**EMPLOYMENT TRIBUNALS**

| **Claimant** | | **Respondent** |
|---|---|---|
| Miss Katherine Rose Henning | **v** | Hampshire Hospitals NHS Foundation Trust |

**Judgment**

**Heard at:** **Southampton** **On: 21,22,23,24,25,28,29,30 31,**

**October and 1 and 2 of November 2019 and in Chambers 11 November 2019**

**Before:** **Employment Judge Rayner**
**Members: Mr K Sleath and Mr M Richardson**

**Appearances**

**Claimant:** **Mr Wheatton, of Counsel**
**Respondent:** **Mr Allsop, of Counsel**

# RESERVED JUDGMENT

1. The Respondents knew or ought to have known that KH was disabled by reason of her physical impairment from July 2015.

2. The Claimant was disabled by reason of her mental impairment from April 2016 and the Respondents knew or ought to have known that she was disabled by that reason from that point in time.

3. KH was unfairly constructively dismissed. The Respondent was in fundamental breach of the implied term of mutual trust and confidence;

4. The Claimant resigned in response to the breach, in good time and did not affirm or waive the breach.

KH's contract of employment

   a. it failed to follow its own procedure to investigate and hear KHs complaints of bullying and harassment against staff in the minor injuries unit;
   b. it discriminated against KH on the grounds of her disability;

5. KH was discriminated against on grounds of her disability

   a. The Respondent failed to make reasonable adjustments for KH whilst KH undertook a clinical assessment out by Dr. Chitnes;
   b. the Respondent failed to make a reasonable adjustment when KH returned to work by failing to provide her with an ergonomic chair;
   c. the Respondent discriminated against the Claimant on grounds of disability in the way in which her complaints of bullying and harassment were dealt with by them.

6. KH was discriminated against indirectly on grounds of disability by the Respondents hearing claims in her absence in early 2017;

**REASONS**

1. In a claim form presented on 9 June 2017 the Claimant Miss Henning (KH) brings claims of disability discrimination and unfair constructive dismissal .

2. KH relies upon two disabilities: Firstly a physical impairment of a bilateral congenital deformity in both hips and secondly a mental impairment of reactive depression.

3. the Respondent admits that KH was disabled by reason of her physical impairment from the date of the diagnosis on 15 May 2015 . The Respondent admits that it had knowledge of KH's bilateral congenital deformity from 7 August 2015 following receipt of the Health4work (H4WK) report.

4. The Respondent admits that KH was disabled by reason of her anxiety and reactive depression from April 2016 onwards. The Respondents admit that they had knowledge of KHs anxiety and reactive depression from 5 July 2016 which is the date of an OH report provided to Lena Zuddick (ZL) by Dr. Jane Spenceley, through H4WK the Respondents occupational health provider.

5. KH initially contacted ACAS in February 2016 and the EC notification date is 5 February 2016. An ACAS certificate was issued on 11 February 2016. ACAS certificate number R 111882/16/28.

6. A 2nd ACAS EC notification is dated 28 April 2017 and the 2nd ACAS certificate is dated 10 May 2017. This number R1 34136/17/44.

7. A 3rd ACAS notification was received on 10 May 2017 and a certificate issued on 10 May 2017. This is numbered R 137187/17/36.

8. In the claim form KH refers to the ACAS certificate number 137187/17/36.

9. KH was employed as a nurse and started her employment on 1 October 2000. At the time of the issues in this case, the Claimant was worked in the minor injuries unit at Andover, part of the Respondent trust. Her substantive job was at MIU until her resignation on 28 April 20 although from the point of her suspension from work in December 2015, until her resignation, she did not return to the unit to work.

10. KHs claim is in respect of a series of events starting in the summer of 2015 when some members of her team started to complain about her. The investigation and handling of these complaints and the Claimants own complaints about members of her team, form the basis of the claims before the ET, and are alleged by the Claimant to have started a continuous course of discriminatory conduct, which was also a fundamental breach of her contract of employment, by the Respondent, which continued until her resignation.

11. At the start of the chronology KH was a senior nurse practitioner within the minor injuries unit managing a team of staff she considered to be friends and whom she had known for many years. At the point that she resigned KH was suffering from serious ill-health ; was disabled by reason of her mental and physical health conditions, and had not been allowed to return to work in her substantive role.

**The hearing**

12. This claim had initially been listed for 12 days but had been adjourned on 2 previous occasions. Shortly before this hearing, the listing was reduced to 10 days to avoid further adjournment and all parties were satisfied to proceed on that basis.

13. At the start of the hearing we were provided with a bundle of documents of 1064 pages. We received some further disclosure during the course of the hearing.

14. The parties also each provided a chronology of events.

15. The tribunal took time to read the witness statements and associated documents on the first day and evidence commenced with cross examination of KH on the second day.

16. The Tribunal received statements and heard oral evidence for KH from Miss. Henning herself; Jennifer Jones and Douglas Smith and received written statements on her behalf from SanDr.a Walter; Elizabeth June Collins and Dr.. Jean-Claude Albrecht.

17. The Tribunal received statements and heard oral evidence for the Respondents from

a. Sara Sparks (SS), Operations manager for unscheduled care;

b. Janet Polson ( JP), Associate Director of HR for HHFT based at Basingstoke site.

c. Philippa Aslet, (PA) Associate Director Of Nursing - Professional Standards

d. Zena Luddick ( ZL) Operations Director medical services for Hampshire hospitals NHS foundation trust

e. Julie Maskery (JM) – chief operating officer of Hampshire hospitals, employed as Director of transformation and performance from July 2015-July 2017.

18. The Tribunal heard evidence about a number of matters and about a number of people who did not give evidence before us. In particular we heard evidence about complaints made by members of staff from the minor injuries unit against KH. These complaints form the basis of some of the Claimants allegations of discrimination by harassment.

19. We were told that none of the staff who complained about KH had been asked to give oral evidence to the ET. We were also told that none of them had been made available for questioning by KH during the course of the disciplinary hearing dealing with her complaints about them, although they had been interviewed in late 2016, by the person investigating the Claimants allegations of bullying and harassment against them.

20. Because they have not given evidence we have therefore referred to them, in so far as it is necessary, by their initials only rather than by name.

21. We also heard evidence from KH about an observation of KH's clinical skills which Dr.. Chitnes carried out. KH makes an allegation of a failure to make reasonable adjustments in respect of this observation.

22. Reference is also made to a complaint raised by Dr.. Chitnis himself about KH, and we heard evidence from KH and the Respondents about this matter which formed part of a subsequent investigation and disciplinary hearing against her. We have not heard evidence from him and have no witness statement from him.

23. We heard evidence about the number of decisions which were apparently made by DG. We heard evidence that Ms Green was involved at various stages of the chronology and that she was the individual who made the decision to refer KH to the NMC and had instructed Phillipa Aslet to include particular historic information in that referral.

24. We were also provided with a Scott Schedule of 56 allegations of discrimination. The schedule was produced by KHs then solicitor following a case management order, and set out KHs allegations which the Respondent had replied to.

25. During the course of the hearing KH made a number of changes and clarifications to the schedule including withDr.awing the number of allegations. Where allegations were withDr.awn this is recorded below.

26. During the course of the hearing KH made an application to amend allegation number from an allegation of direct discrimination, to a claim of discrimination for a reason arising from her disability contrary to section 15 Equality Act 2010.

27. The application was refused on the grounds that it was an entirely new head of claim and was significantly out of time. KH had not previously pleaded any section 15 Equality Act 2010 claim in respect of any of the alleged treatment.

28. The claim had been filed since 2017, had been case managed ;listed for hearing and adjourned on two previous occasions, and whilst KHs ill health may have been a factor in the preparation of her case being delayed and difficult at the early stages, there was no explanation for the timing of the amendment or the delay in making it during the course of the hearing rather than any earlier stage.

29. Taking into account the chronology of this matter, the point in the hearing at which the amendment application was made; taking into account KHs history and chronology of ill health; her access to advice from the RCN and then from her solicitor ,as well as the existing claims before the tribunal, and taking into account the potential prejudice to the Respondent of having to deal with a different allegation, we refused the amendment. Oral and reasons were given orally at hearing. No request was made for written reasons.

30. At the start of the hearing the parties provided and agreed list of issues which makes reference to the numbering of the Scott schedule. The agreed issues are as follows:

***Disability***

1. *Was KH, at the times material to her claim, a disabled person within the meaning of s. 6 of the Equality Act 2010 ("the EA")?*
2. *What is KH's alleged disabilities?*
    *(1) Anxiety and Depression*
    *(2) Bilateral Congenital Deformity*

*The Respondent accepts that KH's two conditions do constitute disabilities but when it is still in dispute.*

*The Respondent accepts that they had knowledge of KHs disabilities from…..:*

3. *What were the material times of the disability?*
4. *When does KH say that anxiety and depression first started to have a substantial adverse effect*
5. *When does KH say that Bilateral Congentital deformity first started to have a substantial adverse effect*
    *(1) upon her ability to carry out normal day to day activities?*
6. *With regard to anxiety and depression, what knowledge did the Respondent have of this disability and at what time did they have this knowledge?*

***Direct disability discrimination – s. 13 EA***

7. *Was KH subjected to direct disability discrimination contrary to s. 13 EA? In particular by (with reference to the item numbers in the Schedule of Discrimination):-*

    *(1) Failing to investigate her grievances as alleged in the Schedule of Discrimination at items numbers 2, 13, 15, 41, 48, 49 because of KH's disability?*
        *i. Did the Respondent treat KH less favourably than it treated or would treat others? If so, was the reason or part of the reason disability?*
        *ii. Does C prove facts from which, the ET could conclude that discrimination has taken place?*
        *iii. What is the Respondents policy on grievance?*

(2) *Being told to take sick pay rather than suspended pay at item numbers 21, 44 because of KH's disability? Respond says this did not happen as a matter of fact?*

(3) *Being required to take annual leave until a non-clinical role could be identified at item number 35 because of KH's disability? Respondent says this did not happen as a matter of fact.*

(4) *Not being placed in a non-clinical role following suspension at items 47 and 51 because of KH's disability?*

(5) *Being unable to apply for a promotion at item number 40 because of KH's disability?*

(6) *Being the subject of a workplace investigation at item numbers 43 and 45 because of KH's disability?*

8. *Was KH thereby treated less favourably on the grounds of her disability (and if so, which one) than an appropriate comparator in the same or similar circumstances was or would have been treated?*

9. *Which comparator does KH relies upon as comparators listed at items 2,13, 15, 21, 35, 40, 41, 43, 44, 45, 47, 48, 49, 51?*

10. *Does KH also rely upon a hypothetical comparator?*

***Failure to Make Reasonable Adjustments – ss 20 and 21 EA***

11. *Did the Respondent fail to comply with a duty to make reasonable adjustments contrary to s. 20(3) EA? In particular:-*

(1) *Did the Respondent have in place a provision, criterion or practice ("PCP") that placed KH at a substantial disadvantage in comparison with non-disabled persons? KH relies on the following (with reference to the item numbers in the Schedule of Discrimination):*

i. *The Respondent's practices of:*

1. *Requiring KH to work her contractual hours (item 5);*
2. *Expressing concern about KH working in a clinical role (item 33)*
3. *Placing employees into non-clinical roles (item 37).*

(2) *Did the Respondent fail to take such steps as it was reasonable for it to have to take to avoid the substantial disadvantage? In particular, did the Respondent fail to take the following steps:*

i. *Roster additional staff so that KH could limit her work to a non-clinical role (item 4);* *C clarified on day 2 that this was not the thrust of the allegation.*

ii. *Explain KH's modified hours to staff and ensure the staff accepted KH's modified hours (items 5 and 20);*

iii. *Place KH in a non-clinical role without criticism from staff (item 8);*
iv. *Adhere to reasonable adjustments per items 23, 25 and 31 (the Respondent notes that these are unspecified);*
v. *Place KH in a role that was not isolated (items 32, 33, 37 and 39);*
vi. *Provide seating during the clinical assessment with Dr. Chitnis (item 38) (and / or per section 20(5) EA 2010);*
vii. *Require KH's supervisor to move from Winchester to Andover to supervise KH (para. 40 of Particulars); and*

viii. *Provide an ergonomic chair and a 'safe room' at Winchester Hospital (para. 39 of Particulars) (and / or per section 20(5) EA 2010);.*

(3) *Were the steps set out above reasonable steps that the Respondent was required to take? Were there other steps which the Respondent ought to have taken?*
(4) *Would the steps set out above have avoided the substantial disadvantage complained of?*
(5) *Did the Respondent know (or could the Respondent reasonably have been expected to know) at the times material to KH's complaint:*
   i. *That KH was a disabled person for the purposes of the EA; and*
   ii. *That KH was likely to be placed at the alleged disadvantage.*

***Indirect disability discrimination – s. 19 EA***

12. *Did the Respondent apply a PCPs as alleged at:*
   (1) *Item 36;*
   (2) *Item 37;*
   (3) *Items 53, 54, and 55?*
13. *If so, what was the alleged PCP?*
14. *If so:*
   (1) *Did the Respondent apply (or would the Respondent have applied) the PCPs to non-disabled employees?*
   (2) *Did the PCPs put (or would they have put) disabled employees with KH's disability (if so, which one is relied upon) at a particular disadvantage compared to non-disabled employees? (KH contends that the disadvantages relied upon are at items 36, 37, 53, 54 and 55).*
   (3) *Did the PCP put (or would it have put) KH at that disadvantage?*
   (4) *Was the PCP a proportionate means of achieving a legitimate aim?*

***Harassment – s. 26 EA***

15. *With reference to the item numbers in the Schedule of Discrimination, did the Respondent engage in the following conduct ("the alleged conduct"):*

   (1) *Mocking and undermining KH (items 1, 3, 6, 16, 19, 22, 23, 48, 52);*
   (2) *Shouting at KH (item 9);*

(3) *Excluding KH (items 14, 17, 50);*

(4) *Not providing support to KH (item 26);*

(5) *Humiliating KH (items 33 and 46);*

(6) *Accusing KH of fraudulently submitting hours (item 5);*

(7) *Raising concerns about KH's performance (items 7, 10, 11, 12, 16, 18, 24, 28, 29, 30, 56);*

(8) *Describe KH as 'chaotic' and / or a 'maverick' (items 27, 28, 29, 30).*

16. *If so, in respect of each of the instances of alleged conduct set out above:*

(1) *Was the conduct unwanted?*

(2) *Was the conduct related to disability?*

(3) *Did the conduct have the purpose or effect of:*

i. *Violating KH's dignity; or*

ii. *Creating an intimidating, hostile, degrading, humiliating or offensive environment for KH*

*(in either event, having regard to KH's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect).*

17. ***Victimisation – s. 27 EA***

(1) *Did KH do a protected act? (KH appears to relies on the following protected acts):*

i. *Raising grievances / appealing (items 33, 34, 42)*

(2) *The Respondent accepts that KH raised grievances/ appealed per (1)(i).*

(3) *Did the Respondent subject KH to a detriment?*

a. *KH relies upon the following as detriments (all of which are denied by the Respondent):*

i. *KH alleges that she was suspended as a result of raising grievances (item 33);*

ii. *KH alleges she was subjected to unnecessary disciplinary hearings (item 34);*

iii. *KH alleges that she was subject to unnecessary disciplinary sanctions (item 42);*

iv. *KH alleges she was required to take sick leave (item 52).*

b. *If yes, did the Respondent subject KH to the detriment because KH did the protected acts set out above?*

***UNFAIR DISMISSAL***

18. ***Constructive Dismissal***

1. *What is the alleged term breached? KH appears to relies on an alleged breach of the implied term of trust and confidence.*

2. *What are the alleged incidents/events relied on by KH in support of her contention that there was a breach of trust and confidence by the Respondent and did these occur? KH relies on the following –*

*1.1.1 The Respondent's alleged failure to deal with her grievance in accordance with its policy (para. 57 of Particulars);*

*1.1.2 The Respondent's alleged failure to adDr.ess the discrimination, harassment and victimisation (para. 58 of the Particulars); and*

*1.1.3 The Respondent's alleged failure to support KH during material time (para. 59 of Particulars).*

3. *If so, was any such breach repudiatory individually or cumulatively?*
4. *If so, did KH acquiesce to the breach of the implied term?*
5. *If not, did KH resign in response, at least in part, to the breach?*
6. *If constructively dismissed, can the Respondents show a fair reason (s.98(2) ERA 1996)?*
7. *If so, was the dismissal fair in all the circumstances of the case (s.98(4) ERA 1996)?*

19. ***Jurisdiction***

1. *Does the Tribunal have jurisdiction under s. 123 of the Equality Act 2010 in relation to each of KH's complaints? (KH's claim was presented on 14 June 2017; the date of receipt by ACAS of the EC notification was 5 February 2016, and the ACAS certificate was issued on 11 February 2016.)*

**Findings of fact**

20. We have taken into account the fact that the matters which we are considering happened some time ago. Where we have contemporaneous letters or notes we have referred to them, and we have been cautious in making findings or Drawing conclusions on the basis of conflicting recollections of events.

