. It is not our function to reopen the investigation undertaken by Ms Jaffrey or the action and conclusions drawn by Mrs Beaumont. However, we could find nothing untoward in the investigation, conclusions and action taken.

109. We heard oral evidence from Miss Kelly Irvine, the Matron at Swan Ward, in which she said that the Claimant was hard-working. She also said when asked that the Claimant had raised her voice to her on occasions. However, she also said that she had not found her behaviour to be inappropriate during the limited occasions that she worked with her. Whilst Miss Irvine was aware of the incident on 15 February 2018 at Swan Ward, she was not involved in it.

110. In her written evidence and the documents attached to it at pages 96-102, 105 and 114-115, the Claimant relies on a number of social media posts made by other members of staff about the NHS and in which they had identified their names, places of work and positions within the Respondent Trust. She submitted that this was either no worse or worse than what she had done and yet none of these members of staff had been disciplined or dismissed. Ms Jaffrey and Mrs Beaumont had not seen these documents at the time of their involvement with the Claimant. They have only been produced as part of these proceedings. Ms Jaffrey said that the Claimant had made a reference at the time of the investigation to other staff making inappropriate comments on Facebook but the Claimant did not say who they

were or what they said. Ms Jaffrey was taken through the pages by the Claimant in cross examination. Ms Jaffrey said that none of the posts were inappropriate. Putting your job and place of work was not inappropriate in itself. Sharing national articles, such as the one from BBC and RCN, were part of a national discussion and were not inappropriate. Whereas the Claimant had sent posts referred to direct patient care incidents within the Trust and which implied that the nursing care provided was below the required level. We accepted the distinction that she drew.

111. In her witness statement at paragraph 5, the Claimant gives the names of a number of actual comparators that she relies upon in support of her complaints of disability discrimination. However, it was hard to see how any of the circumstances described as to each person amounted to true comparators given that none of those named were working restricted shifts as the Claimant was. Indeed, the Claimant accepted in evidence that none of her alleged comparators were working restricted shifts.

112. I asked the Claimant questions relevant to the time limit issues. I first explained to the Claimant how the time limits worked and the discretion that the Tribunal has to deal with complaints even if they have been made out of time.

113. The Claimant said that she did not bring her Tribunal claim sooner because she did not want to lose her job. She said that she wanted to speak to the Equality Adviser and Diabetes UK first but only the Equality Adviser answered. She further stated that the Equality Adviser did not tell her anything about time limits. She went to the Citizens Advice Bureau about the issue with her wages (what she refers to as being suspended without pay) but they did not tell her about a time limit to go to the Tribunal until sometime in the middle of February 2018. In addition, she spoke to ACAS at the same time after her suspension and they told her that there was a time limit of 3 months minus one day after the issue concerned.

114. We had written submissions from Mr Ross which he amplified orally. We heard oral submissions from the Claimant.

**Essential law**

115. Section 13 Equality Act 2010:

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

116. Section 27 Equality Act 2010:

*'(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
*B does a protected act, or A believes that B has done, or may do, a protected act.*
*(2) Each of the following is a protected act—*
*(a) bringing proceedings under this Act;*
*(b) giving evidence or information in connection with proceedings under this Act;*
*(c) doing any other thing for the purposes of or in connection with this Act;*
*(d) making an allegation (whether or not express) that A or another person has contravened this Act…'*

117. Section 20 Equality Act 2010:

> *'(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*
>
> *(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format…'*

118. Section 21 Equality Act 2010:

> *'1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
> *(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.'*

## Conclusions

<u>The burden of proof</u>

119. The standard of proof in the Employment Tribunal is what is know as the balance of probabilities, in other words what more probably happened than not. The burden of proof for most purposes in on the Claimant.

120. The burden of proving unlawful discrimination is set out in section 136 of the Equality Act 2010, which states:

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

121. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of

discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

122. We have followed the guidance given as to the burden of proof by the Court of Appeal in **Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster** [2005] IRLR 258.

Time limits

123. As indicated there are time limit issues with regard to the complaints of discrimination and detrimental treatment.

124. Section 123 governs time limits under The Equality Act 2010. It states as follows:

*"(1) [Subject to section 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—*
*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
*(b) such other period as the employment tribunal thinks just and equitable…*

*…(3) For the purposes of this section—*
*(a) conduct extending over a period is to be treated as done at the end of the period;*
*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
*(a) when P does an act inconsistent with doing it, or*
*(b if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

125. Having regard to the date of presentation of the Claim Form and the dates of the Early Conciliation process anything which occurred prior to 31 December 2017 is out of time although of course can form background to those complaints occurring on or after that date. This is of course subject to whether we find any matters to form part of a continuing course of conduct that was still in existence on or after 31 December 2017.

