EMPLOYMENT TRIBUNALS

Claimant: **Ms R Malik**

Respondent: **Barchester Healthcare Limited**

Heard at: **Hull** **On: 17 – 20 February 2020**

Before: **Employment Judge Maidment**
Members: **Mrs S Scott**
Mr K Lannaman

Representation
Claimant: **Mr F Akpan-Inwang, Consultant**
Respondent: **Mr P Singh, Consultant**

JUDGMENT having been sent to the parties on 21 February 2020 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues and the Claimant's application to amend

1. The Tribunal commenced by going through the Claimant's complaints which it had to determine by reference to preliminary hearings which had already taken place on 7 November 2018 and 30 January 2019. At those clarification had been provided, on behalf the Claimant, of her complaints and applications to amend her complaints had been considered and determined.

2. The Claimant complains of unfair dismissal, where the Respondent puts forward that the Claimant, a staff nurse, was dismissed in respect of her conduct in administering paracetamol to a patient when it had not been prescribed in accordance with its procedures and in leaving a medicine cabinet/fridge unlocked.

3. The Claimant also complains that her dismissal was an act of less favourable treatment because of race. The Claimant describes herself as black African in terms of colour and ethnicity. She raises as comparators Elizabeth Baker, Glenn Muhammed and Priscilla Kusande, who are said to have committed similar errors to the Claimant, but who had been treated more leniently.

4. The Claimant then complains of disability discrimination. These claims are based on her being a disabled person by reason of her suffering from osteoarthritis affecting her mobility. The Respondent accepted, prior to the second preliminary hearing, that the Claimant was at all material times a disabled person, albeit their knowledge of her status as a disabled person is not accepted. It is noted at this stage that, at times within the questioning of the Respondent's witnesses and in submissions, there was reference to the Claimant suffering from depression. The Claimant has never pursued any claim in these proceedings based upon any mental impairment, depression or otherwise. When asked to explain the complaints of disability discrimination it was said, on a number of occasions on behalf of the Claimant, that there was discrimination because the Respondent knew that the Claimant was disabled. The Tribunal explained that there was a need to nevertheless articulate what aspect of treatment was complained of, whether it was said to arise because of disability, from something arising from the disabling condition or whether it was said that the treatment of the Claimant ought to have been different with reference to the disabling condition and on what basis.

5. Indeed, it was identified at the outset that the existing discrimination complaints were complaints pursuant to section 15 of the Equality Act 2010 (discrimination arising from disability) and section 20 (a failure to make reasonable adjustments).

6. The unfavourable treatment was said to be, firstly, the Respondent compelling the Claimant to reduce her hours of work from 42 to 32 hours per week on 19 May 2017 and then further to 24 hours per week on 20 June 2017. Secondly, the Claimant was allegedly less favourably treated in her being moved on 19 May 2017 from working on nights to days, on the basis that work on days was more pressurised. Essentially, the Respondent was said to have reduced her hours and changed her working arrangements to get at her/upset her on account of its antipathy towards the Claimant due to the limitations imposed on her by her reduced mobility.

7. The complaint of a failure to make reasonable adjustments is reliant on the PCP encompassed by the requirement of the Respondent for staff nurses to complete the full range of their duties and responsibilities in accordance with its set working arrangements. This is said to have put the Claimant at a disadvantage because of her mobility issues. The reasonable adjustments which it is said ought to have been made are

those which arose out of an occupational health report dated 28 March 2018 and encompass: firstly, holding regular meetings with a manager to identify the Claimant's needs and to avoid concerns escalating; secondly, allowing the Claimant access to training updates to identify what she could and could not do; thirdly allowing the Claimant additional time to walk between areas of the unit, (the Claimant saying that she was subjected to monitoring by colleagues known as Tabatha and Ms Smith) and, fourthly, implementing a phased increase in the Claimant's hours to reduce the Claimant's stress which arose out of her reduced pay, in circumstances where stress exacerbated her physical disability.

8. It was noted that a complaint of victimisation had been struck out at an earlier preliminary hearing and, whilst intimated at one point in the proceedings, there had been no application to amend to include whistleblowing complaints.

9. The parties both agreed that those were all of the claims currently before the Tribunal.

10. The Tribunal pointed out that there had never been in these proceedings any complaint seeking damages for breach of contract (notice pay). The Tribunal noted that the Claimant was referring to wrongful dismissal/breach of contract in her witness statement. There had previously been reference to unpaid mileage expenses but those were not pursued as complaints in circumstances where the Tribunal had no jurisdiction to deal with them, the sums allegedly owed not arising on or being outstanding as at the termination of the Claimant's employment.

11. The Tribunal also noted that there was no claim of disability discrimination relating to the Claimant's dismissal although, given the contents of a witness statement submitted on behalf of the Respondent, the Respondent appeared to believe it was defending such a complaint.

12. The Tribunal also raised with the Claimant's representative that there was no evidence being advanced from the Claimant's witness statement in respect of the reasonable adjustments complaint and no evidence regarding her complaint of unfavourable treatment in the reduction in her hours or move to day shifts. Indeed, there was no reference in her witness statement to the complaint of race discrimination other than in a single paragraph where it was said that white colleagues were treated differently and, over the period Claimant's employment, she had noticed a number of (unspecified) situations where the Respondent's management had turned a blind eye. Nor was there anything in the witness statement advancing any explanation as to why there had been a delay in bringing Tribunal proceedings in circumstances where potential out of time issues had been raised at the earlier preliminary hearing and it had been pointed out to the Claimant that these would need to be anticipated by her.

13. The Tribunal suggested to the Claimant's representative that he would need to give some thought to these apparent gaps in evidence and how they might be plugged.