21. KH started to work for the Andover community trust as Nurse practitioner trainee.

22. On 7 July 2014 KH was appointed as lead nurse practitioner within the MIU at Andover. This was a promotion making her senior to staff she had worked with for many years.

23. KH was diagnosed with Bilateral Congenital deformity of both hips on 15 May 2015. The impact of the impairment meant that she was physically unable to walk long distances or stand for long periods of time and that she found heavy manual handling difficult. The pain impacted upon her sleep quality and quantity.

24. Whilst she was awaiting surgery in the form of a double hip replacement, KH used crutches to assist her. Her first hip replacement operation took place in the autumn of 2015 and was successful. Her second hip replacement took place in 2016 was not wholly successful and left KH with an on-going mobility issue, which is not expected to improve.

25. The Respondents concede that KH was disabled by reason of the CBD from the 15 May 2015. (para 49 Respondents closing submission).

26. The Respondents witnesses accepted that they had seen KH in the unit walking with crutches

27. Janet Poulson's evidence to the ET was that in the summer of 2015, she saw KH 2 or 3 times each month and was aware that she was walking with a stick and then on crutches. She knew that KH was waiting for an operation but was struggling with pain and mobility but that it was expected that she would recover after the operation. In respect of KHs mental health, JP stated that she did not think she knew at that point, that is in the summer 2015 but that it was in a subsequent H4Wk report.

28. The Respondents admit knowledge of KHs physical disability from the H4W report of 7 August 2015, although they knew Claimant had been attending at the MIU on crutches before this, and At some point in the early summer, management had made reasonable adjustments for KH to enable her to continue working whilst awaiting her hip operation. The adjustments were to KHs working time and to her working hours and to the type of work which she was required to carry out, and duties she would undertake. She was given permission to work on a flexible basis, and to reduce her hours. She was working a mix of clinical and non clinical shifts and it was left to her, as manager of the unit to

rota her own shifts. KH did not therefore always work in a clinical role whilst on the unit. These adjustments had been approved by senior managers and by JMcp, and both KH and her managers had explained the changes being made for KH to the staff.

29. During the course of the summer, the Respondents were also aware of the impact of the Claimants condition upon her because of the complaints raised by members of her own team about her pain levels and her restricted ability. These complaints about KH are the starting point for the breakdown in the relationship between KH, her team and her employers, which followed.

30. KH had kept a contemporary note of matters which concerned her and had put them into a chronology of events. She told the ET and we accept that this was not intended to be a record of all the facts but to be a note of the environment she was working within. It was an aide memoir for her own purposes, and KH never intended it to be an accurate record of all the details of everything that happened.

31. KH had been in post following her promotion within the unit for a period of about a year before being diagnosed with her bilateral congenital hip condition which meant that she started to use a stick and then to walk on crutches. We have heard no evidence of any concerns or complaints about any aspect of KHs work being raised by any staff or anyone else before the summer of 2015 or before KH started to work using crutches. There has been no evidence of any management concerns at all prior to summer 2015.

32. KH herself did become aware of some staff discontent in Summer 2015. The Claimants visible use of crutches and the adjustments made for her coupled with the reduction in work she was required to do caused some concern, but also resentment among some other staff in the minor injuries unit.

33. KH raised her concerns about staff rumblings with Donna Green (DG) at a *Ward to Board* meeting in June 2015, although nothing was done about her concerns.

34. KH compares the lack of action over her concerns with the subsequent action taken to adDr.ess concerns raised subsequently by the AMIU staff about her.

35. We have heard no evidence from DG and accept that KH did raise this with DG, and that DG took no action.

36. KH alleges that members of her staff had started to make adverse and hurtful comments to her, about her being in the workplace. She was told that she should not be at work on crutches and told she would have to use a zimmer frame. KH makes the allegation against the women who were working alongside her in the MIU, RSll; GR; JE and LG.

37. During the summer of 2015 some of the Unit staff also raised concerns about KH with their manager. The concerns raised at that time by RS and LG focussed on KHs health and her management style, and included that KH was working odd hours, that staff did not know what she was doing, that KH did not stick to her shifts. RS reiterated concern about the running of the department and KHs condition

38. The Respondents called no direct evidence on this point, but point to the lack of any reference to it in KHs own contemporaneous chronology of events. It is asserted that the lack of a reference to it by KH in that document, suggests that it did not happen.

39. KHs evidence is corroborated by Jenifer Jones, who stated in her witness statements that three of the same women that KH named had made comments that KH was not fit to be working on crutches.

40. JJ also stated that at the staff meeting of 23 July 2015 other staff had stated that KH was unsafe using crutches and should be off sick.

41. Whilst KHs chronology did not mention a number of matters which KH has subsequently relied on in her evidence, including a comment which she alleges was made to her in the summer of 2015 that

she would soon require a zimmer frame, or the alleged comment that she should not be at work on crutches, or that she may need a mobility scooter, we accept KHs evidence that these comments were made to her, and were made in early summer of 2015 by the named women.

42. On the 20 June 2015 KH was working in the unit, on crutches doing non-clinical work. A member of staff, VL, was late to work, and an emergency arose when a patient collapsed in the waiting area. KH and other members of the MIU started Cardio Pulminary Resuscitation. KH got onto her knees to do this, suffering significant pain to do so. KH administered medication she believed to be in accordance with NICE guidelines, as the patient was conscious between being shocked with the defibrillator. The patient was finally taken to an emergency unit by ambulance after about 45 minutes. He survived and KH nominated everyone who had been involved for an award.

43. KH alleges that she had asked for additional staff to be allocated so that she could do her reduced clinical role without concern that she may be put in this sort of position. She explained that this was not a criticism of the staffing levels generally, but that she wanted an additional member of staff available in case of emergencies.

44. In late June early July 2015, some of the Claimants staff raised verbal complaints with JMcP, the Claimants line manager. One of the women was RS.

45. J McP told RS that things were *pretty tricky* with Kate it would be really helpful to have some further specific details about the staff concerns.

*46.* RS replied that according to Kate *all is well and she (KH) does not want to go off sick.* In an email on 7 July 2105 RS refers to concerns of how she is running of the department and Kates condition.

47. Following the exchange of emails, Julie McP had a telephone conversation on 10 July 2015 with RS who was at home.

48. Her file note sets out 11 bullet points of which the first three are positive comments about the team , including recognition of recruitment to the team being good. The recruitment included that of Charlotte Ross, who is described as great.

49. The remaining bullet points noted by J McP concern KH. The concerns were:
    a. Concerned for Kate physically and mentally- feel she should be off sick
    b. Feel KH is making decisions outside of her scope;
    c. Feels KH gets carried away with plans for the department
    d. Rota at times in not acceptable in their opinion they need more than 2 ENP per shift, but KH reluctant now even though had agreed it initially,
    e. Team are not consulted, everything is KH decision- she is “maverick” in her behaviour and mentions the union a lot. They believe she makes decisions that are not in line with the Trust strategy of my ideas as her line manager. They feel she does not consult me or Sara Sparks before making changes;
    f. KH has taken over the writing of off duty and is controlling it;
    g. KH comes into work as and when- not always according to rota,
    h. Feels that KH behaves in a “risky” way and tries to make new staff work in the same way she does, whilst rest of team try to encourage them to be safe in their practice.

50. Following the telephone call Julie Macpherson contacted KH suggesting a proper H4WK assessment. KH was happy to see Occupational health as she was *struggling a bit anyway and felt she may need to be signed of soon*.

*51.* On 17 July 2015 Julie McP and Sara Sparke received a letter from 5 team members, stating we *are concerned for KH health, she is physically unwell and attends the department on crutches. She is clearly in significant pain and we fear this may impair both her physical ability in an emergency situation and her clarity of thought.*

52. No mention is made of the patient who collapsed, and had a heart attack, which had happened a month before.

53. The letter and the information in the telephone note express some genuine concerns about KH and the way she was working at that point in time. The staff said there were three categories of concern. Professional conduct; which was an allegation that KH was misrepresenting her hours on the roster; leadership of the department, which concerned with issues of trust resources including KH authorising over time and bank staff turning up working been sent away again and lastly KHs Health and patient safety.

54. Part of those concerns were about KH presenting as a women on crutches, with an obvious impairment, and part of those concerns were about how KHs impairment was impacting, or may impact on the department and the work being done. A third part of the concerns were about KH management style and approach.

55. At this point the staff were raising concerns about how the managers behaviour may impact upon the unit combined with allegations that KH was doing something wrong in respect of her Rota and hours of work. All contemporaneous documents suggest a combination of concern for the unit and for KHs health and well-being but also a lack of understanding and the lack of acceptance of adjustments that had been made to enable KH to remain at work.

56. We conclude that the motivation was in part an attempt to alert the mangers to potential difficulties, and to gain assistance from mangers in the staffing and management of the unit.

57. However no such concerns had been raised about KH management style raised at an earlier stage, and the timing does coincide with KHs condition presenting as a physical disability. Some of the concerns were directly about KH being at work on crutches, and some, over the rota and her hours, were about the staff not understanding, or resenting, the Claimant having had adjustments made for her. KH was right to say that this was about her disability.

58. At this point, whilst we question the approach of management in encouraging a focus on complaints about KH, we find that part of the complaints or concerns made by the staff were on grounds of the Claimants physical disability and that part of the motivation to complain and raise concerns whether conscious or subconscious was the fact of KH presenting as a women on crutches, with a physical health condition.

59. On 21 July 2015 a H4W referral was made for KH, stating as the reason performance concerns due to possible health reasons. The referral specifically asked for an assessment of whether or not KH was capable to continue to work clinical shifts until after her surgery.

*60.* The managers stated that *concerns have been raised by her colleagues that due to kates being present in the unit non clinically she can get involved in the clinical elements trying to support the team. KH also has other responsibilities outside her clinical role that require her to travel across sites although this does not come under my line management I have concerns about the impact of this on her long term due to her current physical condition and recovery.*

*61.* In response to the question on the referral form *is the employee having any specific difficulties in the workplace* it is stated that *Kate is at times covering clinical shifts due to workload/lack of clinical cover. I would like to ensure that KH is capable of these elements of her role that may be required of her even on those minimal clinical roles. I would imagine bending to be an issue, ie in cardiac arrest or sudden collapse of a patient.*

62. Whilst not stated, this is an obvious reference to the incident that had happened earlier in the summer.

63. On the 22 July 2015 KH was asked to attend a meeting with J Mcp and SS, following a call after she arrived at work. There is a note of the meeting, with an incorrect date of 23 July 2015. The correct date was 22 July 2015. We accept KH evidence that she remembers this because it was her birthday.

64. At this meeting, Julie McP told KH that staff had raised some concerns about her, and outlined the nature of the concerns. She also passed the letter of 17 July 2015 to KH to read.

65. KH became upset and tearful at what she perceived as the team going against her and was disappointed that they did not support her to make decisions.

66. JMcP was in retrospect, unwise to share the letter of concern and the names of these who raised concerns directly with KH. This was bound to cause upset and had the potential to make the relations worse between the parties. In addition, the women had been very clear about not wanting KH to know that they were raising concerns.

67. KH made it clear that she considered that the reason that the concerns had been raised was because she had been coming into work on crutches and because the staff did not understand that she was entitled to reasonable adjustments of reduced hours and adjusted duties.

68. KH explained that she wanted the team to understand that JMcP did support her decision making and that she does have the authority to make change.

69. In this meeting, KH and JMcP and SS appear to have been in agreement, that KH had the right to manage the unit, was to be supported in her role by management, and in doing a reduced clinical role, and in working her flexible hours.

70. We note that KH accepted that her management style could be changed, but that other than this, there was no suggestion that KHs practice was a problem, or that any concerns were serious, or outstanding or of any real concern to management.

71. KH was keen, following this meeting, to meet with the staff, to discuss matters, although both SS and J MCP advised delay. However it was agreed that the staff meeting planned for 23 July 2015, would go ahead, and that it needed to be held sensitively. A letter in response to the staff letter of concern would be delivered at the meeting.

72. It was also agreed that the meeting needed sensitive handling. SS agreed to attend with KH.

73. Following this, JMcP wrote two letters to the staff group. One was to the 5 people who had signed the letter of concern, and the second letter was to all other staff. Each members of staff received one letter. The letters were handed to staff just prior to the meeting.

74. The letter to the 5 complainants stressed that the management supported KH in her work, and in managing the unit and that she had a right to confidentiality around her health and the right to have reasonable adjustments made in the workplace to enable her to continue working.

75. At the meeting, KH read out a letter which she had prepared in advance.

76. Ground rules which were subsequently written up and displayed in the unit were not read out at this meeting. KH was clear in her evidence about this, and was supported SS who accepted that C was correct. In terms of credibility, this indicated to us that KH had a good recollection of what happened at this meeting, and over the summer of 2015.

77. Whilst the statement is factual and explanatory about some of the staffing and management issues in the unit, it also contains a number of comments and remarks which were ill advised and were

unlikely to improve working relationships or repair damages morale. KH states that some of the allegations made about her are *absolute lies*, and whilst she may have believed this, and may even have been right, it was unworldly to say so in a meeting at this time.

78. We find that the statement is indicative of KHs open and honest nature, but is also indicative of a management style which the team found problematic. The statement told the team how KH felt at the time, and is clearly heartfelt. In it KH provided some explanation of some decisions.

79. The meeting was a difficult one for KH, but she was able to set out what she wants to say respect of her health and her concerns about what others were saying her.

*80.* Not all staff were understanding or supportive of the adjustments that had been made for KH, but the note of the meeting, which KH accepted was an accurate note, and which is relied upon by R, states clearly that KH will be supported by managers. It states in terms that *she [KH] was able to explain and justify all of the items listed.* JMcP stated that she fully supported KH, who did not needed permission from the staff to turn up at work. She states that she and SS are there to support KH and she is not on her own, but notes that KH was feeling isolated and now the Andover team are unhappy she needs support from us.

81. The impact on this meeting is evidenced both in KHs notes of the meeting ( 369) and in an exchange of emails following the meeting between KH and JMcp.

82. The notes of the meeting, which KH must have written after the meeting record that EL stated that if she had a back problem and could not do all her shifts, she (EL) would not be allowed to do half duties. KH records that both she and SS said that she would.

83. The note records that it was obvious that staff remained unhappy, and that RS said that *the staff were doing this because they were worried about KH and cared for her*. KHs response was to say that they should ask what they could do to help rather that telling her she was sick and not needed and should be off sick.

84. We find that the notes made are broadly accurate and support the fact that some staff were not happy about the fact that KH had been allowed to adjust her working hours whilst she was unwell, but stay at work. This was a separate concern or unhappiness for any other concerns that were later raised about the Claimant's management style of practice.

85. The note gives an insight into the subconscious thinking and feeling of some staff. Whilst they may have been concerned for her, they did not express this by seeking to assist her in the workplace, they wanted her to leave the work place and take sick leave, because they saw her as a potential problem. There was also an underlying sense of resentment that the Claimant was receiving what was seen as preferential treatment.

86. Despite KH and her manager attempting to explain the reason for the adjustments and despite staff being told that management supported those adjustments some of the staff remained unhappy at the end of that meeting in part this was because KH remained at work, doing reduced hours whilst using crutches and dealing with a physical impairment.

87. Whilst hospital staff must be able to raise concerns about the running of the department in general terms, the criticisms and implied criticisms of the Claimant that were connected and about her health and her attendance at work on crutches, for which the Respondent had made specific adjustments were not appropriate and were unkind and unnecessary. Management ought to have recognised at an early stage, particularly as KH made it very clear that she was concerned about this aspect of the complaints, that some staff had an issue with their manager being visibly disabled at work.

88. R says that at the end of the meeting KH erupted and made a comment that *you're killing me if you stop me working I don't know what I will do.* KH denied that she said this at that point, but rather at a

later point to Lisa Chan, when she was suspended. We accept KHs evidence that this was said at a later stage.

89. Sometime in August 29015 the H4WK report of 7 August 2015 was sent to Julie McPherson (JMcP). The report stated that KH was fit to remain at work but would require adjustments in the workplace. She was unable to walk long distances, stand for long periods of time and would find heavy manual handling difficult. Situations requiring kneeling, stooping or crouching would not be feasible. The report also stated that remaining at work would be in her best interest if feasible to reduce risk of psychological deterioration.

90. The report continues**,** *Kate is currently working with adjusted duties. Her hours have been reduced and she is coping well with the current hours. I understand that she is due to work in a Supernumerary capacity following her annual leave in September. Until then Kate would be fit to continue with her current adjustment if managerially feasible.*

*91.* It was recommended that *when working non- clinically, she may benefit from not wearing uniform so that staff and patients are clear about expectations.*

92. We find that at this stage the Respondents knew not only that KH had a significant and limiting physical condition, but that they were also on notice of a psychological weakness. The link to KHs remaining in work with her psychological health was stated and known by the Respondents.

93. Following the 7 August 2015 report KH had a workplace assessment to ensure adjustments were made for her in the workplace.