126. However, an act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

127. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a *"continuing discriminatory state of affairs"*.

128. An Employment Tribunal may allow a claim outside the time limit if it is just and equitable to extend time. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. The Tribunal must weigh

up the reasons for and against extending time and explain its thinking. Tribunals have been directed to consider the checklist contained with section 33 of the Limitation Act 1980, suitably modified, although a Tribunal will not make a mistake as long as it does not omit a significant factor.

129. The factors to take into account under the Limitation Act 1980 (as modified) are these:

    129.1 the length of, and reasons for, the Claimant's delay;
    129.2 the extent to which the strength of the evidence of either party might be affected by the delay;
    129.3 the Respondent's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
    129.4 the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
    129.5 the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

130. The Tribunal should also consider whether the Respondent is prejudiced by the lateness of the complaints, ie whether the Respondent was already aware of the allegations and so not caught by surprise, and whether any harm is done to the Respondent or to the chances of a fair hearing by the element of lateness.

131. Where the delay is because the Claimant first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account.

132. If the delay was because the Claimant tried to pursue the matter in correspondence before rushing to an Employment Tribunal, this should also be considered.

133. Section 48(3) of the Employment Rights Act 1996 governs the time limits within which a worker must present a complaint of detrimental treatment for making a protected disclosure. The sub-section states as follows:

    *'(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—*

    *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*

    *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.'*

134. There are two limbs to this formula. First, the worker must show that it was not reasonably practicable to present her claim in time. The burden of proving this rests firmly on the worker (**Porter v Bandridge Ltd [**1978] IRLR 271, CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

135. Whether it was reasonably practicable for the worker to submit her claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the Employee's reasons.

136. The Court of Appeal in **Palmer & Anor v Southend on Sea Council** [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to employers and does not mean 'physically possible', which would be too favourable to workers, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?'

137. May LJ in **Palmer** stated that the factors affecting a worker's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the Employee's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the Employee knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the employee had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Employee or his adviser which led to the failure to present the complaint in time.

138. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA)

139. It may not be reasonably practicable to present a claim in time if the Employee, at a late stage, discovers some important fact which transforms his/her existing belief that s/he has no cause of action into a belief that s/he does or may have a valid claim.

140. Where the worker satisfies the Tribunal that it was not reasonably practicable to present her claim in time, the Tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.

*Direct disability discrimination*

141. Under section 15 of the Equality Act 2010 ("EQA"), it is unlawful to treat a worker less favourably because of a protected characteristic, in this case

disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

142. The Respondent accepts that the Claimant is a disabled person within section 6 EQA by reason of Diabetes.

143. The Claimant's complaint of direct disability discrimination is based on the withdrawal of the offer of Staff Nurse Band 5 in May 2016 and/or Mrs Punter suspending her in February-May 2018. This is set out at paragraphs 1 to 4 of the list of issues at R1 71-72.

144. With regard to the withdrawal of the offer, doing the best we can, this appears to have occurred by earliest 4 May 2016 and for sure by 18 May 2016. It is therefore on the face of it out of time. It is a one-off act albeit with ongoing consequences.

145. With regard to the so-called suspension, the Claimant was prohibited from undertaking direct patient work pending the outcome of the investigation into allegations relating to her conduct on 15 February 2018 on Swan Ward and the sending of social media posts and messages. She was not suspended and not entitled to be paid. She was advised of this on 20 February 2018 and again it is a one-off act albeit with ongoing consequences until she was advised ultimately that she had been removed from the Bank Register in a letter dated 25 May 2018.

146. The Claimant did not give satisfying evidence as to why she waited until 21 May 2018 when she made her Tribunal claim. She said she was worried about losing her job and had belatedly got advice but had raised complaints from February 2018 and after the Swan Ward incident she took advice and was told of the time limit of 3 months less a day.