14. On behalf the Claimant, it was said that it had been thought that if a claim is for unfair dismissal, it followed that it was also a complaint of wrongful dismissal. The Claimant did want to pursue such a complaint. Also, it had always been intended by the Claimant that she pursue a complaint of disability discrimination in her dismissal and in particular that this was an act of unfavourable treatment pursuant to section 15. Mr Akpan-Inwang confirmed that the Claimant still wished to pursue her reasonable adjustments complaint and her less favourable treatment complaints based on a reduction in hours and alteration of working arrangements.

15. Following an adjournment, the Tribunal heard the Claimant's application to amend her complaint to include a complaint of breach of contract (wrongful dismissal) and of unfavourable treatment arising from disability in her dismissal. Mr Singh responded, opposing both applications, albeit recognising that, if an additional disability discrimination complaint was linked to dismissal only, he did not suggest that allowing such amendment would cause any prejudice to the Respondent.

16. Employment Tribunals have a broad discretion to allow amendments at any stage of the proceedings, either on the Tribunal's own initiative or on application by a party. In determining whether to grant an application to amend a claim, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. In **Selkent Bus Co Limited v Moore** [1996] ICR 836, Mr Justice Mummery gave guidance as to how Tribunals should approach applications for leave to amend. Relevant factors will include: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The hardship and injustice test is a balancing exercise. It is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. Thus, it will rarely be enough to look only at the downsides or prejudices themselves. These need to be put into context. The balance of prejudice is to be weighed in each case. The greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. This will be an important factor where the facts material to the new claim sought to be brought by way of amendment or are already in play in the extant claims.

17. Following a further adjournment for the Tribunal to deliberate, the Tribunal allowed the amendment application in respect of the dismissal being an

act of unfavourable treatment arising from disability. That claim, or at least a disability discrimination claim based on dismissal, was referred to in further and better particulars which the Claimant had submitted prior to the second preliminary hearing and which had been intended to encompass an application to amend, albeit there had been a failure to expressly articulate this to the Tribunal at the second preliminary hearing. The Respondent, at the first preliminary hearing, seemed to anticipate a need to justify dismissal as the Tribunal had identified in the note of the case management discussion that the Respondent was seeking to argue that dismissal was a proportionate act in pursuit of a legitimate aim. The Respondent also dealt with this issue in the witness statement of Ms Tas. This had not been identified at the second preliminary hearing as a claim, but the balance of prejudice was in now allowing it to proceed. The Claimant was prejudiced if she could not pursue that complaint, whereas the Respondent had its witness ready and able to deal with the further complaint.

18. The Tribunal refused, however, the application to amend to include a complaint seeking damages for breach of contract in the Claimant having been dismissed without notice. When the Tribunal application was completed, the box referencing notice pay had not been ticked. Wrongful dismissal/breach of contract had not been included in the further particulars subsequently provided or in the amendment application which was considered at the second preliminary hearing. The Claimant, through her representative, could not reasonably believe that a complaint of unfair dismissal was on its own and automatically sufficient to encompass a breach of contract complaint. The Claimant had prepared a schedule of loss which referred to wrongful dismissal, but that was inaccurate and a schedule of loss does not constitute a pleading of a claim. Notice pay was never raised at either preliminary hearing. People can make conscious decisions not to pursue a breach of contract complaint, for instance to avoid the risk of an employer's claim in response or to avoid the risk of a finding of gross misconduct. In terms of balance of prejudice, the Respondent can deal with the reason for dismissal, but through the person who determined what had occurred at the hospital regarding the administration of medicine, not with any primary evidence from those actually involved in the incident. In a case of wrongful dismissal (in contrast to a claim of unfair dismissal), the Tribunal has to determine as a matter of fact what the Claimant's conduct had been. The Claimant was prejudiced if she could not bring this claim now, but she was not prevented from pursuing that claim separately in the County Court if this was a claim she intends to pursue. The application to amend was of course made at a very late stage. The balance of prejudice was in favour of refusing this application.

Evidence

19. The Tribunal had before it an agreed bundle of documents. It was explained to the parties that the Tribunal would not read through every page of the bundle, but only those documents to which it was referred,

whether by a reference in a witness statement or otherwise. At times, on behalf of the Claimant, it was said that there were documents in the bundle which supported her, but where the Tribunal was not assisted as to what or where they might be. Furthermore, reference was made to medical evidence produced by the Claimant and to the Respondent earlier in the proceedings before disability status was conceded. The Tribunal explained that it could not consider documents which it had not seen and were not before it.

20. The Tribunal took some time to read privately into the witness statements which had been exchanged between the parties so that when each witness came to give evidence they could simply confirm their witness statements and, subject to any supplementary questions, would then be open to be cross-examined on them.

21. On behalf of the Respondent, the Tribunal firstly heard from Mrs Deborah Tas, former hospital director with the Respondent. The Respondent also relied on a written statement of Alyson Murphy, regional director, but, in circumstances where she was not present due to illness to be cross-examined, the Tribunal explained that only a significantly reduced weight could be given to that evidence. The Tribunal heard from the Claimant and on her behalf from Mr Olugbemi Oyelade, a registered mental health nurse formerly employed by the Respondent and Mr Simeon Doherty, the Claimant's GMB trade union representative.

22. Having considered all relevant evidence, the Tribunal made the following findings of fact.

Facts

23. The Respondent operates a private hospital for patients suffering from mental ill health. The Claimant is a registered mental health nurse and commenced employment with the Respondent on 2 April 2007.

24. The Claimant had received positive appraisals and had obtained a maximum score in a Medication Competency Assessment completed in April 2017. She had received periodic training, one to one supervisions and had taken and passed competency tests regarding the administration of medication.

25. The Respondent operated detailed procedures which included the administering of drugs. A repeated failure to reach required standards of medication administration could result in the Respondent having to consider the continuance of an employee in his/her role, albeit that support would be provided where practicable. Maladministration of drugs and serious breaches of the procedure were classed as gross misconduct.