94. No further or additional adjustments were made for the Claimant at this point and nor was there any further enquiry about whether or not she was a disabled person at this point. However the Respondents now concede that that this point the Claimant was disabled and that the Respondents knew or ought to have known of this fact.

95. During the Summer of 2015 the Respondents were subject to inspection by the CQC, and during that process, some of KHs staff repeated their concerns about KH to the CQC inspector. We have not seen the particular concerns raised. We have not seen any of the documentation of the CQC inspection or the findings.

96. KH states that she was told by DG that staff had complained about her to the CQC. Other than the testimony of KH, we have no evidence before us about this. KH said that she was interviewed by the CQC.

97. She accepted that DG did not say that the complaints about her were about crutches, but KH believed that all complaints made about her by staff were based on her being on crutches at work. We did not hear any evidence from DG, but accept that KH was told by her that complaints had been made about her to the CQC. We accept this having seen the earlier complaints made by staff, and noting that they remained unhappy after meeting of 23 July 2915, and that complaints were made again subsequently. We find that the staff would be have been likely to raise concerns they had about the unit and KHs management of it with a CQC inspection. We accept that this was in August 2015.

98. On 28 August KH worked a clinical shift in the unit. She alleges in her WS that that EL said to her, *I don't care what they say, what you are doing is wrong. How can you be paid hours you are not working*.

99. On balance of probabilities we find that this was said. Even though this is said for the first time in her statement, we do not Dr.aw any adverse conclusion from that. We have not heard evidence from EL, but note that a comment was alleged to have been made by her about KH's adjustments at the meeting of 23 July 2015. We accept KHs evidence on this.

100. We find that for this member of staff, the issue was that KH was receiving what she saw as preferential treatment, because adjustments had been made for her to accommodate her physical impairment. The comment suggests that KH is in the wrong. KH was upset by the comment, and we find that this comments, and others made to her, did create a hostile environment for her. Some members of her own team did not want her at work as a disabled person, and some team members suggested that by having adjustments to enable her to keep working she was doing something wrong.

101. At about the same time KHs immediate manager moved to a different post and Zena Luddick (ZL) took over the management of the minor injuries unit (MIU).

102. The members of KHs team subsequently made further complaints about KH's management style to managers. The complaints were about her clinical practice but also about her health and the fact that she was continuing to come to work even when she was on crutches; in pain and taking painkillers

103. Following receipt of those complaints SS met with EL and GR, two of the women from MIU who had complained, on 28 August 2015.

104. Following that meeting Louisa Chan, Georgina Bothwick and Sara Sparkes, all Respondent senior staff, decided it was necessary to speak with KH. They arranged a telephone conference with her for the 1 September 2015. KH was at home and had no notice of what the conversation was about. She had no one with her and she was not offered a companion at this stage. No account was taken of her disability and there was no reference to it.

105. The purpose of that meeting was to inform KH that complaints had been made about her, and to suspend her from work pending investigation. KH was told that complaints had been made and was told that she could not return to work in the MIU whilst the matters were investigated. SS recorded in her note of the meeting, that KH was requested not to attend at or contact the MIU but should instead work either at BNH or RHCh whilst an investigation was carried out.

106. SS told us that Ms Chan made the decision to suspend KH. We heard no evidence from her. Whilst KHs managers intended to suspend her, the formalities of suspension set out in the Respondents disciplinary procedure were not followed. SS confirmed that there was no letter of suspension sent to KH. In her contemporaneous note SS recorded that KH initially said she would take self certified sick leave until the investigation was done, but subsequently withDr.ew this and stated that she would work in the union.

107. It was subsequently agreed that KH, who was an RCN representative could continue to attend at work to carry out Union work in the Union office.

108. During the course of the telephone call KH became extremely upset. At one point she was weeping and said that the claim was ruining her life. She threatened to go and Dr.ive a car into a tree and end her life. SS said that *we tried to beg her not to do this*.

109. KH also stating she *hated the staffs guts*, wanted to *punch their faces* and stating that *she was going to kill herself*.

110. These statements put her employer on notice that KH might be suffering from a mental health disability, and at least, that she was very distressed and possibly suicidal.

111. Following this SS went to visit KH, she said in a pastoral role. However following the meeting there was no further discussion by the Respondents of the Claimants mental health or of any support or follow up action that they should consider for her. The Claimant had made a clear threat to kill herself to senior members of the Respondents staff and yet no one took any steps after SS had visited KH to investigate the Claimant's well-being and mental health at all. We find this extraordinary.

112. On 1 September after the meeting at 21.41pm the Claimant sent an email to SS LC; Janet Poulson Sarah Powell and copied it to ZL. In that email the Claimant retracted being forced into taking

sick leave but stated that she considered the treatment of her was gross bullying and gross insubordination of staff. She states she felt she had been victimised by colleagues and the trust in their handling of the matter. She states she will temporarily be redeployed to the union office and requested that the matter be dealt with as a matter of priority to ensure she endure no further stress prior to her operation. She states *I declare that this ostracisation is grossly psychologically damaging to me*.

113. Given what had been said at the meeting ,all of the Respondents senior staff who were sent the email, ought to have questioned whether or not KHs mental health was a cause for concern, and at the very least have made a referral to the OH.

114. SS accepted that this was what the Respondent would usually do if someone was suicidal, or expressing suicidal thoughts, and did not know and could not explain why it was not done in this case. she accepted that this ought to have been done. She also accepted that other than visiting KH in a pastoral role, no action was taken by her or anyone else to investigate KHs mental health or to give her any further support. The Claimant was, on her evidence treated in a different way to the way other staff would have been treated.

115. The fact that there was no formal suspension made little difference to KH on a day to day basis, who was excluded from the Andover MIU unit from that date onwards.

116. It did however make a difference to her in terms of the process, because the lack of a formal decision meant that there was no consideration of how long suspension should last, whether it was from all roles, or whether it should be reviewed and if so when. The policy of the Trust is that the suspension should be formally reviewed after 4 week and thereafter at periods of no longer than 8 weeks. This did not happen for the Claimant in this case at this point. Again, the Claimant was subject to treatment which was different to the Respondents own policy.

117. The email from the Claimant of 1 September 2015 put Respondents on notice that the Claimant's mental health was extremely fragile and also put them on notice that their action in pursuing the complaints against her and in suspending her was potentially causing damage to KHs mental health.

118. The email also raises a very clear grievance. It sets out that KH believes the allegations made amount to bullying and that she is being victimised by staff and the trust. She also states that she expected the staff to give detailed examples of allegations with dates.

119. Janet Poulson was the interim associate director of HR and Sarah Powell was an HR business partner for the medicine division. Sarah Sparks was an operations manager for unscheduled care and KHs line manager. There is no evidence that anybody who read this letter took any steps to investigate the complaints that KH was raising, or to find out how she wanted them dealt with.

120. At this point, the trust's own internal procedures suggest that it would have been the usual for the Respondents to take steps to ensure that KH was being supported, to look into her exclusion from the workplace, and to consider what adjustments might be made to the suspension and the speed of the investigation. The Claimant could reasonably expect her employer to take the steps and their failure to take any action to consider her interests or her health, or to take steps to recognise or investigate the grievance she was raising, had the potential to damage her confidence and trust in her employer.

121. Also on 3 September 2015 the RCN wrote to the trust raising concerns that the RCN had not been contacted when the allegations were first raised. This should have been done because the Claimant was an accredited RCN representative.

122. The RCN also stated that the Claimant was very distressed by the events and requested that an investigation with her be held as soon as possible, preferably before she was admitted for the planned surgery on 22 September 2015.

123. Incidentally, at this point, The RCN also note that KH had told them that she had been offered a modern matron role. The reference in the letter to *this proposal* and an earlier conversation was to a conversation about the creation of a modern matron posts and not to a conversation in which KH was being offered one.

124. By the end of September 2015, the Respondents knew on their own case that the Claimant had a physical disability, and that her disability was an underlying concern for some of her staff, who were also complaining about her behaviour and her abilities at work. At the same time, the Respondents had clear notice that the Claimant was in pain, and suffering with fragile mental health, and that she was very upset and distressed by the complaints that had been made and which were now being pursued. She herself has raised concerns about staff being unhappy with her, and had got no management support, and was now being subject to an investigation, despite having tried to resolve issues with staff at a meeting in the summer.

125. The only action the Respondent did take was to commence investigating the allegations against the Claimant.

126. The Respondent was right to do this, since some of the allegations were potentially of a serious nature, and they had been made and repeated on several occasions. KH accepted this and agreed to co operate, but wanted it to be recognised that she remained concerned that the staffs primary motivation was the fact that she was disabled.

127. On 3 September 2015 Sara Sparks and Bruce Armstrong met CR, who had been appointed by KH and EL. An allegation was made that she was not qualified as a Nurse Practitioner. Following this meeting she was transferred to Basingstoke, where she was appointed as a band 7 trainee Nurse Practitioner.

128. It was obvious at this point in September that KH and EL had appointed CR, in circumstances where they should not have done so.

129. The appointment of staff with the correct qualifications is clearly a serious matter within the health setting, and the Respondents were entitled to treat it as such. KH was the senior nurse on the panel and the Respondents were entitled to consider that KH was responsible and accountable for it. This was one of the matters which formed the basis of subsequent disciplinary action against the Claimant.

130. On 4 September 2015 SS wrote to Julie Maskery, following their discussion, setting out the details of the meeting she had had with the 4 practitioners from MIU on the 28 August 2015, following them having expressed concerns over the phone. In this email SS reports that KH had said she felt like Dr.iving into a tree, when she had been told of the allegations, and that support has been offered to her. We are not told of any further enquiry about KHs health by anyone at that point.

131. On 9 September 2015 ZL, who was only just active in post contacted KH, following KH's email raising concerns about the status quo and in which KH stated that she would like to *ensure staff concerned are taken through a formal process as I truly believe they have no comprehension as to how serious their behaviour and impact on the unit patients has been*.

132. ZL apologised for not having provided a letter with a list of the concerns that been raised and recognised that this had contributed to her distress. She also asks whether there is a need to discuss a referral to H4WK when they speak later. KH responded that she had already been to H4WK and had logged bullying and discussed the way forward so it was on the system. On 10 September 2015 KH again wrote to ZL referring again to the H4WK assessment. She states that for her psychological well-being she needs to *keep going as sitting alone at home no ability to go into my workplace will impact on me significantly*.

133. On 22 September 2015 KH went into hospital for her 1st hip operation.

134. The Respondents had started the disciplinary process to investigate the complaints from the team members against KH and KH had cooperated with the investigation. Her request and the request from RCN she might be interviewed before she had her first operation had not been actioned.

135. The Claimant was seen by Health4Work (H4WK) the Respondents OH provider on 20 October 2015 following the hip replacement. Their view was that KH would be fit to return to work on a purely office-based admin/management duties at 50% normal working hours by 26 October 2015. She should be able to return to clinical duties from 9 November 2015 with adjustments to prevent manual handling and the requirement to respond to emergencies at floor level. H4W recommended a phased return to work but anticipated a full return in due course.

136. A second report on 18 November 2015 suggested potential adjustments for KH and a phased return to work. Following the meeting KH wrote to summarise the recommendations being made. At that point she also noted that she had been informed that a clinical matron job was being advertised and expressed interest in post.

137. On 22 October 2015 KH was interviewed for the purposes of the ongoing investigation into the allegations made against her. She was interviewed by Nigel Evison, Lorna Sugden and Jenny Elliot. KH was accompanied by her RCN representative Lindsey Meekes. The meeting, which the Claimant found very difficult , was adjourned and reconvened for 5 November with the same people.

138. Following the first meeting the Claimant provided a pack of documents including her chronology of events specifically for the attention of NE, and specifically in connection with the investigation.

139. On 23 October 2015 ZL wrote to KH in response to KH's email stating that she had been assessed by H4WK and had been cleared to return to duties on a phased return from Monday, 26 October 2015.

140. ZL did not agree KH's suggestion that she based herself within the trade union office on the Winchester site but does state *it really is important that you are fit to resume clinical work and once I have confirmation about this I can then assess where and how to manage your phased return.* At this point ZL had not seen the H4Wk report.

141. KH replied on 28 October 2015 that she would find it difficult to work clinically in the emergency department due to the deterioration in her left hip. She stated she would need access to a proper chair and limited working, and reiterated that working in MIU would be no problem for her. KH did not in fact physically return to work on Monday, 26 October 2015, but took annual leave. She was not forced to extend her sick leave.

142. The Respondent did not make any adjustments at this point other than to allow KH to remain off work on annual leave. No steps were taken to facilitate KH's return in the workplace. KH told us that what she was struggling with was both her physical and mental health and that what she required was a workplace with suitable seating where she could carry out a phased return. This was not provided to her at this point. The Respondent was a large organisation with numerous sites. The Respondent was in receipt of clear advice about what adjustments were necessary in order to facilitate KH returned to work. The Respondent was also aware at this point of the importance to KH and for her mental health of returning to some form of meaningful work which was not isolated. There has been no explanation given to us as to why KH was not able to return to work, even if not at her substantive post, with adjustments as recommended.

143. The 18 November 2015 KH was seen by Libby Newton of H4WK. She noted that the Claimant had not returned to work and that the adjustments suggested had not been put in place. She

states *Kate enjoys her role and her exclusion from work has had a detrimental effect on her psychological well-being Kate is fit to return to her role as lead nurse practitioner at the MIU at AWMA or alternatively undertaking triage of patients at RHCH or BNHH ED.*

144. The same day the Claimant wrote to ZL and SS to update on her sickness position. She told them that Mr Shetty was dealing with her hip replacement was content her return to duties with adjustments in place and that she was on the waiting list for her left hip replacement. She also stated that she was happy to have a risk assessment to enable her to come back to work, and stated that she *needed a plan regardless for the end of November. I have been getting some symptoms of reactive depression due to the isolation I have endured.*

145. At this point R knew of KHs physical disability and were well aware that not being at work was affecting her mental health. They knew that full time work and a full clinical case load would place KH at a disadvantage. There were adjustments which could be made and we have not been told that there was any reason why they were unreasonable, or why KH could not be found a role somewhere. KH did not return to work.

146. Following the completion of the investigation, and before the disciplinary hearing a recommendation was made that KH should undertake a clinical assessment so that her abilities in the workplace could be considered. This was nothing to do with her disability, and was prompted by concerns about her clinical ability because of the complaints that had been made and the discussion during her investigation meeting.

147. On advice from RCN, KH agreed to the assessment, although she was very reluctant. The intention was that the assessment would take place before the disciplinary hearing.

148. On 8 December 2015 KH submitted a grievance of bullying and Harassment dated 3 December 2015, in writing to Mrs Polson.

*149.* KH specifically stated that since 8 July 2015 she had been bullied and harassed by individuals in the MIU. She went on to state that she believed that the complaints raised *were triggered when I identified my vulnerability in having surgery.* In the same letter KH states *you are also aware that this process has impacted on my mental well-being* and states that further delay will have a further impact upon her.

150. KH clearly considered that the reason why complaints had been made were related to her physical disability and that her mental health was suffering. This should have been clear to Mrs Polson from the letter written. KHs letter of 3 December 2015 raises a clear grievance. By 8 December when the letter was received the Respondents were on notice that Claimants' grievance in relation to bullying and harassment had not been dealt with and remained live and that the failure to deal with it or the delay associated with dealing with it was having an adverse impact on KHs mental health.

151. We conclude that the letter dated 3 December 2015 is a grievance raised under the bullying and harassment procedure and should have been treated as such.

152. The Respondents procedures in relation to bullying and harassment and in respect of grievances do not require any particular formality but insofar as there was a requirement for formality KH satisfied it . Nonetheless the Respondents decided not to carry out a separate investigation into KHs concerns over the motivation of those who are complaining about her at that point.

153. Instead the Respondents proposed to deal with the complaints of bullying and harassment as a response to the disciplinary allegations, and to treat them as something which KH could refer to in the course of the disciplinary hearing.

154. Whilst this is a common response to counter allegations raised in the course of disciplinary action in this case KHs concerns were about the motivation of the complainants, and the possibility of discriminatory conduct by some of her staff. By treating it as something for KH to raise as

mitigation, the Respondents failed to take an opportunity of investigating whether or not KHs disability was a factor in any of the complaints being made, and if so, whether unfounded allegations motivated by the Claimants disability might be harassment or another form or disability discrimination.

155. A disciplinary hearing was subsequently arranged for the 15 December 2015, but was postponed.

156. KH returned to work in the divisional governance section at Basingstoke on 5 January 2016. In respect of the allegation 37 KH alleges that she was placed in nonclinical role which KH confirmed was in fact in Basingstoke not in Winchester.