147. In any event, even if even if the complaints were in time they are simply not made out. The reason why the job offer was withdrawn was because of the Claimant's inability to work a mixture of shifts and although this arose from her disability it was not because of her disability. The reason why the Claimant was prohibited from direct patient work and ultimately removed from the Bank Register was because of her behaviour on the Swan Ward and in sending inappropriate posts and messages via Facebook.

148. With regard to the withdrawal of the job offer, the correct comparator would be someone who was not disabled but could not for some reason work a mixture of shifts. The comparators named by the Claimant are not proper comparators because they had no restrictions on their ability to work a mixture of shifts. The Respondent said, and we accept, that anyone who was restricted from working in the way that the Claimant was, within the requirements of Maple Ward, would have had their offer of employment withdrawn. The Claimant said in evidence that there was no one working on Maple Ward with restrictions.

149. Although the Claimant raised concerns about why she was not offered alternative nursing posts, this was not part of the agreed issues and in any event the Respondent considered alternatives but were available.

150. The correct comparator with regard to the alleged suspension would be someone having been alleged to have committed the same offences of the same seriousness as the Claimant but not disabled. The Claimant did not put forward any actual comparators that were sufficiently similar circumstances to her own. There was nothing to suggest that a hypothetical comparator would have been treated any differently.

151. The complaint of direct disability discrimination therefore fails.

Victimisation

152. It is unlawful to victimise a worker because she has done *a "protected act".* In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 EQA.

153. The Claimant alleges that the protected act was the sending of three emails to Ms Hill on 14 September 2016 about the Equality Act 2010 and reasonable adjustments. The detriments which followed the protected acts were said to be three incidents in September 2016, two of these on unspecified dates in that month by Mrs Punter regarding her use of her insulin pen and the comments that she attributes to Mrs Punter and the third on 8 September 2016 by Ms Hill that her insulin pen must be stored and locked away when there were insufficient lockers. This is set out at paragraphs 4 to 5 of the list of issues at R1 72.

154. With regard to the time limit issues this complaint is also out of time and relates to three discrete incidents.

155. But in any event whilst the first email makes a general reference to disability and equality and the further emails attach or link to matters relating to reasonable adjustments and the Equality Act, we concluded that this was stretching the definition of a protected act within section 27(2). In any event we have found that the detrimental treatment at paragraphs 5 (a) and (b) of the list of issues did not occur and the detrimental treatment at paragraph 5 (c) actually pre-dates the protected act.

156. We therefore find that the complaints of victimisation fail.

Reasonable Adjustments

157. Under sections 20 and 21 EQA, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

158. The adjustment has to be reasonable. In considering whether an employer has met duty to make reasonable adjustments, the tribunal must apply an

objective test. Although we should look closely employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entitled.

159. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

160. The difficulty for the Claimant was that no PCP was identified and the focus of the list of issues was on the disadvantage and adjustments. Indeed, we struggled to even begin to formulate a PCP.

161. Her complaint is set out at paragraphs 6-10 of the agreed list of issues. The Claimant's complaint is that there were insufficient lockers provided by the Respondent for her to store her insulin pen in and further that the provision of the Deputy Sister's office for the storage of her insulin pen both placed her as a disabled person at a substantial disadvantage in comparison with non-disabled persons. This put her health and safety at risk as a diabetic because she was not able to check her blood sugar levels regularly and take her insulin injection subcutaneously when she needed to. Furthermore, she was not able to store her insulin pen and needles in a safe way. The reasonable adjustments are at paragraph 9.

162. Under paragraph 20 of schedule 8 EQA, the duty to make reasonable adjustments does not apply if the Respondent did not know and could not reasonably have been expected to know that the worker is likely to be placed at a substantial disadvantage as a result of physical features within section 20(4 EQA.

163. As we have found, the Respondent had no knowledge between September/October 2016 and February 2018 of the inadequacy of storage that the Claimant has raised. This in itself gives rise to time limit issues. But in any event, there is no evidence that this continued to a be an issue.

164. In terms of the reasonable adjustments that the Claimant cites, it was not reasonable to allow the Claimant to carry her insulin pens on her person and this was explained to her at the time, adequate storage was available, the Claimant could take regular breaks, she was not prevented from doing so and she could modify her own work schedule accordingly as a Bank Worker. In addition, the Occupational Health adviser stated that the Claimant's condition was stable and did not suggest any adjustments that she required aside from not working nights and having her normal breaks.