26. The Respondent utilised Medication Administration Record ('MAR') sheets which had to contain relevant details in respect of each patient to which they related. The term 'PRN' was used for medication which is to be taken "when required" and is usually prescribed to treat short-term or intermittent conditions. A patient care plan was to be signed by the psychiatrist in addition to agreeing the medication on the MAR.

27. Medicines were to be stored securely within separate lockable cupboards or fridges, dependent upon the type of medication. The cupboards were to be locked except when medicines were in the process of being issued or received and the keys of all cupboards used in the storage of medicine had to be held securely by a registered nurse at all times.

28. The Respondent's policy provided that all medicines were to be given in accordance with written instruction, as prescribed and authorised by a medical practitioner or non-medical prescriber. The Claimant accepted that she was not herself trained as a nurse prescriber. The NMC Code for standards in medication management states that a patient's medicine administration chart must be signed by a registered prescriber.

29. The Claimant was the subject of an investigatory meeting on 29 May 2017 which included enquiries regarding her non-completion of the MAR sheets in a timely manner. However, no disciplinary action was taken in the light of mitigating factors raised by the Claimant. However, the Claimant was informed by letter of that date that any future allegations would be taken very seriously and could lead to formal disciplinary action. The Claimant was directed to renew her medication competency assessment and read the observation policy and locked door policies of the Respondent by 10 June 2017. The Claimant told the Tribunal that she was singled out for criticism, but the Tribunal has no evidence of any one else at this time found to have been responsible for a similar breach of procedure.

30. The Claimant received a written warning on 18 September 2017 following a disciplinary hearing on that date in respect of a failure to sign 6 MAR sheets after dispensing medication to patients. The Claimant admitted the offence, but the Respondent was satisfied that she had acknowledged the serious nature of her actions and potential consequences. She also completed a supervised medication round which was completed to a satisfactory standard. She was told that any future breaches would lead to further disciplinary action being taken. The Claimant did not appeal that decision. Again, the Claimant says that she was not the only one to have behaved in this way, but the Tribunal has no evidence of any other individuals.

31. On 5 February 2018 in the Claimant was given a final written warning following a disciplinary hearing on 2 February. This related to the Claimant

having double signed a patient's MAR sheet for medication at 10am and 6pm, despite only administering the 10am dose, causing the evening dose to be missed. Again, the Claimant was recorded as admitting to the offence, but that the Respondent was satisfied that the Claimant had acknowledged the serious nature of her actions and the potential consequences. Her current written warning was taken into account and it was felt that the Claimant had failed to provide any mitigating factors so that it was decided that a final written warning was justified at that stage. The Claimant was again to complete a medication competency assessment and supervised medication round and was to receive monthly supervision for the next 3 months or longer if felt necessary. The Claimant was warned that any future breaches might result in the termination of her employment. The Claimant was given the right to appeal that decision, but chose not to.

32. The Claimant's evidence before the Tribunal was that she was not saying that she had acted correctly in the matter which led to her final warning, but that people had done worse things than her. She said that she had self-reported the error even though a colleague, Elizabeth Baker, had said that she would cover for the Claimant. The Claimant complained that no one had called her at home to check the situation regarding the patient's drugs in circumstances where she was not physically at work at the time when the medication appeared, for a second time on the day, to have been signed as administered. She said that prior to the disciplinary hearing she had been told not to worry and encouraged to come to the hearing despite no one from the RCN being available to represent her. She said that Ms Emma Normandale, unit manager and her line manager, had said that she would support her. However, to her surprise, the final written warning was given. The Claimant accepted, however, that following all of the warnings all of the recommended follow-up actions had been completed, including further training and assessment and the Claimant receiving supervisions in February and March 2018.

33. On 18 April 2018 the Claimant was asked by Ms Normandale for the clinic room keys at approximately 12pm. The clinic room was to be kept locked and within it were located the medication cabinets and fridge, all themselves individually lockable. Whilst Ms Normandale was in the clinic room, an employee, Wandia, knocked on the door and came in to return some cream for a patient to the cupboard. When Ms Normandale went to open the cupboard, she noticed that the door was already unlocked. This then prompted her to check other cupboards and she subsequently reported that she had found the stock cupboard open and also the medication fridge. She said that she immediately locked them and then spoke to the Claimant who apologised for them being left open. She then asked the Claimant to provide a statement of events. The Claimant said before the Tribunal that she was the only person to be asked to provide a statement despite others being responsible for failures to keep the drug cabinets and fridge locked. This point was not put to Ms Tas and the

Tribunal has no evidence before it as to how the other individuals were dealt with beyond the final notes of outcomes described below.

34. Ms Normandale completed her own statement setting out her involvement as above on 20 April and also attended an investigation meeting with the then hospital director, Janet Dodsworth. Ms Normandale reported that 3 cupboards containing medication were closed but unlocked. She said that, when she had spoken to the Claimant, the Claimant had looked irritated and said she was sorry. This had led Ms Normandale to informing Ms Dodsworth and completing an incident report. She confirmed that she had sent an email to all nurses about the importance of all medication cupboards being locked immediately after use. This indeed was sent during the afternoon of 20 April advising that it was not acceptable to leave the cupboards and fridge open after they had left the clinic room.

35. The Claimant was suspended from work on that day pending an investigation into the failure to lock the cabinets.

36. The Claimant was then interviewed by Ms Dodsworth on 27 April 2018. A note was subsequently prepared of that interview. The Claimant said she was asked for cream for the patient and when she went to get that for a colleague found the fridge was already unlocked. She gave the cream to her colleague and went to get a drink of water. She then met Miss Normandale in the corridor and gave her the clinic keys before going to check on another patient. On learning that the cream had been handed back directly to Ms Normandale, the Claimant went back to the clinic to be told by Ms Normandale that she had left the cupboards and fridge unlocked and that Ms Normandale had put the cream back and locked up. The Claimant said she had tried to explain that it had been busy that day, not least in circumstances where a CCQ inspection was taking place. The Claimant said that she was aware that the cupboards and fridge should always be locked and that she normally kept them locked. The Claimant said that when she had gone to get the cream she had found the fridge to be unlocked, but accepted that she had not enquired as to why. She described leaving a cupboard open as an oversight which she shouldn't have done.