157. We find that the role was an isolated role. The role was based in Basingstoke site on which KH has not worked previously. KH's role was to go around 3 sites and support staff in writing standards of clinical competence which the CQC had highlighted needed review. KH was isolated in that she was working on her own and was not working in a team. She also had to travel across all 3 sites which was difficult for her. We accept KH's evidence that she was hot desking; that she had no computer and no chair specifically for her use. She had been provided with an ergonomic chair when at the Andover MIU

158. On 14 January ZL made a referral for KH to H4WK. The form refers to KH being in a secluded role in governance and not currently in role as nurse practitioner. The document states that *Kate has been experienced significant work related stress due to a claim for bullying in the workplace and has indicated to me this morning that she believes she now suffers from reactive depression which has been diagnosed by her GP.*

159. This is filled in by ZL. The form also refers to KH being currently under investigation and not being able to return to her substantive role and notes that the pressure of the prolonged investigation and pending hearing is causing Kate significant distress.

160. The referral form concludes *I am concerned about Kate's current mental and psychological well-being and would like to understand what additional support/intervention we need to offer to support Kate during this time*

161. We conclude that by January 2016 the Respondent was well aware of KHs potential mental health impairment and was of the impact which KH said it was having upon her.

162. On the same day ZL wrote to KH in respect of competency assessment process. The Respondent required KH to undertake an assessment prior to allowing her to return to clinical work. The assessment was to take place before the disciplinary hearing dealing with complaints about KH. KH was concerned at the time it was taking and on 14 January 2016 ZL reassured KH that a Dr. Luis Chan would carry out the assessment and that KH was to contact her.

163. On the 15 January 2019 JP replied to KH's trade union representative Lindsay Meeks who had raised a number of concerns about the way the allegations against KH were being investigated including concerns about the length of time given to the RCN and KH for reviewing the case papers for a disciplinary Ms Meeks had pointed out that 3 ½ working days to prepare was insufficient and in breach of the trusts management of conduct disciplinary policy which required 7 calendar days notice .

164. In her response Ms Poulson addresses the question of how KH's concerns regarding the culture of the MIU and in particular complaints which she had made about the treatment she was subjected to would be dealt with. This refers to a letter written by KH to Janet Poulson about bullying and harassment. JPs response is that whilst the culture of the unit was not within the terms of reference of the investigation, a number of witnesses had referred to it. She further states that the matter should be part of the consideration of the allegations and expected KH and her representative to raise this.

165. We find as fact that the Respondent knew or ought to have known that KH was suffering with depression and that isolation in the workplace would have a negative effect on KH at this point. The Respondent was also well aware of KH's physical restrictions as a result of the hip surgery she had had and the surgery which she was still waiting for.

166. The Respondent had a duty to KH to make reasonable adjustments because they knew of her physical disability her physical restrictions by January 2016. They were aware that the allocation of KH to an isolated role working across 3 sites with no allocated desk or chair placed her at a significant disadvantage compared to others who did not have a physical disability. Whilst KH had symptoms of a mental impairment, we do not find that it was a disability which R knew of a this point, but we do find that they were under a duty to make adjustments to the workplace because of the physical disability. No adjustments were made to the physical environment.

167. **Assessment by Dr. Chitnes**

168. Following the recommendation that KH must agree to her clinical practice being assessed whilst seeing patients, the Respondents set up session with Dr. Chitnes, when the first person suggested was unavailable.

169. KH asked for reasonable adjustments to be made in order that she could carry out the assessment in comfort. Specifically, she needed to be seated and ideally to use a stool with wheels so that she could move easily.

170. KH alleges a failure to make reasonable adjustments in respect of the assessment. She refers to a PCP of Rs of expressing concern about KH working in a clinical role. We accept that R did have a policy or practice in respect of KH at least, of requiring her to satisfy her manager that she was competent to undertake clinical work, and that this involved or lead to the clinical assessment by Dr. Chitnes. The Claimant was placed at a disadvantage compared to those who were not disabled, because she was less able to stand, or move with ease, and could not walk quickly. KH was physically disabled and R knew this, and there was a duty to make reasonable adjustments.

171. The clinical assessment was carried out by Dr. Chitnes on 25 January 2016. Dr. Chitnis wrote a report the same day . In that report he stated that the Claimants practice was mostly reasonable and that she had performed on the whole, fairly. He then made a number of comments and observations of areas where she would benefit from further training and recommended that in particular she would require a refresher course in emergency radiology and that she should be supervised with discussion of the cases for 3 months following which they should be a review.

172. We have heard no evidence from Dr. Chitnes and the only evidence we have of what happened during the course of that assessment is from KH together with the report which the Dr. Chitnes subsequently wrote for the Respondent's.

173. KH had attended at H4W before the assessment and they had written a report which set out in detail adjustments that KH would require. This report was received by Zena Luddick on the day of the assessment itself. ZL took no steps to inform Dr. Chitnes of the need for any adjustments. She said that she did not consider this to be necessary despite what she knew of KHs mental and physical ill health by that point.

174. Dr. Chitnes was asked by KH whether he had received the report from Dr. Spenceley regarding reasonable adjustments needed for the observation and that he said he had not. KH did raise her concerns about reasonable adjustments but in any event she should not have had to do so. The Respondents were aware of KHs disability and albeit that ZL told us she had not seen the report making recommendations for reasonable adjustments, KH knew that it was in existence.

175. KH alleges that adjustments were not made for her in that the H4WK recommendation was that any assessment should be done in a seated capacity with reasonable adjustments.

176. We accept the evidence from KH in respect of the events of that day. We find that KH had specifically asked that the door should not be locked because of her claustrophobia and that this

was ignored. Dr. Chitnes took no steps whatsoever to consider whether any form of adjustment was necessary or to make any enquiries from anybody else.

177. We accept KHs evidence that at one point during the course of the assessment Dr. Chitnes required her to go with him some way down the corridor in order to check her opinion on x-ray. We accept that he went very quickly and that KH had some difficulty keeping up with him because she was using crutches. We accept KHs evidence that another member of staff who saw them told him to slow down because KH could not keep up with him as she was on crutches. If it was obvious to another member of staff that KH was struggling it must have been obvious to Dr. Chitnis that KH was struggling. We find that this was humiliating and hurtful for KH and that it placed an unnecessary pressure upon her in circumstances when she was already (As noted by Dr. Chitnes) nervous and using 2 crutches. The test was taking place in a hospital environment medical staff and the Dr. must have known that KH was being disadvantaged.

178. We accept KHs evidence that she was uncomfortable and distressed during the assessment and we find that it is highly likely that she did not perform to the best of her ability as a result.

179. Further, following the observation, no-one took any account of the fact that there should have been formal consideration of adjustments when KH raised this. PA told us that she was sure that Dr. Chitnes would have treated KH on no evidence other than her knowledge of Dr. Chitnes.

180. A fair assessment of KH required consideration of adjustments both in terms of seating but also in terms of her own comfort. R had a duty to consider making adjustment and failed to do so. The adjustments which could have been made were reasonable ones to make.

181. The Respondents were under a duty to make reasonable adjustments for KH when she took part in the assessment and we accept KH's evidence that as a result she did not perform to the best of her ability.

182. The only explanation given by R for not considering adjustments is from ZL, who thought it unnecessary. Since she had a report saying the opposite, we conclude she must have deliberately decided to disregard the report. We conclude that by the time KH was being assessed some of the senior Respondents staff had formed such a negative opinion or view of KH, that they were unconcerned about disregarding her rights or her needs as a disabled employee.

**First disciplinary hearing**

183. On 29 January 2016 KH was invited to a disciplinary hearing which was to take place on 5 February 2016 and which was to consider 7 allegations against her. The letter stated that ZL also wanted to discuss KH's competency assessment with her at that meeting.

184. KH attended at the disciplinary meeting but stated that she had been signed off sick and that she felt she had not had the opportunity to properly prepare or to respond. The Respondents note of the meeting is that it lasted 3 hours 45 minutes and we accept that that was the case.

185. Following the hearing there was significant communication between Janet Poulson; Zena Ludwick; Sarah Cragg and Philippa Aslet. Sarah Cragg sent out a letter and notes asking PA to review the wording in respect of certain sections. These were the sections concerning the administration of Dr.ugs and the failure to follow the guidelines. PA had been asked to advise the panel on the guidelines and the trusts policy. It is obvious that the determination over whether or not the allegation would be upheld against the Claimant depended upon what PA said about this matter. PA was doing more than offering an opinion. She was involved in the determination of the issue, and the writing and approval of the outcome letter

186. **The outcome of the disciplinary process**

187. Following the disciplinary KH was issued with a first written warning. Based on the Respondent's disciplinary procedure this was the lowest disciplinary sanction.

188. The allegations that were upheld were as follows:

a. that KH had recruited an unqualified member of staff in contravention of the trusts recruitment and selection policy; ( Charlotte Ross)

b. KH had inappropriately prescribed diamorphine hyDr.ochloride 20 June 2015 to a patient who went into cardiac arrest in contravention of the Respondents medicine management policy;

c. KH inappropriately administered diamorphine hyDr.ochloride as above and had this witnessed by clinical nurse assistant indirect compilation should of the administration of controlled Dr.ugs standard operating procedure;

d. KH failed to share knowledge of the NP faculty with her team thereby denying them access to professional development across their role.

189. The allegations which were dismissed against KHs were as follows;

e. KH ordered items from the departmental budget without approval level prior authorization

f. KH had deliberately continued to prescribe the Dr.ug diclofenac via FP 10

g. KH performed CPR on a patient who had a cardiac arrest despite not working clinically at the time due to health issues potentially putting the patient and KH at risk from harm

h. KH failed to demonstrate leadership by inappropriately undertaking union activities within the workplace and earshot of staff breaching confidentiality

i. KH had disagreements with other members of staff in a loud manner within earshot patients

190. At this point KH's allegations of bullying and harassment had not been investigated by the Respondent. This was despite the fact that a number of allegations had been dismissed. KH had alleged that part of the motivation for the allegations was that she came to work on crutches.

191. During the disciplinary investigation and subsequent hearing, which was a comparatively long one, there was no investigation by the Respondents of what KHs concerns were, or how they might affect the allegations being made against her.

192. None of the Respondents ever asked whether KH might have had valid concerns that some allegations, such as an allegation that she did not display leadership because she undertook union activities within earshot of staff, or that she had disagreements with staff in a loud manner might have been made in bad faith.

193. All the focus was on KH and her failings and shortcomings. Following the disciplinary hearing, as well as imposing on KH a first written warning, KH was to undergo a 3 month placement of supervised practice with every case to be discussed with the senior nurse practitioner or doctor. This was as suggested by Dr.. Chitnes.

194. In addition, a competency assessment framework was to be agreed at the start of the 3 month placement. KH was to be supported to attend courses and was then to be formally assessed to confirm whether or not she was fit for independent practice or to identify remaining training needs. Once KH's clinical competency was confirmed she was to undertake a further 3 month placement as an independent practitioner with a clearly defined and agreed leadership development programme, to include recruitment; influencing; skills and impact on others amongst other matters.

195. The RCN raised concerns about the competency assessment report prepared by Dr. Chitnes In particular the RCN were concerned that the report was being used to impose a further period of supervision on KH. The RCN raised the concern that this is in addition to a disciplinary sanction and imposed by the chair of the disciplinary hearing.

196. The RCN were concerned that the effect of the decision would be to effectively remove KH from the MIU for a period of 6 months . The RCN expressed concern that the agenda was to remove KH from the MIU on a permanent basis.

197. The Respondents have explained why KH was subject to a further period of supervised practice following on from the Dr. Chitnes assessment, because it was his recommendation. We find as fact that by February 2016 the Respondents were unwilling to allow KH to return to clinical practice without supervision.

198. ZL expressed a preference for KH to undertake six-month formal placement at Basingstoke. At the end of the placement KH was to return to her existing role at Andover MIU as nurse practitioner lead band 7. The result was that KH would not return to MIU until the supervised practice had been carried out.

199. We fail to understand why KH was not allowed to return to her substantive post with supervision. We cannot see that there was any good reason for preventing her from returning to the MIU. The only reason appears to a background concern about KH's ability to do her job. Whilst we find that the Respondents had concerns about KH at this time, there were proposals for managing those concerns and the Claimants disability. Both could have allowed KH to return to her substantive role.

200. On 15 February 2016 the RCN wrote to Ms Paulson about KH referring to her letter of 3 December 2015 that she had been subject to serious bullying and harassment. The letter notes that KH had raised her concerns at the hearing on 5 February 2016 and that the RCN had submitted a statement of case in which was clearly articulated that KH felt she had been subjected to bullying and harassment, by members of the Andover MIU. The RCN point out that despite this there has been no attempt to investigate the allegations and nothing in the outcome letter of 12 February 2016 to reflect that the issues have been considered at all. The RCN formally requested that KH's grievance was taken to the 2nd stage of the grievance procedure

201. KH accepted at the time and before us that her union had initially agreed that the matter would be dealt with or could be dealt with at the disciplinary hearing but this had not in fact happened.

202. Whilst the Respondent's own procedure required an immediate start of the process of investigation as soon as an allegation of bullying and harassment was made, it did not happen here. Not only had the Respondents deviated from their own process, by combining the two matters, they had not in fact then considered the Claimants complaints at all.

203. Whilst the concerns raised by staff in the minor injuries unit were investigated and resulted in disciplinary action being taken against KH, her own complaints about the motivation and about bullying and harassment by the same individuals did not result in any investigation or disciplinary action for a significant period of time.

204. The first interviews staff members who KH complained about, for the purposes of exploring or investigating the allegations KH made, that they were motivated by her being disabled, did not take place until much later in 2016, over a year after the events had happened, and after a series of complaints about KH had been investigated, determined and appealed.

205. The only explanation from R is that they assumed that KH was raising her concerns either as a defence or as mitigation against the allegations made. On the face of her letters, this is not the case.

206. Whilst KH was raising her concerns in part as an explanation of why some of the complaints were being made (she maintained before us that all the complaints were made because of her disability and her being at work on crutches), the complaints themselves were stand alone complaints of bullying and harassment.

207. None of the Respondent staff have explained why they did not look at the nature of the complaints at the time, or been able to explain why, once it was obvious that they had not in fact been dealt with, and that the Claimant and her union wanted them to be dealt with, no action was taken immediately.

208. Whilst a number of the concerns raised clearly merited investigation and were subsequently found to be substantiated against KH (for example the recruitment of CR and the use of diclofenac during the resuscitation of a person suffering cardiac arrest) the failure by the Respondent to recognise and properly address KHs own valid concerns at an early stage requires explanation.

209. By 12 February 2016 the Respondents knew not only that the Claimant's grievance had not been dealt with during the course of the hearing but also that she still wanted her concerns to be investigated and that she was appealing against the outcome of the disciplinary action. There is no explanation why the Claimants grievance was not immediately investigated and dealt with, and why it took until late 2016 for the women from MIU to be investigated, or why it was not until 2017 that there was a hearing of the matters.

210. When ZL was questioned about this at hearing she could not provide any explanation as to why she had not acted upon KH's grievance about bullying and harassment at an earlier stage. She accepted that looking at the matter with hindsight it was clear to her that some action should been taken at a much earlier stage and she could not now recall why that had not happened.

211. By early 2016 the Respondents had advice from H4WK; information from the Claimant herself about her health and the impact that the processes were having on her, and their own observations of her at work. The Respondents took no steps to question whether or not KH was disabled within the meaning of the Equality Act 2010 either by reason of her physical condition or by reason of her mental health. No steps were taken to ensure that the reasonable adjustments were made for the Claimant in a clinical observation, and when the Claimant complained about the failure, nothing was done to deal with her concern, or to remedy the situation. In short, the Respondents deliberately ignored the Claimants physical and mental health impairments and her concerns that her health was being ignored.

212. On 18 February 2016 the RCN sent an urgent appeal letter to Donna Green from KH. In the appeal letter the RCN makes specific reference to R having made no effort to investigate allegations of bullying and harassment.

213. KH subsequently underwent a 2nd hip operation on 5 March 2016. KH alleges direct discrimination on the basis that she was not allowed to return to work.

214. KH was on certified leave in April 2016 and on 13 April 2016 KH raised with the union representative her concern that ZL was deliberately preventing her from returning to work in the unit.

215. KH had at this point been seen by H4WK. Their report of 12 April 2016 refers to KHs physical health following the orthopaedic surgery.

216. We note that in the subsequent 15 March 2017 letter from Dr. Jane Spenceley, written in support of KHs application for ill health retirement, reference is made to a H4Wk report of the same date, making reference to KHs mental health anxiety and depression. The 2017 letter notes that the Hospital anxiety and depression scale was anxiety15 and depression 12 in April 2016.

217. In May 2016 a further report was provided by H4WK , which states in letter to Julia Uzzell, who was ZL line manger, that *as you are fully aware Kate is currently absent from work with a combination of Psychological and physical symptoms*. Julia Uzzell then attended a long term sickness absence meeting in May 2016 covering for Sarah Sparks ( R chronology)

218. Dr. Jane Spencely was the consultant in occupational health, and it is highly probable that the information about KHs mental health in April 2016 was passed on to the Respondents at that time. The Respondent had actual or constructive knowledge of the condition and its impact on the Claimant it at that stage.

