EMPLOYMENT TRIBUNALS

Claimant: **Mr S Matthews**

Respondent: **Homerton University NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **1, 2 October 2019 and 4 October 2019 (Partially in Chambers)**

Before: **Employment Judge John Crosfill**

Members: **Ms L Conwell-Tillotson**
Mrs T Brown

Representation

Claimant: In person

Respondent: Ms B Criddle of Counsel instructed by Hempsons Solicitors

JUDGMENT

1. The Claimant's claims brought under Section 47C and 48 of the Employment Rights Act 1996 that the Respondent subjected him to detriments on the ground that he made protected disclosures are dismissed; and

2. The Claimant's claims that the Respondent failed to make reasonable adjustments for his disability brought under sections 20, 21 and 39(5) of the Equality Act 2010 are dismissed.

3. The Claimant's claims of victimisation brought under sections 27 and 39 of the Equality Act 2010 are dismissed upon withdrawal by the Claimant.

REASONS

1. On 4 February 2008, the Claimant started working for the Respondent NHS Trust initially as an Anaesthetics Team Leader then as a permanent Lead Anaesthetics Practitioner, a Band B7 post. On 15 December 2017, there was an incident where the Claimant says that following a disagreement he was assaulted by his manager Phillip White. Shortly after this, the Claimant commenced a period of sick

leave from which he never returned handing in his resignation on 4 October 2018. He brings two types of complaint. Firstly, he says that he made 4 protected disclosures where he drew attention to the alleged assault on him and to what he described as a serious patient safety incident. He says that he was then subjected to detriments that are principally concerned with the process and outcome of the various complaints that he had made. The second category of complaint is the alleged failures to make reasonable adjustments during the period when the Claimant was off sick. Again, he complains of the processes followed by the Respondent in relation to his complaints and a failure to allocate him a role off the main hospital site.

Procedural matters

2. The Claimant presented his claim on 24 September 2018. He had brought claims alleging a failure to make reasonable adjustments, complaints that he had been subjected to a detriment for making protected disclosures and complaints of victimisation having done a protected act. A Preliminary Hearing took place on 10 January 2019 before EJ Russell. Following that hearing, the Claimant withdrew his victimisation claims by e-mail sent on 11 January 2019. By the same e-mail he sought to introduce claims of unfair dismissal together with further claims of discrimination relying on disability as a protected characteristic. Directions were made by EJ Russell for the Claimant to provide information in support of any application to amend with the intention that the matter would be dealt with on paper. In the event, a further Preliminary Hearing was held on 9 May 2019 when those applications were considered by EJ Russell. EJ Russell dismissed the application to amend the claim. There was no appeal against that order and therefore we were not dealing with claims arising out of the Claimant's resignation.

3. At the outset of the hearing, we confirmed with the parties that the issues that we needed to determine remained those identified by EJ Russell in her case management order following the hearing on 10 January 2019 (which had been drawn up taking into account the withdrawal of the victimisation claims). We note that the withdrawal of the victimisation claims has not been formally actioned. Those claims are formally dismissed above.

4. The list of issues sets out the reasonable adjustment claims and the protected disclosure detriment claims in sub paragraphs under paragraph 8 of the Case Management Order. We shall not repeat that list of issues within our reasons but record that the list of issues is found at page 58-60 of the bundle prepared by the Respondent. When we decide the issues in the case we refer to the numbered paragraphs of that list.

5. At the outset of the hearing the Employment Judge explained the process to the parties in general but particularly for the benefit of the Claimant. In particular, he explained how the witnesses would give their evidence and the process of cross examination. He explained that the parties would have an opportunity to give submissions at the end of the case.

6. The case had been listed for 6 days but, due to a lack of resources, only 3 full days were available. In the event, that caused no significant difficulties.

7. The Respondent had produced a joint bundle in accordance with the case management orders of EJ Russell. They had also produced a neutral chronology. The Claimant has produced a bundle of his own that, in the main, contained documents also found in the Respondent's bundle. During the hearing, we worked mainly from the Respondent's bundle but it later transpired that some documents (medical records) in the Respondent's bundle were incomplete. Alternate pages being missing from the Claimant's GP records. This came to light during the hearing. The Respondent did not object to the Claimant relying on these documents and we took them into account when deciding the question of whether the Claimant met the statutory test for disability set out at Section 6 of the Equality Act 2010. The Claimant suggested that the documents had been deliberately left out. Correspondence about that was received after we had concluded our deliberations. We are entirely satisfied that there was no deliberate failure to include the documents.

8. As has become usual, after agreeing the issues, we adjourned to read the witness statements and documents. We resumed at 2pm on the first day and then heard evidence from the following witnesses:

8.1. The Claimant gave evidence and was cross-examined between 14:00 and 16:40 (with breaks) on the first day and then until 11:00 am the following day.

8.2. Lydia David who managed the Claimant for a period who gave evidence and was cross examined between 11am and 11:47 on day 2. We then had an early lunch at the Claimant's request.

8.3. Philip White, the Claimant's manager and the person who he claimed assaulted him gave evidence and was cross examined between 13:00 and 14:15.

8.4. Margret 'Mags' Farley, the Divisional Operations Director who dealt with a disciplinary issue in early 2017 and later part of the Claimant's grievance, gave evidence and was cross examined between 14:18 and 15:08 when we had an early finish.

8.5. Our hearing resumed on Friday 4 October 2019. We started at 9:30 to make up for the lost hearing days.

8.6. We heard from Daniel Waldron who had commissioned an investigation and dealt with complaints raised by the Claimant. He gave evidence for just 15 minutes.