37. A separate allegation was then raised with the Claimant which she was told was being taken up with a number of workers, not just the Claimant, involving the administering of PRN medication. She was asked to look at a MAR sheet and say what was wrong with it. The Claimant acknowledged that none of the medication been signed by a doctor as prescribed for the patient. It was pointed out that the Claimant had signed on one occasion as administering medication, paracetamol, and other nurses had been doing the same since February. The Claimant said that she hadn't noticed that and accepted that she should have taken the card to a doctor or asked Elizabeth Baker to do it. Ms Dodsworth explained that they were having discussions with other people but that the Claimant

was *"further down the line. This is the fourth time and we must deal with it according to procedure."*

38. Ms Dodsworth subsequently completed an investigation report. This noted that, for a particular patient, PRN paracetamol had been administered by the Claimant on 30 March 2018 without the prescriber's signature on the MAR sheet. The Claimant was also noted to have completed a medication competency record on 6 February 2018 including a section on the storage of medication. The Claimant's previous disciplinary record was referred to. Ms Dodsworth then went on to describe the incidents which had occurred. She noted that the Claimant had been party to 4 investigations in the past 12 months relating to the management of medication and, on each occasion, she had shown remorse and undertaken extra training. Despite that, her ability to carry out her duties with reference to the safe management of medication was, she said, once again in question. It was recommended that the Claimant should attend a disciplinary meeting to decide what action should now be taken.

39. Debbie Tas took over as Hospital Director and invited the Claimant by letter of 8 May to attend a formal disciplinary hearing into the two allegations. She had an overlap of around 6 weeks with Ms Dodsworth, before she left the Respondent. She was briefed by her on the disciplinary issue involving the Claimant. She had no recollection of knowing or being informed that the Claimant was disabled nor, in more general terms, had any physical impairment. She did not observe her to have any mobility issues herself, including in her walking into the disciplinary hearing – she had no experience of otherwise observing the Claimant at work. She had no recollection of any occupational health referral. Enclosed with the invitation letter were the investigation report, Ms Normandale's statement, investigation meeting notes, a copy of the MAR sheets and copies of the Respondent's relevant policies. The Claimant was warned that, if the allegations were proven, her employment might be terminated taking into account the final written warning she had received.

40. The disciplinary hearing duly took place on 22 May before Ms Tas and with the Claimant accompanied by a representative from the Royal College of Nursing. There was discussion regarding the locking of the cabinets. The Claimant did not think she had left the stock cupboard open. She had not, however, locked the creams cabinet. She had found the fridge unlocked and was going to lock it when the cream had been put back. She hadn't finished dealing with the matter. She described the PRN medication, where she had administered paracetamol to the patient, as an oversight.

41. She said that other people had also given medication to that patient and the MAR sheets had been checked by many people, but the omission spotted by no one. She agreed, however, that it was her responsibility to

check the MAR before administering further medication. The Claimant's representative referred to this as being the third disciplinary over *"minor things"* and asked if other nurses who had administered the PRN medication were being treated in the same way.

42. Ms Tas was not concerned with discrepancies in the investigation regarding the number of cabinets left unlocked or the exact timing. She did not see that there was a conflict in evidence she had to resolve between the Claimant and Ms Normandale. For her, the Claimant did not deny failings in her conduct - what she had done/not done was quite cut and dry. No mitigation had been offered other than that she was busy. The Claimant had put her hands up to the allegation that she had given medication to a patient without a prescriber's signature against it. The clinic room door had been locked, but all medication still had to be in locked cabinets. There was a breach of the Respondent's policy and legal requirements. The Respondent operated a mental health hospital with many difficult patients who might have been able to access the clinic room or attempted to do so. Someone else might have failed to lock the fridge, but the Claimant had found it unlocked and yet left it in that state.

43. Ms Tas emailed Jane Henderson of human resources, copied at the same time to Alyson Murphy, summarising events. This included a summary of the Claimant's previous disciplinary record. She went on that all other nurses who had administered paracetamol in the absence of a prescriber signature had had the matter discussed with them and recorded in supervision or they had received a line in the sand warning letter. She said she was mentioning this as the Claimant might argue that she was being treated unfairly. She noted that the Claimant had not contested the allegations and continued that although none of these issues in isolation would constitute gross misconduct, they built a picture of below standard practice and an apparent inability to correct failings despite guidance. It was therefore Ms Tas' intention to dismiss the Claimant albeit "*without notice*", it being her belief that the Claimant had failed to demonstrate an improvement in practice, ultimately placing patients at risk.

44. Ms Tas had dealt with the conduct of Ms Baker who had committed a similar medication error and also misplaced the controlled drugs key. She is white British and received a letter of concern/line in the sand. Ms Tas said that she recognised that anyone could make mistakes. With genuine first mistakes, the Respondent could work with the individual to offer training and support, but it would not expect the mistake then to be repeated. This was a first offence.

45. Other individuals had already been dealt with by Ms Dodsworth. Mrs Kasunde had been given a supervision and letter of concern for misplacing the drugs keys and administering medication without the signature of a prescriber. She is black, possibly of Afro-Caribbean ethnicity. Glenn Muhammed had a note on his supervision record for

giving medication without a prescriber's signature. He was described as non-white in terms of colour/ethnicity. For both, this was also a first offence.