219. Her consultant Mr S Shetty wrote to the Respondents on 4 May 2016 stating that at a review on 14 April 2016 she had been making good progress from surgery. He stated that she was walking with a single elbow crutch, and that he was hoping that she would make good recovery and be able to wean herself of crutches during the period. He stated that she should be up to manage her normal tasks including mixed sitting and standing and treating patients in emergency situations. He considered that a phased return to work would be the right option for her possibly from June 2016 onwards.

220. On 24 May 2016 H4WK contacted the Respondents having reviewed KH and also attended a case conference with the Respondents. The report notes that

(1) the Respondent is well aware that Claimant is currently absent from work following a combination of psychological and physical symptoms;

(2) that KH's psychological health has significantly improved and that she is making good progress following replacement surgery;

(3) that KH was fit to return to work on a phased return and advised initial work of 3 days of 6 hours per day 2 weeks increasing to 4 days 6 hours per day 2 weeks with the aim of subsequent further increase in working hours to 4 days of 7 ½ hours for a further 2 weeks.

221. The intention was that KH would return to her staff side chairperson role, that she would deal with mandatory and statutory training and take some annual leave. A risk assessment for KH would be necessary once there was agreement about where she would return to work, but H4WK noted that KH needed minimal assistance and could go up and down stairs. It was also suggested that when she returned to work in a clinical environment KH should be supernumerary. H4WK also suggested that KH's counselling sessions would continue.

222. On 24 May 2016 KH attended a case conference. Dr. Jane Spenceley thought that KH could do either a clinical or nonclinical role. KH felt it was important and was clear that she wanted to

undertake clinical work and to return to a nursing post and that the only difficulty she had was Driving.

223. It was accepted at that meeting that KH was fit to return to work albeit that she required a phased return to work.

224. From the notes of that meeting it is apparent that JU was concerned about where KH would be returning to work, saying that that it would be difficult to arrange for to return to work if there is a separate appeal process. This was KHs appeal against the disciplinary sanction.

225. JB suggested that there would need to be agreement as to whether KH could return to MIU and it was suggested that ZL would need to clarify which site KH was to return back to.

226. Other than the supervised clinical practice session which KH had done with Dr. Chitnes, no steps had been taken at this point, to put into practice the various support and supervision which ZL had set out in her letter as required, before KH could return to clinical practice and her job at MIU.

227. In the interim KH and her adviser specifically asked whether it would be possible for KH to return to Andover with supervision and it was confirmed that this would need to be agreed by ZL.

228. On 2 June 2016 KH received a letter from ZL regarding her return to work. The letter states that ZL is happy to support a phased return to work on the basis that she undertakes union duties mandatory and statutory training or takes annual leave but confirms that she will not sanction KH undertaking clinical shifts on any site until she is fit enough to return to work clinically on *a full-time basis*. (page 565.) It was not explained to the Claimant or her reps why she could not return on a part-time basis, and start the process of supervised practice, and it was not explained to us why the Claimant could not return to clinical nursing duties with adjustments at that stage, with the supervision imposed by the Respondents.

229. KH's allegation in respect of her return to work is put in terms of direct and indirect discrimination. She alleges that she was excluded from MIU because of the disciplinary appeals taking an unreasonable amount of time and that she was unclear about whether she was taking sick leave or annual leave. She alleged she was placed in an isolated role, and that the PCP of placing her in a non clinical role placed her at a disadvantage.

230. The letter from ZL to KH of 2 June 2016 clarified the Respondent was concerned KH could not return to clinical shifts on any site until she was fit enough to return to work clinically on a full-time basis. Since KH was not able to return to work clinically on a full-time basis as a result of her disability and as a result of restrictions placed on her by the Respondent, she was prevented from returning to any form of clinical practice.

231. A PCP of working full time and being fully fit was applied to KH and placed her at a significant disadvantage compared to others returning to work without her disability. The result of the PCP

was that KH was placed in an isolated role which also placed her at a disadvantage because of her deteriorating mental health. At this point, R was aware of KHs mental health and its impact upon her and we find that R had constructive knowledge of her mental health disability.

232. We have to therefore consider whether the process of excluding KH from clinical work and placing her in an isolated role was justified. Was this a proportionate means of achieving a legitimate aim?

233. The letter from ZL refers back to the outcome of the disciplinary hearing which was set out in the letter of 12 February 2016. As well as imposing on KH a first written warning, KH was to undergo a 3 month placement of supervised practice, as set out above. Only at the end of the placement KH was return to return to her existing role at Andover MIU as nurse practitioner lead band 7.

234. We find as fact that as at 2 June 2016 it appeared that KH was to be prevented from return to work in a clinical capacity. None of the steps that had been imposed on KH following the disciplinary procedure had in fact been put in place and at most she was being offered the opportunity to carry out union duties; training and to take accrued annual leave. KH was effectively excluded from doing any clinical work for the foreseeable future. There is no explanation for this, and no adjustment was made to the PCP imposed by ZL at this point

235. KH complains of direct discrimination, and raises a general complaint about her continued exclusion the workplace. She does not make a claim of indirect discrimination, but does rely on her treatment throughout her employment as part of a continuing breach of an implied term of mutual trust and confidence.

236. Was KH treated less favorably than another employee was or would have been treated in the same circumstances? The practice of returning a person to a non clinical role was one commonly applied by R to those returning from sick leave. This was one complaint from KH in respect of treatment at other stages in the chronology, that she could have been returned to a non clinical role. She was not being treated differently from how others would have been treated in that respect.

237. The explanation for the non clinical role was concern about the Claimants practice. The Claimant had been allowed to work on a part time basis in a clinical role previously, and H4Wk recommended a phased return to work, as is usual in many similar situations, and as had been done for KH in the past. In the absence of any suggestion for R that this was standard or usual, we conclude that it was not, and that it was specific different treatment of KH.

238. We have considered the reason for the treatment and find that the only one is of concerns about KHs clinical practice. This was to be managed by supervision over a three month period of time, as suggested by Dr. Chitnes, not on grounds of her disability or her complaints, but because of

concerns about her ability to practice unsupervised. To this ZL had added a requirement of KH being fully fit and able to return full time. Whilst adjustments could have been made to address those concerns by allowing the Claimant to work a shorter number of clinical hours whilst on a phased return, the concerns were related to KHs clinical skills and not to her disability.

239. We have considered why KH was excluded from clinical work, and whether it was a breach of the implied term .

240. Whilst R taking action to address concerns over KH practice was legitimate, and imposing a period of supervision to do that was proportionate and a reasonable management action, we have no explanation of why KH could not start the process whilst on her phased return to work. This is disproportionate and was obviously a disadvantage to KH, because of her disability. R must have known this, and ignored the impact on KH. We conclude that this did breach the implied term.

241. In June 2016 the Claimant did return to work in Winchester on a phased return. She was not able to return to clinical work.

242. One **2**8 June 2016 the Claimant met with Karen Brimacombe to consider the Claimant's grievances . The meeting was to consider 3 issues including the competency assessment report carried out by Dr. Chitnis and the Claimants bullying and harassment allegations, and the issue of the Modern Matron recruitment.

243. The Meeting notes suggest that during that meeting it was decided by R that the bullying and harassment allegations would be raised by the Claimant at the appeal meeting. This was the approach taken previously by R, in the mistaken belief that the Claimant was raising her concerns as a defence to all the allegations.

244. Whilst this may well have been an appropriate part of mitigation, it was not in fact dealt with at the appeal hearing. Instead, the note records that Julie Maskrey who heard the appeal believed the matters were being dealt with elsewhere. Again, the bullying and harassment allegations were simply not dealt with. This was not because KH failed to raised them, but because they were not being investigated at all by R under their own policy.

245. This is different treatment of the Claimant and there is no explanation for the Rs persistent refusal to make sure that the complaints were addressed. The Respondents all knew that KH wanted the matters investigated and dealt with, but despite recognising this, no one event made sure it happened. It was simply always left to someone else to deal with.

246. The result for the Claimant was again that she was left to raise matters in mitigation which the Respondents then failed to consider. These were matters which the Claimant has a clear policy in respect of and which formed a background to serious allegations being made against the Claimant. The Claimants complaints had not been addressed at all and had at that point been outstanding for over 6 months. In this time the Claimant had had 2 operations, had been subject to disciplinary investigation and sanction had taken part in the clinical assessment about which she had raised a grievance and had also lodged an appeal against disciplinary sanction. R was , as an organisation quite capable of dealing with issues and complaints, and the only conclusion is that no one cared enough about KH and her rights as an employee with a disability, to ensure that her complaints were properly addressed or addressed at all.

247. The Claimant met on numerous occasions with the Respondents about her return to work and had raised on numerous occasions the fact that she required reasonable adjustments. The Respondent that put in place changes in the Claimants workplace by a phased return to work and the period of supervised practice which was to commence in August 2016. Had they wanted to deal with the Claimant's own concerns it is quite clear that they could have done so.

248. On 15 July 2016 a disciplinary appeal hearing was held.

249. Prior to the appeal the Claimant submitted her own information in respect of the administration of diamorphine, which raised questions about whether the Claimant was in the wrong or not. Zena Ludwick emailed PA stating that in the light of the new information provided by KH for tomorrow *I have asked our ET consultant to review the case notes that she has confirmed that it is reasonable to give diamorphine for this specific presentation*. She goes on to note that the consultant was of the opinion that giving diamorphine was *not unreasonable* and asked PA for her views.

250. The correspondence that follows includes a query from Janet Poulson as to whether or not, despite being not unreasonable, it might be outdated rather than current good practice. PA responds stating that if the consultant has reviewed the chronology of events and believes it was not an appropriate she did not feel she was in a position to contradict the opinion. ZL then sought the opinion of Mark Richardson, who expressed a view essentially that the Dr.ug should not be used in resuscitation.

251. ZL was seeking to understand whether or not the use of the Drug was in line with guidance or not.

252. What is clear is that the Claimant's appeal on this point was raising a serious issue about the understanding of the guidance and appeared to lead to conflicting opinions. The Respondents had to work quite hard to be able to say that the use of the Dr.ug in the circumstances in which the Claimant found herself was contrary to the guidance, and there were different opinions, some of which supported the Claimant.

253. If the Claimant was right, or if, on balance, the Claimant might have been right, she should have been given the benefit of the doubt and the sanction overturned. If that had happened, then the outstanding issues against KH would have been about her recruitment practices, and not about her clinical practice. If the Claimant had not been subject to disciplinary action in respect of clinical practice, the Respondent would have found it difficult to justify the continued exclusion from unsupervised clinical work, simply on the basis of what Dr. Chitnes had said in his report.

254. The appeal hearing took place on 15 July 2016 and was heard by Julie Maskrey. The note of the hearing recalls that ZL referred to trust guidelines and policy for cardiac arrests and concluded that this was not the correct Dr.ug to use. ZL also stated that all trust policies were standardised across site, but no mention was apparently made to the various views which have been expressed of doubts or that some opinions have supported the Claimant's position.

255. At the end of the hearing Julie Maskrey stated that she upheld the disciplinary sanction of a first written warning. There is no recognition that there was any difference of view, or that KH might be given the benefit of the doubt.

256. On the 20 July 2016 ZL contacted the Claimant about her return to work at the end of her phased return. The Claimant was return to return to the Winchester site on 1 August 2016 to meet with Heidi Blondin in order to set up the 3 month supervised practice and placement and other matters required by ZL.

257. On 22 July 2016 the Claimant received a letter giving her the outcome of her appeal hearing. The allegation that the Claimant had failed to share her knowledge of the MP faculty with her team was overturned.

258. The panel also recognised that the Claimant had raised issues of bullying and harassment which has not to date being dealt with. It states that these will be explored further as part of a separate process to be commenced to review these. The panel considered mitigation but did not accept that they would fundamentally change the outcome of their decision.

259. This is a surprising conclusion, since at that point there had been no investigation or conclusion of the Claimant's allegations that she had been bullied and harassed by members of the team and that the alleged bullying and harassment was on the basis of disability. A finding that she was right may well have had an impact on some of the conclusions particularly those which were

based on information provided by her team. One was that she had actively discouraged her team seeking advice from medical colleagues and referred to medical colleagues in derogatory terms.

260. In addition, it may well have challenged the attitude of senior members of the Respondent's staff, who seem to have believed what the women from MIU said about KH being a maverick and potentially a risk. If the Claimant had been given the benefit of the doubt over the Dr.ug allegation; if her complaints had been investigated, and if KH had been treated fairly in the clinical assessment by having adjustments made for her, it is entirely possible that a fair employer would have behaved very differently to KH, providing her with support to return to work after following surgery and adDr.essing some of her management development requirements.

261. The sequence of events and the persistent failure to treat KH fairly and in line with its own policies and procedures, is not explained by R and we conclude that the failings were the result of a breach of the implied term of mutual trust and confidence at this point in the chronology. KH was not treated as she or her union expected her to be treated, nor was she treated as any employee of the R would expect to be treated.

262. We are satisfied that KHs complaints had some merit, and that on any investigation at an early stage with an open mind, the Respondent would have been bound to find that some of the staff in MIU were motivated to complain about KH because they were unhappy about her continuing to work with a disability, and having reasonable adjustments made, which were seen, by one staff member at least as being preferential treatment.

263. A number of the allegations being made required an assessment of the truth of what was said by staff about KH. An example is a suggestion that KH had falsified her time sheets. These allegations were very hurtful to KH, and were subsequently dismissed. If the Respondents had investigated the motivation of staff, they would have found that at least part of the cause of the concerns was KHs disability, the fact that reasonable adjustments had been made for her, and that staff were not aware of how she was working. These issues were not the ones that formed the basis of the sanction, but they were relevant.

264. Whilst we accept that it would have been inevitably reasonable and appropriate for some of the allegations to be investigated, it is highly likely that had the Respondents taken KHs allegations seriously, and treated them as they should have done as separate under the bullying and harassment policy, that two things would have happened.

265. Firstly the Respondents would have had to ask why allegations of falsification of records had been made against KH and a reasonable employer would have been bound to conclude that it was due to resentment and misunderstanding of reasonable adjustments made for a disabled woman.

266. Secondly it is highly likely that an early and fair investigation would have meant that the allegations of falsification of records would not have been pursued at an investigation or disciplinary hearing against KH at all. KH would almost certainly have had greater confidence in a system and process, which recognised the validity of her own concerns.

267. At no point have the Respondents ever acknowledged that they were aware from the summer of 2015 that part of the reason for complaints being made were connected with the fact that KH was coming to work on crutches and the fact that she had had her workload and her work schedule adjusted in order that she could continue to work . had they done so, they would have been bound to acknowledge that there was, in part at least, a discriminatory motive capable of supporting KHs concerns about both bullying and harassment .

268. On 9 August 2016 the Claimant attended the grievance outcome meeting. Following the meeting she received a formal outcome letter dismissing her grievance in respect of Dr. Chitnis and in respect of the post in mIU.

269. The letter recognises that the Claimant has not received a full investigation report but she had received a redacted copy of the areas specifically related to the concerns around clinical competency. K Brimacombe confirmed that she has spoken to Dr. Chitnis who apparently told her that whilst the Claimant was nervous, this was no more so than anyone else would be that he wasn't aware that she was feeling unwell that she hadn't asked the assessment to be rearranged or postponed. She, KB, did not consider whether or not he had looked at the question of reasonable adjustments being made for a disabled individual and concludes that there is nothing to suggest that the findings of the review cannot be relied upon or are unfair for the reasons that the Claimant had out lined.

270. It is extraordinary that when looking at the Claimant's grievance KV did not consider the H4WK report which has been provided to ZL which specifically raised the question of reasonable adjustments being made for the KH. She took on board the fact that the Claimant was on crutches but was required to follow Dr. Chitnis down a corridor at speed.

271. It is also apparent that for some reason, not explained to us, KH was not provided with a copy of Dr. Chitnis's report about her clinical practice. In fact the report suggested that the Claimant had performed reasonably well and a fair reading does not suggest that Dr. Chitnis any fundamental concerns about the Claimant. He highlighted some training needs and suggested clinical supervision. We can see no reason why a copy wasn't provided to the Claimant.

272. The Claimant was very unhappy with the outcome.

273. The following day 10 August 2016 KH, Jennifer Jones and Dr. Chitnis were in one of the staff rooms at same time. The Claimant asked Dr. Chitnis about the report seeking to clarify what he thought she needed in terms of personal development. She had previously sent email requests to him asking for a copy of his report and recommendations which he had not replied to.

274. When the Claimant spoke to him he said that he was not allowed to speak to her because she was under investigation. He refused to speak to her and following the conversation he reported the Claimant having spoken to him to KB. He subsequently made a complaint against the Claimant.

275. On 22 August 2016 the Claimant filed a grievance against the outcome of appeal.

276. On 23 August 2016 a further health for work report referred to the Claimant's depression anxiety paranoia and ongoing complications of failed surgery.

277. On 24 August 2016 Zena Ludwick produced terms of reference for the investigation of the Claimants behaviour in the time leading up to 20 September 2016. The reason for the investigation suggested that examples of her behaviour should be collected regarding her substantive role as chair of staff side and in her role as staff side representatives. The Claimants behaviour that was to be investigated included her interaction with Dr. Chitnis. The suggestion was also made that she had undermined a member of consultant staff in front of a patient; that the way that she spoke to managers was an issue. There were 8 classes or groups of behaviour that were being raised.