165. We therefore find that this complaint fails and is dismissed.

<u>Whistle-blowing detriment</u>

166. Under section 47B ERA, workers and employees are protected against detrimental treatment for making a protected disclosure.

167. A protected disclosure must disclose information not simply make an allegation. The information must fall within certain categories and must be disclosed to the correct person in the correct way. A qualifying disclosure is any disclosure of information which, in the reasonable belief of the worker, is made in the public interest and which tends to show one or more of the following: that a criminal offence has been, is being or is likely to be committed; that a person has failed, is failing or is likely to fail to comply with a legal obligation; that a miscarriage of justice has occurred, is occurring or is likely to occur; that the health and safety of any individual has been, is being or is likely to be endangered; that the environment has been, is being or is likely to be damaged; that information tending to show any of the above has been, is being or is likely to be concealed.

168. Disclosures can be made to the worker's employer and in certain circumstances to certain prescribed bodies including the Care Quality Commission.

169. The Claimant's complaint with regard to detrimental treatment as a result of making protected disclosures is set out at paragraphs 11-15 of the agreed list of issues. She alleges seven protected disclosures set out at paragraph 11. The alleged detriments that she suffered as a result of making those disclosures are set out at paragraph 15.

170. On considering each of the disclosures we draw the following conclusions.

171. Only the email letter to the Care Quality Commission on 12 March 2018 is capable of being a protected disclosure.

172. The FSUP Guardian email of 12 February 2018 does not raise whistleblowing but is about the Claimant's Tribunal claim and work and she initially accepted it was raising Diabetes discrimination.

173. The email to Ms Hill on 26 December 2017 is not about patient safety and the Claimant could not remember what she said to Ms Hill verbally at the time and Ms Hill denied any such conversation prior to the email or at the time of the email.

174. The handwritten letter to Ms Keyhan left on the Ward Manager's office table on 26 December 2017 has not been produced and although the Claimant states that it raised concerns about not receiving help for a patient re-position, we are unclear as to the terms so as to determine that it even gives rise to a protected disclosure. In any event it amounts to no more than an assertion.

175. As to ACAS, there is no document or witness evidence as to what the Claimant said to ACAS and in any event the Respondent was unaware of what was said to ACAS.

176. Similarly, the Respondent was unaware of what the Claimant said to the RCN online on 24 February 2018.

177. Similarly, the Respondent was unaware of what the Claimant discussed with the Citizens Advice Bureau by telephone, email and face to face after her suspension. The only contact the Respondent had from the CAB was as to whether the Claimant was entitled to be paid during the period of restriction from bank duties (what she referred to as suspension without pay). That cannot give rise to a protected disclosure.

178. In any event we do not find that the detriments relied upon were on the grounds that the Claimant made any of the alleged protected disclosures.

179. The Claimant was restricted from duties following concerns about her behaviour on Swan Ward on 20 February 2018 and inappropriate posts that she placed on Facebook between 16-17 February 2018. She was not suspended as she describes it. Ms Sherlock was only aware of the FTSU Guardian email on 23 February 2018 and this post-dates the decision she made to restrict the Claimant from duties which was communicated to the Claimant on 20 February 2018. The allegations were proven following investigation and the Claimant was removed from Bank Work for reasons unconnected with any of the alleged protected disclosures. Ms Jaffrey and Mrs Beaumont had not seen any of the communications which are relied upon as alleged protected disclosures. Whilst there were matters raised by the Claimant of which Mrs Beaumont was aware, these are not identified as protected disclosures by the Claimant in the list of issues and Mrs Beaumont dealt with them within her consideration of the Claimant's complaints and was clear that they formed no part of her consideration and decision to remove the Clamant from the Bank Register.

180. The complaint of whistle-blowing detriments therefore fails.

Unfair Dismissal

181. We first considered the Claimant's employment status given that only employees are protected against being unfairly dismissed. Applying the usual tests as to control, intention of the parties, mode and method of payment, mutuality of obligation and looking at the day to day working arrangements, from our findings it is clear that the Claimant was not an employee and so she cannot bring a complaint of unfair dismissal. Further her complaints that the respondent did not follow the ACAS Code of Practice are unfounded.

182. The complaint of unfair dismissal therefore fails because the Tribunal has no jurisdiction to deal with it.

183. In conclusion then we find that all the Claimant's complaints fail and the claim is dismissed.

_____

Employment Judge Tsamados

Date 25 November 2019