46. The Claimant's summary dismissal was confirmed by letter of 23 May 2018. Her actions were said to be considered to amount to gross misconduct. The Claimant was given the right to appeal. Ms Tas explained to the Tribunal her view that trust in the Claimant's practice had been lost. She saw the Claimant as someone who, despite previous warnings, supervision and training, had been unable to change her conduct to avoid putting patients at risk. She credited the Claimant with not trying to deny her failings, but said that she had to ask how many chances the Claimant could be given. The Claimant was told that a report would be made to the NMC. The Claimant, before the Tribunal, accepted that the Respondent had a statutory obligation to inform the NMC of the circumstances which led to her dismissal.

47. The Claimant confirmed to the Tribunal her acceptance that she had failed to lock the creams cabinet and had found the fridge already to be unlocked, but had not then locked it up herself. As regards the medication and MAR sheet issue, she told the Tribunal that when a sheet was full a continuation sheet was typically transcribed in the presence of two nurses, one of whom would sign to confirm this had been done. This had not, however, been done in the case of the MAR sheet for the patient who was given paracetamol. The Claimant said that she was not responsible for that. She said that Ms Baker had transcribed the information across onto the new MAR sheet. She pointed out that, whilst she had given the patient paracetamol on one occasion, some nurses had done so four times. She said that this issue with the MAR sheet had been raised by the CQC.

48. Ms Tas expressed great hurt and upset in being accused of race discrimination. She denied that there was any preferential treatment of Ms Normandale when put to her by the Claimant's representative. The Tribunal put the Claimant's case to Ms Tas, i.e. that the treatment of other nurses involved in medication management errors had been more favourable because they were not black African. She was adamant that race had nothing to do with her decision. The others, who were treated more leniently than the Claimant, were not so far down the disciplinary process – they were not subject to a final written warning. That, she said, was the reason for the difference in treatment in the Claimant's case.

49. Ms Normandale had no belief or understanding that the Claimant was physically impaired or had any restrictions on her duties. Her decision to dismiss, therefore, was not based on any such considerations.

50. The Claimant appealed on 29 May on the basis that the sanction was far too harsh, was discriminatory as other staff had not been

disciplined/dismissed for minor drug errors, that no account had been taken of the mitigating factors such as the stress of the CQC's visit and that the Claimant believed that she was dismissed due to her injury and health issues. She noted that the investigation notes had not been signed off as a true reflection of the meeting and did not believe everything discussed was accurately recorded in the notes.

51. The Claimant was invited to an appeal hearing which was rearranged at her request to ensure the availability of her RCN representative and ultimately took place on 16 August.

52. The Claimant was indeed represented at that hearing before Alyson Murphy, Regional Director Hospitals and Complex Care Services, but by Mr Simeon Doherty of the GMB. Mr Doherty requested a copy of the minutes to be available immediately after the meeting had concluded. He also suggested that Ms Murphy ought to have completed her investigation prior to the meeting and have prepared questions to put to the Claimant. She responded that she had gathered all the information she needed, but hadn't spoken to the investigator or the chair of the disciplinary meeting. Mr Doherty was recorded as saying that the Claimant didn't lock the medication cupboard and the administration of the PRN medication hadn't been signed off as it ought to have been. He asked to see copies of the Respondent's policies. Following an adjournment, he repeated the request to have the notes of the meeting provided immediately as otherwise there would be a lack of trust. Ms Murphy said that if Mr Doherty continued to argue and interrupt, she would have no alternative but to postpone the meeting. Mr Doherty said that failing to agree to provide *"raw minutes"* affirmed his opinion of the need to treat the Respondent as suspicious, potentially biased and prejudiced. At this point Ms Murphy said that she was adjourning the meeting and would be in touch in due course with a new proposed date. It is noted that the Claimant accepted in her evidence that before the meeting ended she had been asked to state her grounds of appeal and did so.

53. The Tribunal has not been taken to any part of the Respondent's policies which provide for the provision of a note of a disciplinary or appeal meeting, handwritten or otherwise, to be supplied to the employee immediately on the conclusion of the meeting. The Tribunal considers the typed note of this aborted appeal meeting (produced after the meeting) to be accurate. The Claimant herself did not challenge its accuracy nor indeed the accuracy of the earlier investigation and disciplinary notes. Mr Doherty's position was that they were not a true record and a lot was missed out, but this was not put to Ms Tas in particular, when she gave her evidence. Mr Doherty was not present at the earlier meetings.

54. Ms Murphy reported to Ms Henderson that Mr Doherty had been, in her view, disruptive and was asked to forward the minutes of the meeting so that Ms Henderson could request that he did not attend the rescheduled

hearing. An HR co-ordinator subsequently wrote to the Claimant by letter of 18 July stating that, due to the conduct of Mr Doherty, the Respondent did not wish for him to be a representative at the rescheduled appeal hearing. The meeting, it was said, would reconvene on 31 July and the Claimant was asked to contact the Respondent by 25 July to confirm her attendance, if she would be accompanied and, if so, by whom. She was told that the Respondent would not be in a position to reschedule the meeting again should the Claimant not attend.

55. The Claimant subsequently wrote to the Respondent regarding her right of representation and to have a representative of her choice. Ms Henderson queried with an HR colleague whether or not the Claimant had confirmed that she would be attending the appeal hearing and was told that she had not. Ms Helen Miller of HR emailed the Claimant at 2:01pm on 30 July saying that the Respondent had not offered to provide the Claimant with a new representative and that this was her responsibility to arrange. Whilst the Claimant had been asked to confirm her attendance at the reconvened appeal meeting by 25 July, she was now given until 4pm that day to confirm her attendance. The Claimant emailed Ms Miller at 2:48pm saying that she would be attending the appeal. The Claimant then received an email from Ms Miller after 4pm saying that, as the Respondent had not heard from her, she would not get the opportunity to attend, but instead had an opportunity to submit a statement in writing before 12 noon the following day. The Claimant responded that evening attaching a screenshot of her earlier email, expressing a lack of understanding and saying that she would be attending the appeal the next day by 11am.