278. The terms of the investigation have the appearance of a fishing expedition to dig up something against the Claimant. Dr. Chitnes had reported that the Claimant had spoken to him and he was unhappy about the her manner, but he had we find been encouraged to complain. The Claimant was also being observed in Winchester, and we accept her evidence that this was not supportive supervision, but was looking at ways to criticize her.

279. The terms of reference state that is expected that a report from the investigation will be received by 21 October 2016 and for the Claimant be advised of the outcome of investigation by 28 October 2016.

280. On 24 August 2016 KH was informed that they would be a further investigation into her behavior. Reference was made to Dr. Chitnis and to a conversation with Rebecca Sherwood on 16 August 2016.

281. There is no reference anywhere that we can see of any one from the Respondents taking into account the serious concerns raised by H4WK about a deterioration in the Claimants mental health, and no apparent consideration that the Claimants mental health disability may be impacting upon her behaviour in the workplace. There is no consideration that the constant criticism of the Claimant coupled with the refusal to allow her to return to her substantive role where she felt supported and comfortable might have been having an adverse impact upon her, or that there was any duty to consider making any reasonable adjustments.

282. There is also a marked contrast between the speed with which the Respondent moved to investigate a complaint made by Dr. Chitnis about one conversation with KH and the lack of any action at all to deal with the Claimant's own allegations of bullying and harassment, still outstanding from 2015.

283. On 1 September 2016 Julie Maskrey produced terms of reference for the investigation of alleged bullying and harassment of KH between July 2015 and December 2015 by 3 members of the Andover MIU. The investigation would be undertaken by Janice McKenzie in line with the trusts investigation policy. The aim was to provide an outcome from the investigation by 21 September 2016.

284. At this point the Claimant was working in Winchester. She felt she was subject to excessive scrutiny and on 3 September 2016 the RCN wrote to Janet Poulson on her behalf raising a concern that the Claimant felt unsafe and under excessive scrutiny.

285. On 8 September 2016 the Claimant was notified by letter that Janice McKenzie had been appointed to investigate the alleged bullying and harassment. A meeting been set up for 13 September 2016.

286. On 9 September 2016 KH attended another meeting this time with Rebecca Sherwood and Sarah Mason amongst others to discuss what reasonable adjustments might be made for her.

287. On 13 September a grievance meeting took place to consider the Claimant's allegations of bullying and harassment. Unfortunately, the Claimant did not attend because she had not received the notification of the letter, as she had been on annual leave when the letter was sent by recorded delivery. KH was subsequently invited to a rearranged meeting take place on 27 September 2016.

288. From 23 September 2016 KH was on certified sick leave. The Claimant emailed Nigel Everson advising that she could not attend grievance appeal meeting set up of 26 September due to depression.

289. On 21 September 2016 the Claimant sent a grievance letter to Elizabeth Padmore complaining about her treatment by the Respondents. This letter was passed to Janet Poulson who responded to the Claimant.

290. Despite the Respondents being well aware of the Claimant's mental health disability at this point and despite being told that she could not attend at meetings because she was on certified sick leave with depression the grievance meeting went ahead in her absence.

291. On 4 October 2016 the Claimant was sent the outcome of the appeal meeting of the grievance of 26 September 2016. It was noted that the RCN had objected to the appeal going ahead in the Claimant's absence and in the absence of an RCN representative. The meeting was not postponed because the Respondent considered they had the information they required. The Claimants appeal was dismissed.

292. The Claimant alleges that hearing her grievance appeal in her absence amounted to indirect discrimination. She relies on the Respondents practice of holding hearings in the absence of an individual and alleges that she was placed at a disadvantage on grounds of disability. At this point the Claimant was not able to give clear instructions either herself or to the RCN. The Claimant's claims had not been investigated until relatively recently and during the period between the matters that the Claimant complained of and the investigation Claimant's health deteriorated

significantly. The Claimant had been moved to work in another unit and some members of the MIU team had left the organization.

293. The policy or practice of proceeding in the absence of a party in this case was more disadvantageous to the Claimant because of the particular nature of her disability. She was not able to give instructions to representative about any of the matters because mental health has deteriorated significantly. In addition, a fair conclusion of the matters was obviously of key importance to the KH and her representatives were unhappy about the matter proceeding in her absence. This is a disadvantage which others who are not disabled in the same way that the Claimant was disabled would not have been subjected to. Whilst being unable to attend at one's own grievance would always be a disadvantage, the circumstances of this case make a disadvantage to the Claimant specific, particular and greater and others would have suffered.

294. We must determine whether or not the Respondents were justified in proceeding at this point, and consider whether proceeding was a proportionate means of achieving a legitimate aim and we find that they were not. Whilst wanting to conclude a procedure or process which has not been dealt with for a long time maybe a legitimate aim, in this case the reason that the matter had not been concluded previously was because the Respondents had not investigated it previously.

295. Further the reason why it was not possible to have the hearing in September 2016 with the Claimant present was because of the significant deterioration in the Claimant's health.

296. We have therefore considered what the Respondents were told about the Claimant's health and we have been referred to contemporaneous occupational health reports in which the suggestion is that the Claimants mental health may well improve the benefit treatment including counselling. The Respondents were clearly aware that the Claimant might be able to attend and contribute in the foreseeable future .

297. We conclude that the Respondents were also well aware of the real importance to the Claimant of being able to attend and/ or be represented. In the circumstances there was no basis whatsoever for the Respondents refusing to adjourn the matter other than their own wish to see the matter brought to a conclusion. We find that there was no evidence that the disadvantage to the Claimant of proceeding in her absence, or the available medical advice was balanced against the Respondents preferred progression of matters. We conclude that this was not a proportionate response at that time.

298. On 10 October 2016 Sarah Powell, the HR business partner for the Respondent sent Philippa Aslett documents for the purposes of a referral of the Claimant to the NMC. The timing of the sending of these documents indicates that the Respondent had been considering referring KH to the NMC for a period of time prior to 10 October 2016.

299. On 2 December 2016 the Claimant met with a woman called Lizzie Hoad, a senior nurse practitioner, to whom she had been referred by her GP for an assessment of low mood and anxiety. Following the meeting with Ms Hoad a letter headed *to whom it may concern* was provided with a full report .

300. The letter dated 5 December 2016 gave a brief overview of the Claimants mental health at that point in time. It states that having seen KH on 2 December 2016 , she is suffering with an episode of severe depression; that her mood is currently too low to reasonably expect her to attend formal meetings. She goes on that KH is incredibly tearful, has difficulty concentrating and her cognitions are incredibly negative and clouded by depression. The letter states that in the opinion of the writer it would be unfair to expect KH to attend meetings at that time. The letters is marked *received 16 December 2016*.

301. Also in early December 2016 PA was in the process of collating information in respect of a potential referral to the NMC.

302. On 12 December 2016 JP from the Respondent contacted the Claimant about her period of sickness absence and the ongoing investigation.

303. At this point the Respondent notes that the Claimant had a H4WK appointment on 8 November 2016 and failed to attend, and another one on 15 November 2016. Whilst the trust has a fit note stating that the Claimant was unfit for work due to work related stress and correspondence from the Claimant's GP reviewing her ongoing disc depression, the trust's position was that they had no information as to the likely prognosis of the current period of absence or ability to engage with formal process.

304. In the absence of any information the trust's position was that it wanted to deal with investigations in a timely manner in order to bring them to a conclusion and therefore the Claimant was asked to respond to the questions from the 2 external investigating officers together. She was asked to do this by Friday, 30 December 2016 or to contact the Respondents if she would prefer to meet with 2 investigators instead.

305. On 3 January 2017 Ms Hoad sent KH a copy of the initial assessment with confirmation of KH care plan. The report summarises the history of Claimant ill health and makes reference to her being signed off sick due to both depression and also the 2 total hip replacements. One of the hip replacements lead to complications on the left side leaving KH permanently disabled. She recorded that the KH had reported having panic attacks if she went to the hospital and being terrified of attending meetings about her performance. She was anxious when she got letters and was terrified of being dismissed.

306. On 10 January 2017 the Claimant received confirmation of receipt of the letter dated 5 January 2017 from the Respondents occupational health and confirmed that an appointment was booked with occupational health HRW on 17 January 2017 .

307. At this point the Claimant was considering whether or not to apply for ill health retirement and the letter makes reference to that.

308. On 12 January 2017 a referral was made for KH to a consultant orthopaedic surgeon to consider possible future surgery. Whilst expressing the view that surgery was probably not necessarily going to be in KH's interests the letter notes that the Claimant is only 50 and was mainly complaining of an inability to return to job as a nurse or have any decent level of mobility. Following the referral the opinion of the doctors was that further surgery may well make the situation worse and that the Claimant should be kept under review.

309. At this time the Claimant received the necessary forms for her to apply for ill health retirement. On 13 January 2017 the Respondents filled in their part of the form noting that the situation at that stage was that they had been informed that the Claimants GP had advised that KH was not well enough to engage in any meetings. It also states that KH was currently off sick with no indication of the likely return to work date. The Respondent had received the information that the Claimant was too unwell to attend the meetings, and on the evidcne we have we conclude that the trust did have knowledge of this on the 16 December 2016, when the report from Ms Hoad was marked received.

310. On the 17 January 2017 at the request of Janet Poulson, Dr. Jane Spenceley of H4W the Respondents occupational health provider carried out a home visit to KH. The resulting report is dated 21 February 2017 and states that KH was unfit to attend trust investigatory meetings due to *an acute deterioration in her mental health condition and potential adverse impact on her mental health at present and for the foreseeable future*.

311. The report notes that KH is aware that things cannot continue indefinitely but there is hope that some plan support from the community mental health team and continued medication may improve KH is coping skills and that further assessment would occur in 11 weeks time to consider fitness to attend meetings.

312. On 23 January 2017 Julie Maskrey (JM) wrote to the Claimant in respect of the investigation into the allegations of bullying and harassment by 3 members of staff from AMIU. This was the Claimant's complaint which had originally been made in late 2015. The Claimant had not been well enough to attend an investigation meeting. The letter attached the practical information regarding the investigation including the investigation report.

313. The letter referred to the arrangements made for KH to contribute to the investigation and states that she had not taken part in the investigation.

*314.* There is no reference at all to and no recognition of the Claimants health by way of depression and physical disability and there is no recognition within the letter that the Claimant had been unable rather unwilling to participate, or that the Respondents knew this. Either there was a failure to make any enquiries, or the information had just been ignored. Either way, the Respondents had the information and failed to include it. This is an example of the Respondents not treating the Claimant with trust or respect, but of the officers presenting an unfair and untrue description of the facts and a negative picture of KH.

*315.* There is no suggestion that any consideration has been given to any other way of engaging with KH in order to investigate the complaints which she had made and nor is there any indication in this letter or indeed evidence from the Respondents that there was any consideration of any further delay to see whether or not she would recover enough to be able to take part.

*316.* The Respondents have referred to the 3 women who were alleged to have harassed the Claimant raising concerns about the length of time that the investigation was taking. The Respondents were sympathetic to the needs of these 3 women to have closure and an outcome. The concern for these women was in contrast to the lack of concern shown to KH through out the process when she raised concerns about the time it was taking for her complaints to be progressed.

*317.* One incident that points to a difference in concern and a very negative view of KH being shared by Respondents staff was a concern expressed by PA during a break in one of the earlier investigation meetings with KH, that one of the women was physically sick with concern about meeting KH. The Respondent staff were overheard discussing this, in terms of total sympathy for the woman.

*318.* The Claimant was told that she needed to meet with the Respondent to discuss the outcome. A meeting was set for Tuesday, 31 January 2017, giving the Claimant 7 days notice. The letter concludes that if the Claimant fails to attend the meeting it will be necessary to proceed to consider her bullying and harassment complaint at the appeal stage in her absence on 31 January 2017. There is no indication in the letter that the Respondents had considered that the Claimant was at that stage disabled because of her physical and mental impairment, was absent on sick leave, suffering with severe depression, making it much harder for the Claimant to attend such a meeting. There was a duty to consider reasonable adjustments for the Claimant to both the meeting but also the process.

*319.* On 25 January 2017 the Respondents sent a copy of the investigation pack and copy letter to KHs RCN representative.

*320.* On 30 January 2017 the RCN notified the Respondents that due to ill-health KH would be unable to attend the meeting on 31 January 2017 to receive feedback agreement. KH had been advised by her GP that she was too unwell to engage in any and due to her mental health was waiting to be seen by a psychiatrist. The RCN suggested that as it was unclear when KH would be well enough to attend a meeting that the feedback was put on hold with a review each month for an indication of when she may be fit enough to engage in any process.

*321.* On 31 January 2017 Dr. Chitnis confirmed the accuracy of the notes taken at a meeting on 8 November 2016 concerning an investigation into the behaviour professionalism and conduct of KH.

*322.* On 6 of February 2016 Julie Maskrey wrote to the Claimant refusing to delay the meeting of 31 January 2017. The reason for the refusal is *due to the length of time from initial concerns being raised in the time since the outcome of the conduct hearing I do not feel that the outcome can be delayed indefinitely. In making the decision I also need to take into consideration requirements to provide both you and the 3 staff members against whom your concerns were raised an outcome from the investigation.*

*323.* There is no evidence before us and none in that letter that the Respondents sought any further medical advice or that any consideration was given to the Respondent's duties under the Equality

Act 2010 or their own policies and procedures in respect of making reasonable adjustments for a disabled employee.

324. Whilst there is no discrimination claim in respect of the failure to make adjustments, KH does rely upon the breach of the implied term of mutual trust and confidence in support of her claim of constructive fair dismissal and this failure to recognise and take account of KH disability is part of an ongoing and continuous failure to treat KH either fairly, reasonably, in line with trust policy, or according to her employment rights.

*325.* The letter goes on to provide the feedback on the outcome of the investigation. The conclusion is that there is no further action which the trust can reasonably be expected to take respect of the decision is final and conclusive bullying and harassment process.

*326.* At the end of the letter the Claimant was informed of her right to make an appointment with H4W if she wished to do so.

*327.* On 9 February 2017 the Claimant contacted her RCN rep asking for information about her employment rights if she resigns and also refers to ill-health retirement. She stated *I am fuming and feel totally let down by everyone and everything*. She also states the *pressure and damage is doing is intolerable.*

*328.* On 13 February 2017 the Claimant was reviewed by Dr. Lisa Taylor consultant psychiatrist. Her report was copied to Dr. Spencley the Respondents occupational health provider. The report states that she had moderate to severe depression and anxiety in the context of external stressors; that she had chronic pain and disability from two hip replacements and that she had suicidal thoughts, although she denied plan and intent.

*329.* The report sets out how the Claimant was feeling at the time and reports the Claimant stating that she had ongoing anxiety with feelings of persecution in particular about her employers and colleagues . She presented as being extremely stressed and stated that she wanted the stress she had been put under by her employers to be acknowledged and that the allegations made against her had been false . She said that her employers had destroyed her; that they were making out that she was incompetent and unsafe and that she believed she had been used as a scapegoat. She was very angry and bitter to those making allegations. She said that she was tired of it all and felt obstructed persecuted and alone in her fight against the Trust.

*330.* On 20 February 2017 the Claimant's RCN representative wrote to Janet Poulson regarding a hearing planned for the 27 February 2017. The RCN again stated that Ms Henning remained seriously unwell and that the RCN was unable to take any instructions from her to discuss or progress her representation. The RCN stated that she had shared her concerns that the Claimant needed to seek a mental health advocate or appoint a power of attorney to another to speak and instruct on her behalf. KH had agreed to do this and was waiting for an appointment. The RCN stated that KH had seen a psychiatrist with before and that a report would be sent to H4W which may give an indication of when KH would be fit enough to engage with process .

*331.* The RCN formally requested a reasonable adjustment of the postponement of the hearing until such time as KH had an advocate or power of attorney in place, or when she was able to give instructions so that the RCN could attend on her behalf.

*332.* On 21 February Janet Poulson referred the request to those who would be dealing with the hearing as she, Janet Poulson was leaving the trust the following week . We note that the OH report from Dr. Jane Spenceley is also dated 21st of February 2017. We are not told whether this was also forwarded to the panel

*333.* On the 21 February 2017 the RCN were informed that the reasonable adjustments requested would be granted & a request was made for suggested dates for a future hearing. This email came from Noushin Sorayyapour . This is the first time there has been any recognition that KH was disabled and that adjustments should be made. This decision was made by someone who had had no previous involvement in the matter.

*334.* On March 2017 two things happened concerning KH. Firstly the Respondent was in the process of putting together a pack of information which we found the basis for a referral of the Claimant to the NMC.

*335.* At the same time the Claimant was being reviewed by medical experts for the Respondents occupational health in respect of her physical and mental health disability purposes of her application for early ill-health retirement.

*336.* On 15 March 2017 letter was sent to H4W setting out a summary of the Claimants history of depression and anxiety. The letter notes the input from RCN and H4WK in May 2016 and the Claimant's return to work in July 2016.