56. At 8:33am on 31 July, Ms Miller emailed the Claimant saying that her email confirming attendance had not arrived at the Respondent until 5:50pm the previous day and therefore they were not expecting her at the appeal meeting. The Claimant duly attended at the venue designated for the appeal hearing at 10:50am, followed, around 20 minutes later, by Mr Doherty. However, Ms Murphy did not arrive to commence the hearing and they left shortly after 12pm.

57. The Claimant emailed Ms Miller on 1 August expressing disappointment at her not being allowed to attend an appeal hearing. She repeated her reliance on her grounds of appeal. On 3 August Ms Tas emailed Ms Murphy with information Ms Murphy appeared to have requested regarding the action taken against other nurses who had been found to have breached medication procedures around the same time.

58. By letter dated 3 August 2018 Ms Murphy wrote to the Claimant rejecting her appeal and dealing in some detail with each individual ground of appeal. She referred to the previous disciplinary incidents relating to medication in support of a rejection of the Claimant's argument that the sanction had been too harsh. She said that she was unable to breach

confidentiality in advising how others had been dealt with, but said that 4 other registered nurses had been investigated with outcomes recorded. She did not accept the stress of the CQC's visit to be a relevant mitigating factor. She rejected that the Claimant had been dismissed due to her injury and health issues, noting support given to the Claimant in terms of her mobility concerns.

59. The Claimant was referred to the NMC who determined that the Claimant was still fit to practice as a nurse.

60. The Claimant in her witness evidence has told the Tribunal very little about her disability of osteoarthritis, how it impaired her and how she was viewed by the Respondent because of it. The Claimant was taken to a letter signed by her on 20 June 2017 in which she requested to further reduce her hours from 32 hours per week, which she had reduced on 19 May 2017 from 40 hours. She said she was now requesting a further reduction to 24 hours per week, saying that the reduction was happening due to her mobility issues. A further letter of that date was signed by the Claimant recording the change in hours, subject to a review in 3 months.

61. The Claimant told the Tribunal that she had been pressurised into submitting her letter which she did not want to do, but had been promised that the change would be temporary. She accepted that she did not raise any concerns about the issue thereafter. She then, however, told the Tribunal that she had been told to resign and go on benefits, that people had followed her monitoring her work and that she had complained to the Hospital Director who had told her to watch her back. No more specific evidence was given.

62. She said that when she returned to work in 2017 following an accident at work she had used a zimmer frame to help her to walk. She, however, told the Respondent that she needed this to get to the unit door, but thereafter was able to move around the unit without this aid. From this time, she had started taking a taxi to work rather than undertaking the short walk as she had previously done. She said that, all of a sudden, she was no longer asked to come into work to help out in addition to her normal hours. She was told that the Respondent needed her to obtain a doctor's report and then the warnings regarding her medication started.

63. The Claimant has also referred to an occupational health report dated 28 March 2018 and addressed to Ms Dodsworth. The Tribunal knows nothing about the circumstances which led to the request for this report. The report refers to the Claimant's previous reduction in hours to assist with her mobility concerns. Reference was made to the Claimant's musculoskeletal knee condition, but that she felt able to fulfil her role at work and could usually mobilise within the unit without the aid of crutches. The Claimant was then recorded as having referred to a number of

factors, including her mobility, heightening her worries at work and as a result causing her to make errors. The Claimant said that her mobility was much improved although she could be a little slow at times around the unit. The Claimant expressed a preference to work on nights to reduce her walking, but occupational health suggested that she might need to remain on days to ensure that she received the adequate support/training which would help to rebuild her confidence. Occupational health reported that the Claimant would like to be able to resume her normal working hours and duties, i.e. nightshift, as soon as she was able. A number of additional adjustments/support were suggested as possibly being beneficial in facilitating a long-term recovery and management of her health conditions. These included the regular support of meetings with her manager to assess progress and identify training needs so that any updates/training could be implemented; discussing any concerns as they arise to avoid them escalating; having access to training/updates as required in order to minimise the Claimant's perceived anxiety at work and rebuild her confidence; additional time for walking between areas within the unit; and gradually building up the Claimant's working hours if this could be accommodated to alleviate her financial stresses, as stress could also aggravate any musculoskeletal condition. It was said that returning to a nightshift at some point might minimise the impact of her musculoskeletal condition, but that the Claimant was aware of the benefits of working on day shifts during the next few months in order to rebuild her confidence and access the necessary support.

64. The Claimant was asked in re-examination to explain what she was able to do in her role before her accident at work and what she was able to do thereafter. The Claimant said that the only thing she could not do in terms of her nursing duties was to take patients on visits outside the hospital premises.

Applicable law

65. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct pursuant to Section 98(2)(b). This is the reason relied upon by the Respondent. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
> *depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably*

in treating it as a sufficient reason for dismissing the employee, and

shall be determined in accordance with equity and the substantial merits of the case".

66. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

67. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

68. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

69. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6).

70. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

71. The Claimant complains of direct race discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(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."*

72. "Race" is one of the protected characteristics listed in Section 4 and further defined in Section 9 of the 2010 Act so as to include colour, nationality, ethnic or national origins. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case*".

73. The Act deals with the burden of proof at Section 136(2) as follows*:-*

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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".*

74. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation (particularly on the Tribunal's scope for inferring discrimination) albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes note of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

75. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did.

76. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** also made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

77. *"Disability"* is another of the protected characteristics listed in Section 4 of the Equality Act 2010. The duty to make reasonable adjustments arises under Section 20 of the Equality Act 2010 which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(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……"*

78. The Tribunal must identify the provision, criterion or practice ('PCP') applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

79. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

80. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking of the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

81. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

82. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

83. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

84. Again, there can be no liability if A shows that A did not know and could not reasonably be expected to know that B had the disability.

85. Having applied these legal principles to the facts, the Tribunal reaches the following conclusions.

Conclusions

86. The Tribunal deals firstly with the Claimant's complaint of direct race discrimination in her dismissal. There is in fact no actual comparator. There is no white employee on a final written warning and in breach of medication procedures. The comparators relied upon were not in similar circumstances to the Claimant because they had prior clean disciplinary records. Within the comparators relied upon, the Tribunal is unable to discern an inconsistency of treatment as between a white (Ms Baker) and 2 non-white employees (Mr Muhammed and Ms Kasunde).

87. There is nothing inherently unlikely or unusual or obviously unreasonable in the Claimant receiving the series of warnings which led to her dismissal and/or which might indicate an ulterior motive for dismissal. It is noted that the Claimant has not brought separate complaints seeking to allege that the earlier warnings constituted acts of race discrimination. The Claimant had been employed by the Respondent for 11 years, 10 of which had been of unblemished service.

88. There is no factual or evidential basis upon which the Tribunal could conclude race to be a factor in the Claimant's dismissal. In any event, the Tribunal accepts Ms Tas' explanation for the Claimant's dismissal – that the reason was her concerns regarding the Claimant's nursing practice and a belief that trust had broken down. This was in circumstances where

she considered that the Claimant had received all relevant training and that the action of dismissal was necessary to safeguard patients – she described that she wouldn't have wanted her mother receiving the level of care she attributed to the Claimant. She came across as genuinely affronted by the suggestion of a racial motivation and the Tribunal finds that there was no such motivation, conscious or unconscious in her decision to terminate the Claimant's employment.

89. Turning to the claims of discrimination arising out of disability, the Respondent accepts that the Claimant was at all material times a disabled person by reason of her suffering from osteoarthritis. The Claimant has never in these proceedings relied on any mental health impairment. The Tribunal finds that the Respondent had knowledge of her disability at the point of her dismissal. This was in circumstances where an occupational health report had been received referring to the osteoarthritis and there was other medical information provided making it clear that this was a long-term condition.

90. The Claimant's claim relating to her dismissal is put on the basis that the Respondent wanted to be rid of the Claimant because of how her osteoarthritis affected her in the carrying out of her duties. It is noted that she has not suggested in evidence that there was any connection (direct or indirect) between her disability and the medication errors she made. On her behalf, it has been alluded to that her mental impairment may have had an effect on her behaviour, but again in circumstances where there has never been an allegation that the Claimant was disabled arising out of any mental health impairment.

91. There is no evidence that the Claimant was significantly restricted by her osteoarthritis in the performance of her duties. The only nursing duty which she said to the Tribunal that she couldn't undertake was taking patients out of the hospital on visits.

92. Ms Tas was not aware of any disability affecting the Claimant and had not observed any issues with the Claimant's ability to carry out her role. She had only recently been in post and had had little to no personal contact with the Claimant. She had not been informed of any issues by Janet Dodsworth. There is no evidence of the Claimant not performing her duties or of any perception that she was restricted or unreliable with reference to her disability. The Claimant has not brought a claim that any earlier warnings were in any way related to her disability. Again, the Tribunal accepts Mrs Tas' evidence that the sole reason for the Claimant's dismissal was the view she took of the Claimant's nursing practice.

93. Turning to the complaint of unfair dismissal, as already indicated, the Respondent has shown the reason for dismissal to be conduct related – a potentially fair reason for dismissal.

94. Ms Tas reached her conclusion that the Claimant had been guilty of breaches of medication procedure on reasonable grounds. The Claimant accepted that she had not locked a creams cabinet and, finding an unlocked medication fridge, she did not then secure it. She accepted that she should not have given a patient paracetamol when there was no prescriber signature on the MAR sheet next to that drug. Ms Tas did not conclude that the Claimant was responsible for any other unlocked cabinets and accepted the Claimant's word on that. Her conclusion was based on the Claimant's own admissions.

95. Those conclusions followed a reasonable investigation where again the failings were accepted by the Claimant. There had been some confusion in terms of which cabinets were unlocked, but the case found against the Claimant was ultimately only based upon her own admissions. The fact that others may have acted in breach of procedure did not excuse the Claimant. There was no inconsistency of treatment. As already stated, other nurses were dealt with more leniently, but because they were not subject to previous disciplinary warnings. The Claimant was dismissed based on her being subject to a live final written warning which followed a written warning and an earlier more informal 'line in the sand' letter.

96. The Tribunal cannot reopen consideration of the appropriateness of the earlier warnings in circumstances where there is no evidence of bad faith or that they were manifestly inappropriate. Indeed, the earlier warnings were given in response to earlier admitted failings of the Claimant to observe the medication procedures.

97. The decision to dismiss was within a band of reasonable responses. The Claimant was an experienced nurse, fully trained and had shown that she understood the medication procedures. She was reasonably regarded as having no excuse for failing in respect of the allegations against her. The Claimant being busy did not prevent her from the very quick and straightforward task of locking the creams cabinet and medication fridge. It was clearly not sufficient within the Respondent's procedures for the clinic room door to be locked and the policy of security of medication was reasonably justified given the risk and nature of the patients being cared for. She had no explanation for her oversight on the MAR sheet other than that others were, she believed, equally or more guilty. She has never suggested that any health issue caused her to make the errors or contributed to them.

98. The failings were serious. They were further failings following disciplinary warnings and all reasonable steps having been taken to help the Claimant avoid a recurrence. Ms Tas did reasonably conclude that she could no longer have trust in the Claimant and therefore that dismissal was the appropriate sanction.