*337.* On 7 April 2017 the Respondent were informed that the Claimant's application for ill health retirement been successful and that KH had been informed of the decision the same day. The Respondent was asked for a statement of benefits to be supplied to KH and to arrange for the various completions of forms and past forms to the occupational health Department.

*338.* The Respondent referred KH to the NMC referral dated 13 April 2017, which stated that there were numerous incidents concerns and complaints between 2010 and 2016 about KH. In fact that referral refers to one incident, 21 November 2010 regarding a matter in which an out of court settlement and been reached and no action had been taken against KH.

*339.* The other incidents concerned an incident in April 2015, but other than that all the matters were those that had been canvassed and rehearsed within the internal investigation process. The matters included the complaint made by Dr. J Chitnis about KH. Reference is made to the Claimant being on sick leave but no reference is made to the fact of the Claimants physical or mental health disability. No reference at all was made to the Claimant's own complaints of bullying and harassment.

*340.* On 20 April 2017 KH wrote to payroll apologising for the delay in responding which was due to agreement she asked for confirmation that she had been awarded to 1 ill-health retirement and stated that on receipt she would on legal advice consider her employment. At this point KH had not made a final decision about her employment.

*341.* On 25 April 27 team the Respondents pensions officer for the Claimant was still assessing the situation in respect of early retirement

*342.* On 28 April 2017 the RCN wrote on behalf of their member KH to Ms Powell the HR business partner stating that the RCN have not been able to discuss the content of the letter 26 April due to her distressed state but that they have managed to establish that KH had notified the Respondent that she had resigned with immediate effect . The RCN state that they will advise the NMC that KH's current mental health states been severely compromised by the referral and that any chance well enough to attend at trust internal meetings is being undermined and she has lost all trust and confidence in the trust to hold fair and reasonable hearing as it appears on referral that the trust had already the outcome.

*343.* The RCN also confirmed in that letter that having received notification of the successful ill-health pension application the RCN had advised KH that she needed to be certain that she wanted a ill-health retirement since it was clearly a big decision. The RCN noted that the KH had not received information that she required and that the RCN had made a further request for information on KH the previous week.

*344.* The Claimants letter of resignation is dated the 29 April 2017 . In its the Claimant gives formal notice of a resignation with immediate effect . She states that *trust and confidence I had in my employment has been completely destroyed and the detriment my mental well-being is forcibly to take ill-health retirement* .

*345.* She referred to her complaints about harassment and less favourable treatment from colleagues; to having raised a grievance and to having been removed from MIU as part of unfounded disciplinary proceedings . She referred to her depression the isolation caused by the removal from the unit the redeployment under duress to Basingstoke hospital; to the disciplinary process and the warning .

*346.* The letter concludes that *I have been subject to further insult the trust is referred me to the NMC with unfounded allegations based on historical and unsubstantiated statements. My situation is therefore intolerable untenable and indicates that my employer is denying me any fair honest or appropriate treatment..*

*347.* She ends her letter *I have no alternative but to resign and take ill-health retirement indication that I have suffered permanent irreparable damage*.

**Conclusions.**

348. KH was constructively and unfairly dismissed.

349. The Respondents knew or ought to have known that KH was physically disabled by late June 2015 but consistently failed to make adjustments for her in the work place, or to accept that there were issues for KH when they did not.

350. The Respondents knew that KH had fragile mental health from December 2015, and were told that she suffered from reactive depression on several occasions. R accepts that KH was disabled because of her mental impairment from April 2016, and we conclude that they knew or ought to have known that she was disabled from that time. Any lack of actual knowledge was not because of a lack of information about the impairment and its impact, but a lack of interest, lack of enquiry and lack of concern for KH. This started with the telephone call suspending her and continued until she resigned.

351. The failure of the Respondents to deal with her grievance until late 2016 early 2017 in any reasonable manner was contrary to their own procedures, was different treatment of KK, and was unexplained. The Respondents knew how important it was to KH and simply failed to address the issues. The delay had serious consequences for KH, and the Respondent knew or ought to have known from an early stage that the failure to deal with her grievance would and did impact on KHs mental health.

352. Senior staff placed numerous hurdles in the way of KH returning to clinical work, requiring her to be fully fit, imposing lengthy periods of supervision on her, and subjecting her to unusual levels of scrutiny.

353. The Respondent Staff did not trust KH to work in a clinical environment and this was made clear to KH, although the reasons for that lack of trust were not clear to her, and were unclear to us. Whilst KH had made some errors, some over management issues, and whilst there had been an issue with use of a drug, the only supervised practice we heard about reported her as being fair. We accept that some support and further training may have been reasonable and that it was not a breach of trust and confidence to impose a period of supervised clinical practice. What we find unexplained and contributing to the breach of trust and confidence is the way the Claimants supervised clinical practice was handled. What was unfair and unreasonable and a breach of trust was the prevention of KH returning to MIU at all; the failure to allow her to do any clinical work on a phased return basis, the length of supervision and conditions placed on her.

354. We have looked at this in the context of how KH was treated overall, and find that there was a negative attitude to her as a person and as a practitioner from the point that the complaints were made formal , post the CQC inspection, which is demonstrated both in the various hearing notes, in the way the investigations were established and handles and in the process and the content of the NMC referral.

355. The breach of the term of mutual trust and confidence was fundamental , and KH resigned in response to it.

356. The referral to the NMC, and the notification to KH confirmed what she already believed. We find that KH was in the process of deciding whether to take early retirement, and that the notification of the referral to NMC was a final straw.

**Disability Discrimination**

357. KH had made a large number of allegations of discrimination, including harassment and victimization and direct and indirect discrimination. Before reaching our conclusion on each of the specific allegations, we have looked at several aspects of the claim which stand out as being central to the claims made and to the defense to the claim. These are

(1) The failure to deal with the Claimants grievances

(2) The acknowledgement of the Claimants physical and mental health disabilities

(3) The exclusion of KH from clinical work and the referral of her to Dr. Chitnes

(4) The approach of R to making adjustments for KH in the workplace

(5) The investigation of KH and the NMC referral

358. Our findings and conclusions on these matters have formed the basis of our conclusions on the claim as a whole.

**The treatment of the Claimant**

359. At no time have the Respondents taken any real account of KHs clearly deteriorating mental health against the background of her mounting concern that her own complaints and grievances were simply not being considered . There was a failure to make any reasonable adjustments. The Respondents knew of the Claimants disabilities and yet did nothing to address them

360. We find that in the case of KHs use of diclofenac , when seeking to resuscitate a patient who had collapsed in the minor injuries unit, that there were alternative views over the utility of using the Drug in the circumstances in which KH had used it .Despite this there was no indication at any stage that anybody considered that she should be given the benefit of the doubt or that this may be a matter for retraining rather than disciplinary action. The Claimant had not deliberately used the wrong Drug, but believed with some evidence to support her, that she was justified in the circumstances in using it.

361. We do not need to decide whether the Claimant or the Respondents experts were correct, but do find that the incident was in the context that the actions of KH and her team probably saved the mans life. Before us the Respondent witnesses were unwilling to give any credit to KH for this at all.

362. When the Claimant produced alternative expert views and evidence which supported her suggestion that there were different views, and that her actions were therefore reasonable, the Respondents made every effort to prove her wrong. There was no recognition that there were differing views which may be mitigating circumstances for the Claimant. Instead there was an unreasonable determination to prove the Claimant wrong and at fault.

**The Assessment of practice by Dr Chitnes**

363. We accept the evidence of KH and her witness that during the course of the clinical assessment, which KH attended on crutches, KH was required to follow Doctor Chitnis down a corridor at some speed, because he walked fast and told her to keep up, and that had great difficulty in doing so and was caused distress as a result.

364. We find that the Claimant was put at a substantial disadvantage by the PCP of having her clinical practice assessed, and the associated practice of the assessment being carried out whilst the standing and requiring walking.

365. We find that the Respondents discriminated by failing to make reasonable adjustments as required by the Equality Act 2010.

366. Further, and in any event, they failed to ensure that KH was afforded a fundamental right of reasonable adjustments whilst undergoing a clinical assessment in the workplace. Not only was KH visibly disabled because she was using crutches but the Respondents were well aware that she was suffering with fragile mental health even if they were not actively aware that she had a mental health disability .

367. We find that the Respondents treated the Claimant differently to others in that it expected her to be able to perform to a high level even after she had been out of the workplace for reasons of ill health and even though she had a disability which was causing her pain and even though she was suffering with fragile mental health. We find that had the adjustments been made that she required, it is highly probable that she would have performed to a higher standard at the clinical assessment. In any event, the Claimant performed reasonably.

368. The willingness of the Respondents to accept without question that Dr. Chitnis would not have treated KH unfairly is indicative of the attitude towards KH that she is not telling the truth, but also demonstrates an unwillingness to accept that she was entitled to any assistance; support or benefit of the doubt or indeed that she was entitled to display any frailty at all at work.

369. This was fundamental breach of the implied term of mutual trust and confidence, and is also part of the facts we have considered when looking at disability discrimination.

370. We also accept the evidence from KH and her witness about what was said and the manner in which KH spoke to Dr. Chitnes following the assessment, when KH asked him about his report. Whilst KH may come across as forceful, we do not accept that there was any real reason for Dr. Chitnes to complain about KH speaking to him, and find that KHs enquiry was a reasonable one to make and that she made it in a reasonable manner.

371. We find that KH behaved reasonably in speaking to Dr. Chitnes about the report. Whilst he had the right to raise a complaint about bullying we compare and contrast the way his complaints were treated, with the way KHs own complaints about members of her team were treated. His complaint was taken seriously and supported immediately. An investigation took place within a reasonable time and was determined. This did not happen when she complained.

372. We conclude that at an early stage in the process a number of the Respondents witnesses formed a negative view of KH, accepting what others told them, that she was a difficult and problematic manager, and having accepted this view, failed to deal with her or her concerns fairly or objectively, or give her the benefit of the doubt over any matter at all.

**Conclusions on NMC**

373. We have been referred to the documents which were eventually sent on referral to the NMC and we have also been referred to the correspondence between the NMC and the Respondents some of which postdates the Claimant's employment.

374. The Respondents referral included matters dating back several years someone which had been concluded and dealt with well before the Claimant was promoted to her post at the MIU. No referral to the NMC had been made in respect of those matters at an earlier time and it was wholly unclear why they were being referred in 2017.

375. Some of the matters referred were clearly connected with the Claimant's lack of understanding in respect of recruitment of staff and were nothing to do with her clinical ability.

376. Other matters appeared to be more relevant to questions of the Claimants in health rather than her ability to practice.

377. A referral of a nurse to the NMC in respect of fitness to practice is a serious step. It is not one which an organisation takes lightly, we are told that this organisation made this referral at this time in good faith. We are told that the decision to make the referral was made by Donna Green, who gave instructions to PA but we have heard no evidence from Donna Green and must Dr.aw conclusions or inferences as to her motivation all the other evidence before us.

378. The Claimant relies upon the referral as act of harassment but also as a final straw in her claim of constructive unfair dismissal.

379. On the evidence before us we expect that the referral to the NMC was unwanted conduct by the Respondents. It was all very something for the Claimant and certainly would have created an intimidating environment for the Claimant on return to work Claimant has already indicated in her email to Ms Patmore that she felt that the Respondents were trying to force her out of the organization.

380. However we cannot find that the referral to the NMC was on grounds of the Claimants disability.

381. We have also considered whether or not the referral could be classed as a final straw and we find that it can be.

*382.* Whilst we fully accept that any health provider not only has a discretion to refer but also has an obligation to refer where there are genuine reasonable concerns about practitioner, we find that in this case the Respondents were prejudiced against the Claimant on wanted to prevent her from returning to the workplace. Whilst there may have been some genuine concerns about the Claimants practice we find that by late 2016 early 2017 the Respondents had become wholly unable to deal with those concerns fairly or reasonably because of a prejudicial attitude to the Claimant that were shared across the management of the Respondent organisation.

*383.* The point at which the referral was made and the breadth of information included in it about the Claimant is indicative of a significant trawl for potentially adverse information and adverse evidence against the Claimant. This was an attempt to build a case against KH and were prepared to include unproven allegations of a highly prejudicial nature against Claimant in order to bolster the referral. This was not a good faith exercise but and we conclude that the Respondents were not making a neutral referral. This was unfair and unreasonable and was a breach of the implied term of mutual trust and confidence.

*384.* **The Grievance and failure to deal with the grievance**

385. Allegation 41 is an allegation of direct discrimination that by the middle of February 2016 KH's grievances had not been investigated whilst the grievances raised by members of the MIU had been investigated and progressed.

*386.* When GR, (one of the women from MIU who complained about KH) was interviewed in respect of the disciplinary and asked about the health concerns and stated that *she was working on crutches and in constant pain taking pain killers. I told KH to go off sick but KH wouldn't as she needed to be here for her mental health* did try to talk to KH informally but this didn't work

387. EL stated in her interview that *: Explained her concerns were KH coming into work on crutches and working in a clinical capacity. This was addressed but things went sour afterwards. EL felt KH made up the rules as she went along and wanted another assistant to be her legs and that it all fell apart .* EL added *KH was "like a bull in a china shop" she took back the rotas, changed working patterns with no thought to anybody else's personal lives. This made the team doubt everything she did. KH's patient care was not in doubt however, her practice was a bit "maverick" and this made them question things.*

388. These comments were the same type that the Claimants had complained of, and which we have found as fact were said. They had been witnesses ad recorded in the summer of 2015. These were the sort of comments which KH alleged were bullying and harassment and which she said were made because she was disabled.

389. KH found the comments hurtful and complained to managers about them. She was upset when she heard about comments having been made later to investigators, and remained concerned that the women she had worked with had complained about her because she was disabled.

390. We conclude that some of the comments were clearly about KHs disability, and that other some of the women did make other complaints because of adjustments having been made for KH. Some of the complaints made were made on grounds of disability, and whilst they may not have been intended to upset KH, they did have that effect.

391. Comments made in the course of an investigation are of a different nature to those made in the ordinary course of employment, and we find that at least some of the complaints and comments made to KH and about her to others in June and July 2015 were harassment on grounds of disability.

392. Was the failure to investigate and resolve the grievance direct discrimination? We conclude that it was. In considering this we have considered facts from throughout the chronology and have also looked at how others have been treated when making complaints internally. We have also considered the evidence the Respondents have given by way of explanation for not investigating KH's claims earlier in this history.

393. We that the MIU women were treated differently to KH. We find that Dr. Chitnes was treated differently when he complained. We find that there is an explanation for why the complaints of others were investigated but no satisfactory explanation as to why KHs complaints were not investigated until later 2016.

394. The Claimant was not dealt with according to the Respondent policy, and a number of managers tasked with addressing the grievance did not in fact do so.

395. The Claimant was a disabled person complaining that her disability had motivated complaints made about her. The Respondents were investigating the Claimant because of some of the complaints made by those same people.

396. There was evidence that the complaints were about the Claimants disability as early as July 2015 and that evidence was known to the Respondents, by which time the Respondents knew that KH was disabled and covered by the Equality Act 2010.

397. In an email from Dr. Chitnes about the Claimant speaking to him aggressively, the Respondents reply shows that his version of events is accepted and that he is encouraged to complain about the Claimant. He is told he will be supported.

398. Later on, when the women who had raised complaints were interviewed, and when number of the complaints made had been dismissed or not upheld, the writer of the report concludes, that the comments were not discriminatory because there was no intention to hurt or upset the clamant. This is contrary to their own guidance and the legal test for harassment, that it is the effect on the recipient that must be considered.

399. In all these situations, the Claimant has been treated differently and less favourably than others. A hypothetical person in her situation, would not be treated in the same way, and in each situation, that claims disability was a factor known to the Respondents, and at the heart of the issues.

400. One of the consequences of the failure to deal with an investigation into KH's own concerns at an early stage was that the Respondents individually and collectively became entrenched in their thinking about KH.

401. We find that the attitude was shared between senior colleagues and that it affected the Respondents treatment of KH; how KHs concerns were treated and the seriousness with which the Respondents took KHs disability and her mental health.

402. The terms of refence refer to the Respondents policy for dealing with bullying and harassment. The policy sets out requirements for managers, and for staff, and requires a meeting within 7 days of an informal concern being raised, and a meeting within 14 days of a formal concern being raised. A formal concern can be raised either verbally or in writing.

403. The Respondents did not comply with their own policy at any stage of the process. The complaints raised by KH were not addressed in any way formally or informally until they were raised again at the appeal hearing of KHs appeal against disciplinary sanctions. The sanctions imposed on her resulted, in part from complaints made by the same three women from MIU about whom she had raised her complaints of bullying and harassment.

404. Whilst some of the concerns raised were upheld on appeal a number were dismissed at the first hearing, and one not upheld on appeal.

405. Had KHs concerns been taken seriously, and treated with the same concern that the complaints against where were treated, at an early stage of the process, following their own procedure and guidance, we conclude that there would have been a finding that KH had been discriminated against on grounds of her disability, because she had been bullied and harassed by some of her own team members on grounds of her disability.