99. A dismissal can, however, be unfair if a fair procedure has not been followed. In this case the Claimant did benefit from a full and fair procedure up to the point of the 31 July appeal. She attended full and detailed meetings where she was accompanied and had the opportunity to state a case. It was not put to Ms Tas that the disciplinary hearing had been brought to a premature close as has been suggested on the Claimant's part.

100. The Respondent clearly recognised that the Claimant had a right to appeal and that a fair appeal process would involve a meeting. It was patient in allowing the rescheduling of meetings. An appeal meeting did take place on 16 July. It was not, however, concluded. The Tribunal would note that Mr Doherty's requirement for instantaneous minutes to be provided was neither reasonable nor pursuant to any statutory code of practice or internal procedure. Ms Murphy could have concluded the appeal on that day and, indeed, even if Mr Doherty still refused to engage. She, however, chose not to and to give the Claimant a further chance.

101. The Claimant was ultimately given a deadline of 4pm on 30 July to confirm her attendance at an appeal set for the following day. She sent an email to that effect at 2:48pm. She complied. The Respondent was unaware of that email until 5:50pm, but was then aware that the Claimant had attempted to send it within the prescribed timeframe. The Respondent determined that the Claimant had lost her chance of an appeal hearing and gave her the option of written submissions only (and at this very late stage). The Respondent could have kept the appeal in Ms Murphy's diary or alternatively rearranged it. She was aware that the Claimant actually attended for the meeting, but still chose to conduct a paper exercise only before issuing an outcome.

102. The right to an appeal is a fundamental part of a fair disciplinary process. The ACAS Code of Practice on Disciplinary and Grievance Procedures, to which the Tribunal must have regard, includes that opportunity and clearly envisages the need for a meeting. The Claimant was unreasonably denied that opportunity. Any lack of reasonableness on the Claimant's part or lack of prompt response in the earlier attempts to arrange an appeal, does not provide a justification for the Respondent's actions. The Respondent clearly recognised the need for a reconvened appeal hearing to ensure a fair process and appears to have run out of patience when the hearing could in fact have taken place at the time designated by the Respondent. This is sufficient to render dismissal, in all the circumstances, unfair. The Claimant's claim of unfair dismissal succeeds.

103. However, the Tribunal concludes that had an appeal taken place the Claimant would have been fairly dismissed in any event and that is, indeed, with a 100% degree of certainty. The Claimant would have raised

no additional arguments which would have called into question a dismissal decision which was within the band of reasonable responses. She has raised no arguments beyond those which were considered by Ms Murphy in her detailed letter of outcome, given after her review of relevant documentation. There should be no compensatory award.

104. The Tribunal must also consider the question of the Claimant's conduct prior to the dismissal in the context of any basic award. The Tribunal considers that the Claimant as a matter of fact and on her own admission was guilty of misconduct, but notes that Ms Tas in her deliberations considered that the offences on their own and without the prior warnings would not have justified dismissal. The Tribunal considers it just and equitable to reduce the Claimant basic award by a factor of 75%. The Claimant's conduct was blameworthy and the fundamental cause of her dismissal.

105. The Claimant also brings additional disability discrimination claims. Again, they are only based on her impairment of osteoarthritis. As regards the reasonable adjustment complaints, the Claimant has led virtually no evidence as to her duties and working arrangements as a nurse and how her osteoarthritis caused difficulties. She said that the only duty she could not do was accompanying patients on outside visits. It appears that the Respondent permitted this restriction on her duties – there is no suggestion or evidence to the contrary. The Tribunal can conclude that the Claimant's lack of mobility disadvantaged her, but the Tribunal has no evidence of the speed at which the Claimant was required to walk between areas of the unit or the amount of walking involved. It does not even know what or where those areas were. It is clear that the Claimant has never been penalised or criticised for her speed of movement (her assertions as to being monitored are vague and without corroboration) and, on the balance of evidence, she regulated her own pace of work.

106. The Claimant has not explained or evidenced stress exacerbated by her osteoarthritis which would be removed if the Claimant's hours were increased as she maintains ought to have occurred as a reasonable adjustment.

107. The holding of regular meetings and access to training occurred in any event and the Claimant has not explained how more of that could have removed any disadvantage. In submissions it was suggested that, through these, the Claimant's needs might have been highlighted but these were therefore no more than procedural steps, not reasonable adjustments in themselves.

108. Finally, the Claimant brings complaints of discrimination arising from disability in respect of the 2017 reduction in her hours of work and removal from night working. The reduction in hours from the documentation

amounts to an agreed reasonable adjustment to help the Claimant with her osteoarthritis (she referred to that when seen by occupational health in March 2018) which the Claimant raised no complaint over. It was not therefore an act of unfavourable treatment when the reduction was made. There is no complaint before the Tribunal regarding any subsequent failure to increase hours.

109. There has been little evidence advanced in respect of the move to days, but the occupational health specialist in March 2018 saw working days as beneficial in terms of the support which could be provided to the Claimant.

110. In any event both of these actions occurred in May – June 2017. They are singular (not continuing) events not linked to any subsequent act of discrimination and the complaints about them have been brought to the Tribunal on 13 September 2018 substantially outside the applicable primary time limit of three months. The Claimant has advanced no explanation at all for the lack of any earlier claim to the Employment Tribunal and, in the complete absence of any explanation, it would not be just and equitable for the Tribunal to extend time.

111. All of the Claimant's complaints of unlawful discrimination must fail and are dismissed.

112. Turning to the issue of remedy in the claim of unfair dismissal, the Claimant's gross monthly salary was £1660 per month, giving a weekly gross figure of £383.08 per week. At the time of her dismissal she was 55 years of age and had 11 completed years of service. Each of those years attracts a multiplier of 1.5. That leaves a basic award entitlement of £6320.82 which, when reduced by a factor of 75%, gives an entitlement and an amount which the Respondent is ordered to pay to the Claimant of £1580.21.

Employment Judge Maidment

Date 17 March 2020