406. There are facts from which we could conclude, in the absence of an explanation from R, that there has been disability discrimination. We infer from the facts found that there is a prima facie case of discrimination.

407. The explanation for the Respondent for not investigating the Claimants grievance is one of confusion and expectation that KH would herself raise the matters in the Disciplinary hearing. Whilst this accounts for initial failures, it does not explain at all why there was a continued failure from January 2016 until the investigation was finally set up in Autumn 2016. We find that the Respondents have not provided any non discriminatory reason for the treatment in this respect.

408. In the absence of any non discriminatory explanations for the differences in treatment we find that the reason KH was treated as she was, was because she was a disabled woman who had sought reasonable adjustments and was suffering from mental health disability.

409. Issue 24 harassment by MIU staff: Staff met in MIU on 7 September 2015. We found as fact that the staff did indeed meet and repeated the allegations contained in their complaint letter. KH was unaware of the meeting at the time but when she found out about it subsequently we find as fact that she was upset by the fact the complaints being made and by what she understood had been said about disability

410. We conclude that the actions of the staff in raising their concerns did have the effect of creating a degrading and humiliating environment for KH and were about her disability. From the facts we find we conclude that although some of the staff raised concerns about KH's safety and that concerns were raised about KH's practice as a nurse, and whilst it was legitimate for them to raise them, other complaints were about her disability, and were harassment.

411. **Allegation 31** concerns KH's return to work on 28 October 2015 after a period of sick leave. KH states that there was a failure to make reasonable adjustments and refers to the H4WK report and recommendations made with in it.

412. We conclude that there was a failure to make reasonable adjustments for KH to return to work at this point

413. **Allegation 32** also concerns a failure to make reasonable adjustments and find this is proved. KH states that she emailed ZL and Sarah Sparks stating that she felt isolated and was beginning to suffer symptoms of a depressive episode. Despite this no support was provided to her.

414. On 18 November 2015 KH contacted ZL and Sarah Sparks stating that she had had a review with her consultant Mr Shetty was very pleased with her progress and that he was content that return to duties with current minor adjustments in place. KH stated that she had also seen H$W

who were also content for KH to resume normal duties based on a risk assessment. KH stated that she was happy to have a risk assessment.

415. KH the Respondent that she was mindful of the ongoing process meaning the internal investigation but stated *I do have anxieties that I need a return plan regardless of the end of November. I have been getting some symptoms of reactive depression due to the isolation I have endured. I do have some counselling in place and will bounce back in the interim.*

416. We find that this is a clear statement which put both ZL and Sarah Sparks on notice again of KHs mental health disability. We also find that there was no action taken by the Respondents to investigate how KH might return to work or to facilitate a return with adjustments in place at this point.

417. In addition on 18 November H4W provided a report to Sarah Sparks following a referral of KH to them. The report refers to Dr. Spenceley's anticipation that Kate would be able to return to clinical duties from 9 November but would need a number of adjustments to prevent manual handling and the requirement to respond to emergencies at floor level. The recommendation was that KH spent 3 to 4 hours per shift performing clinical work and 3 to 4 hours per shift performing admin and management work. It was anticipated that KH would be able to return to full duties following her phased return to work the report goes on at that Kate enjoys her role and her exclusion from work has had a detrimental effect on her psychological well being.

418. We find that the Respondents knew or ought to have known by the end of November that KH was suffering from reactive depression and that her exclusion from the workplace was having a detrimental effect on her. They knew that she was disabled because of her physical health but did not make adjustment to enable her to return to work. There was a failure to make a reasonable adjustment .

**Findings and conclusions on the remaining issues**

419. The Claimant has made many allegations of discrimination which we dismiss. We have set out our reasons in respect of the numbers corresponding to the list of allegations.

420. Allegation 5 and 20 are of a failure to make adjustment of explaining KHs modified hours. Dismiss this claim. KH was disabled but there is no obvious PCP being applied. The adjustments were explained to staff, in so far as was reasonable, and the problems arose in part because of a failure of staff to accept the explanations of managers and KH herself that reasonable adjustments had been made for KH.

421. Allegation 3 was of staff harassment, by KH being told she should be off sick. This was on grounds of disability and we find it humiliated KH and was harassment.

422. Allegation 4 is dismissed. KH wanted an additional member of staff, so that she would not be required to act in a clinical emergency.

423. As a professional nurse KH would be required to intervene in a medical emergency including resuscitation at floor level whether or duty in a clinical role or not and whether another member of staff were available or not. This placed KH at a substantial disadvantage in the summer of 2015 because doing so would cause her pain in her hips and because she would have difficulty providing emergency resuscitation from a kneeling position.

424. By July 2015 the Respondents knew KH was physically disabled and that she was at a disadvantage. There was a PCP which placed KH at a substantial disadvantage in comparison to others. However the adjustment was not, we conclude, one which it was reasonable for the Respondent to make . This includes consideration of the extent to which the adjustment would avoid the disadvantage to the Claimant.

425. The provision member of staff would not be a reasonable adjustment and we find that KH's own evidence supports this. The instance of a patient collapsing in the minor injuries unit was unusual and wholly unforeseeable. Whilst an emergency is always possible in a medical environment KH accepted that this was only an issue for her on that particular day, because it coincided with a

member of staff being late for. If the patient had suffered a heart attack at any other time, it would not have been an issue. A further member of staff allocated to deal with the potential for emergency would be neither proportionate to the risk nor cost-effective . Even if an additional member of staff had been allocated to the unit there would always be a risk of unforeseeable incidents, such as the one that occurred on that day.

426. KH confirmed that issue 23 was not an allegation, but she was setting out a protected act. She stated that she submitted a bullying and harassment claim with H4WK by telephone in which she explained that she felt undermined and that there was a lack of respect for her disability and reasonable adjustments. Allegations 6,7,8,9 and11, 12, and 20 are allegations of harassment by staff. We find these are proved. Comments and complaints were made and were on grounds of KH having a physical disability. They created a hostile and humiliating environment for KH and we find they were harassment.

427. We do not find that allegation 10 which were a complaint made to a manager was harassment. We find that the staff member was expressing wide concerns about KH. This was not on grounds of disability.

428. Allegation 12 and 19, concerns complaints made in July 2015. Some of this was harassment, where it was about the Claimants disability. However allegation 19 is not upheld. If said, we cannot find that this was on grounds of disability.

429. Allegations 15, 17 concern the Claimants grievance. We have made findings and conclusions about this above.

430. Allegation 16 is dismissed. We have no evidence of what was said to the CQC, and only what KH was told had been said by a third person.

431. Allegations 21, 22 and 23 were not pursued.

432. Allegation 24 is about the complaints made and we find that in part , these amounts to bullying and harassment of KH

433. **Allegation** 25 is raised by KH as a failure to make reasonable adjustments. The allegation concerns an email KH sent stating it was not appropriate for her to be crossed of duty by the MIU staff when she should be marked as redeployed. We find that insofar as there was an incorrect notation, that this was not a failure to make a reasonable adjustment. The adjustment was the redeployment of KH. We conclude therefore that this allegation is not well founded.

434. **Allegation 26- 30** concern the investigation meeting notes taken at meetings with various members of MIU staff. KH alleges that the notes amount to harassment. We find that KH found the comments that were made about her to be unwarranted conduct and that the comments did cause her to feel humiliated and to consider that the environment at work was degrading and hostile. We conclude that the comments made during the course of an investigation meeting ought not to be treated as having the statutory effect given the circumstances of complaints being made against KH. The Respondent was correct to investigate the complaints and the people who were interviewed were entitled to make the comments they made in private to an investigator.

435. The investigation notes do however record concerns about KH being chaotic because of her sickness and raise concerns about KH being at work whilst she was on crutches. We find that the comments within the notes are a fair reflection of the views of the people who made them. We have relied upon them as evidence of the attitude of the individual women who complained about KH.

436. Despite this action was not taken at that time .

437. **Allegations 32, 33, 37 and 39**: these allegations are of a failure to make a reasonable adjustment of ensuring that KH was not placed in an isolated role. Whilst we find that the work place was isolated and did have an adverse impact on KH, and that R knew this, we find that KH was not disabled by reason of her mental health until April 2016. Each of these allegations relates to the return to work discussion in November 2015 or those in January 2016.

438. KH accepted that 32 was reference to a meeting on 28 November. KH confirmed that KH was not pursuing a claim in respect of victimisation based on events in the meeting of 2 December, but KH's allegations are in respect of a failure to make reasonable adjustments and harassment.

439. Allegation 33 is also put as harassment and victimisation. We find it was neither and dismiss this claim. KH alleges that a comment made by ZL questioning her ability using only one crutch was humiliating. We find as fact that the discussion that KH reports about being asked how she was coping with using only one crutch upset KH. However we find that the question from a manager in the course of the meeting that was taking place and in the circumstances of the case did not violate KH's dignity or create an intimidating hostile degrading humiliating or offensive environment for KH. We find that it was not reasonable for the conduct to have that effect. We find that this was a genuine enquiry about how KH was managing. We find that KH was unwell at this point and that she was feeling very fragile and that she was upset but that it is not reasonable to treat this as harassment. This was not a comment we conclude, that was made because of a protected act done by the Claimant.

440. The allegation also refers to the Claimant being suspended, and the cause of that suspension beign her having raised grievances. We find that the Respondents ought to have considered at this point whether or not an adjustment to their policy of suspension could be made so that KH could remain in the workplace. We find that this did not happen at this point in time. We do find that KH was told that she must not contact any of her work colleagues at all and that this included members of staff with whom she was close friends. We find that the Respondents would have been reasonable to have considered adjusting this policy, so that KH could remain in contact with close friends who were not involved investigation against her.

441. We conclude however, that the reason for KH's suspension was the allegations that had been made about her and the concerns that remained following the investigatory meetings. We conclude that KH was not suspended as a result of her having raised grievances. We find that it was appropriate for the Respondent's to suspend KH and to refer the concerns to a disciplinary hearing and that this was not because of her grievances nor was it less favourable treatment.

442. The Respondents had a duty to make adjustments because the policy of suspension at a particular and significant adverse impact on KH. We find that the Respondents adjustment of policy so that KH was given permission to speak to the chaplain is indicative of the Respondents knowledge and recognition of KH's fragile mental health but that this was insufficient. However, we find that at this stage the Claimant was not disabled because of her mental health impairment.

443. **Allegation 34 is an allegation of victimisation**. We do not find that this was victimisation. KH relies upon her letter of 3 December 2015 to Mrs Poulson in which she alleges that she has been subjected to bullying and harassment by individuals in the MIU. The Letter refers to KH's hip deformity; to her surgery for total hip replacement and her exclusion from the workplace. She states she believed this was triggered when she identified her vulnerability over having surgery. She also states that the process which R was following had impacted on her mental well-being. KHs letter refers to matters which are capable of amounting to disability including KH's physical and mental health disability and it is clear from the wording of the letter that KH is alleging that she believes she has been a subject to complaints because of her physical disability. We conclude that the letter is a protected act.

444. On 14 December 2015 Janet Poulson responded to KH stating that she needed to consider the most suitable way to manage the concerns that had been raised and requesting further information about the individuals who KH said had subjected her to bullying behaviour. The Respondents had a clear policy for managing bullying and harassment at work which KH

expected to be followed and which we assume would have been followed in other cases. We have found that a complaint made by Dr. Chitnis was actioned and investigated and that complaints made by women in the MIU were actioned and investigated. We have heard no explanation as to why KH's allegations were not simply progress through the Respondents own policy.

445. However KH's allegation is that the act of suspending her to investigate allegations which she felt had already been investigated is victimisation. We do not agree. KH was suspended because allegations had been made against her serious nature and the Respondent genuinely considered that they needed to be investigated. KH's own allegations also merited investigation but were not causative of her suspension or the allegations investigation into those allegations.

446. **Allegation 35** is an allegation which KH confirmed she was not pursuing.

**Conclusion on the award of the sanction following first disciplinary hearing**

447. We find that the sanction itself was awarded to KH not because she had made a grievance herself but because the Respondents had found that some although not all of the allegations made against KH were well founded. This was not an act of victimization or discrimination.

448. **Allegation 36** is that KH submitted a complaint regarding less favourable treatment the date for this is 30 December 2015. We have looked at this with allegation 39 in which KH refers to meeting with her buddy at the end of January 2016 and expressing isolation and exclusion. KH alleges that an adjustment should made to ensure that she was not isolated workplace. We find that the Claimant was not disabled by reason of her mental health impairment at this time. Therefore there was no duty to make an adjustment and this allegation is dismissed.

449. **Allegation 37 is that KH was placed in a non clinical role in Winchester and was isolated.**

**Conclusion on the Modern matron role**

450. **Allegation 40** concerns the recruitment the matron whilst KH was on sick leave she alleges that she was not able to apply because of the investigation. We find that the position that KH was interested in was not in fact an open post at any time during the relevant period we find it is more probable than not that there had been a conversation at an earlier stage with KH prior to the investigation about the possibility of a role but we find as fact that subsequently there was a decision by the Respondents not to continue considering the role. We find that the first time the RCN knew that KH believed she had been offered a post was in September 2015.

451. We find that although a conversation with KH had probably taken place at an earlier stage in the summer, there had been no offer of a post. At most, the Respondent said that there would be posts, and enquired whether C would be interested. We find that the C was not offered a modern matron post as a slot in, and that she had misunderstood any conversations that she had had about this.

452. In these circumstances we find that there was no less favourable treatment because there was no role available.

453. Allegation 42. KH alleges that she would not been subject to the disciplinary sanction had she not put in her grievance. We find as fact that the sanction imposed upon KH was nothing to do with her having submitted a grievance. The reason why KH subjected to a disciplinary sanction was because the Respondents considered that there was a valid basis following on from a reasonable investigation at which they had determined that KH had committed acts of misconduct. Whilst we are critical of some aspects of the process of the disciplinary itself, and whilst we are critical of the Respondents for not having dealt adequately with KH's own complaints and grievances, there is no evidence other than KH's assertions that point towards the process and the sanction themselves being either acts of discrimination or acts of victimization.

454. We accept that KH's grievances were protected acts but we cannot find any evidence of a causative link between KH's grievance and the imposition of a disciplinary sanction. It follows that we do not uphold **allegation 43** which is of direct discrimination as a result of the investigation.

455. KH clarified that her concern was not the suspension with the exclusion from the workplace. We have addressed this above.

456. We have found that the Respondent ought to have made adjustments in respect of KH suspension and in respect of the places that she was allocated to work but we do not find that the decision to remove her from the minor injuries unit itself was an act of discrimination. We find that the decision to remove her was the result of complaints being having been made by other members of staff and the need to supervise and assess KH in a clinical working environment. In so far as there was a perceived need to separate KH from other employees in the minor injuries unit we do not find that any of those decisions were caused either by KH's disability itself or caused by in any part the fact Claimant herself had made complaints.

457. 43. KH alleges she was excluded from work because of her grievance. This is not upheld. Her not being at work was partly because she had had an operation, and partly because there were concerns about where she would return, given restrictions placed on her practice. We have made finding about the fairness of this, but conclude that it was not direct discrimination, because there is a non discriminatory reason in any event

458. Allegation 44. KH alleges that she was not able to return to work in a non clinical role. We find that she did return to work, but was not able to do clinical work. She was not forced to take sick leave and her treatment was not direct discrimination.

459. Allegation 48 is part of the section 13 direct discrimination claim of a failure to investigate the grievance and is addressed above.

460. allegation 50 concerns a failure to make adjustments and has been addressed as apart of the overall failures above.

461. Allegation 51 refer to the grievance raised to Ms Padmore. The Claimant puts this as direct discrimination.

462. The complaint made to Ms Padmore was passed to ZL and that it was after this that the Claimants complaint was investigated. We do not understand KH to be complaining of an additional act of direct discrimination, but have considered this as part of the over arching claim of direct discrimination in failing to progress her grievance, and in suspending her from work. We have made findings of discrimination in respect of both of these issues, and make no additional finding in respect of allegation 51.

463. Allegation 52 is of harassment and victimization. The allegation is that the Claimant started a period of sickness absence due to harassment and victimisation. There is no separate allegation and we cannot find that the reason for her absence was either harassment or victimization on the evidence before us.

464. Allegations 53, 54 and 55 are of indirect discrimination, in respect of the Respondent holding an appeal meeting and two investigatory meetings in the Claimants absence, when she was too unwell to attend on 10 February 2017 and on 16 February 2017.

465. We find that there were meetings held in the Claimants absence when she was too unwell to attend. The Respondent did have a practice of proceeding in the absence of a party.

466. We have found that this did put the Claimant at a disadvantage because she was not able to give instructions or take part by providing a written response. This was because of her mental health disability of which R was aware.

467. We find that continuing in the Claimants absence was not justified as being a proportionate means of achieving a legitimate aim, and that this was indirect discrimination.

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**Employment Judge Rayner**

**Dated: 13 February 2020**
**……**

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