8.7. Finally, we heard from Dylan Jones who heard an appeal the Claimant brought against the outcome of his grievance hearing. The Claimant did not ask him any questions.

9. At all stages we attempted to explain the process that would be followed to the Claimant. We were aware that he said that he suffered from a mental health condition and we assumed that was the true position. To accommodate that we offered the Claimant breaks and broke up the court day whenever possible.

10. We were concerned that the Claimant was not putting many aspects of his case to the witnesses and explained the need for him to challenge any parts of their evidence with which he disagreed. Despite this, the Claimant was reluctant to challenge the witnesses. The Tribunal was faced with the difficult position of not wishing to enter into the ring but did ensure that each witness was asked about the key issues in the Claimant's case.

11. The parties both provided written submissions. Ms Criddle made oral submissions to support her written submissions. The Claimant was content to rely upon his written submissions. Submissions were completed by mid-morning on 4 October 2019. We asked the parties if they wanted to wait for an oral judgment. The Claimant said that he did not feel able to do so. We therefore formally reserved our decision. We were able to deliberate and reach a decision on 4 October 2019 which was recorded by the Employment Judge. Unfortunately, due to pressures of other cases it has taken some time to provide this written judgment and reasons. We apologise for any anxiety that this may have caused.

General findings of fact

12. We make the following general findings of fact relevant to all the claims that we must decide. Under headings below we make further findings where they are necessary to determine any particular complaint. We have not dealt with every single matter the parties put before us but having had regard to the totality of the evidence set out our findings on the matters we considered most important.

13. The Claimant qualified as an Operating Department Practitioner ('OPD') in 1998. After working for some time through an agency, the Claimant obtained a position as a full time Band 6 OPD in 2009. He was soon promoted to a Band 7 position as a Lead Anaesthetics Practitioner. In that role, he reported to Philip White who was responsible for his line management.

14. Philip White told us that at least prior to 2016, he had a good working relationship with the Claimant. He said that the Claimant was highly effective and empathetic in caring for his patients. We accept that evidence. Whilst the Claimant now suggests that Philip White was 'autocratic and unreasonable' there was no evidence that the two had not worked together well over a good number of years.

15. Whilst Philip White had a great deal of respect for the Claimant's work he told us that the Claimant's exacting standards meant that he did not 'suffer fools gladly'. We took that to mean that the Claimant would be critical of others where they did not live up to his own high standards and that he was capable of ruffling feathers.

16. In 2016, an incident took place which led to open disagreement between the Claimant and Philip White. The Claimant did not give much detail in his witness statement simply stating that he was asked to do a particular task by Philip White which he declined to do because he considered it unsafe. Philip White and Mags Farley (who had discussed this with the Claimant closer to the time but had no direct involvement) told us more about what happened. The Claimant was in charge of co-ordinating the operating theatres. He had been asked by a Consultant to accommodate an emergency caesarean section. The Claimant had been unwilling to

assist citing the fact that the operating theatres were fully booked and that there were staff shortages. Whilst the Claimant's concerns may well have been justified, the way he raised those concerns had offended other members of staff and their complaints were escalated to Philip White. Philip White told us that the Claimant was clearly angry and that he initially suggested that he cover the 'bleep' whilst the Claimant had lunch. We accept that this suggestion was made in an attempt to de-escalate the situation. The Claimant did not perceive it in this way but as criticism and turned his frustration on Philip White. Philip White responded by asking the Claimant to go home for the rest of the day.

17. The Claimant was then absent from work from 29 February 2016 to 1 May 2016. During that period the Claimant was referred to the Respondent's Occupational Health advisors on two occasions. The Claimant attended a face to face consultation with Afua Baffour, a Specialist OH Practitioner, on 15 March 2016. The written report produced after that contains the following passages:

> *'Mr Matthews reports that he is experiencing an increased workload within his department due to the lack of support from his colleagues, and as a result, he feels pressurised and frustrated at work….[he] reports of the surgical list being consistently overbooked on a day-to day- basis, thus he is expected to manage that as a part of his duties in a given day…….no resolution has been agreed as yet…….Mr Matthews confirms that he has an underlying health condition diagnosed 14 months ago; this is managed with prescribed medication with good effect.*
>
> *Mr Matthews informed that he is experiencing low moods with flash backs of incidents whilst he was at work, intermittent sleeping patterns and tiredness and poor concentration.'*

18. The recommendations made by Afua Baffour were that a review of the factors that contributed to the stress at work was undertaken including a structured interview with the Claimant.

19. It had been anticipated that the Claimant would return to work on 22 March 2016 but in the event, he was not fit enough to do so. On 4 April 2016, he sent a number of medical certificates to Philip White by e-mail. He also mentioned that he was meeting with his GP to 'assess [his] new medication'.

20. The Claimant attended a further consultation with Afua Baffour on 21 April 2016. The written report of that consultation gave further information about the Claimant's mental health. The report contains the following passages:

> *'Mr Mathews states that he is diagnosed with depression and anxiety by his General Practitioner a year and a half ago. Thus, he was initially prescribed with citalopram which was changed recently to Sertaline. However, due to side effects of the medication, it has now been changed to Prozac….*

Mr Mathews further reports that he is experiencing on-going psychological symptoms such as anxiety, tearfulness and emotional [at] times, sleep deprivation (sleeps 4 hours a night), and has poor concentration.'

21. Afua Baffour's report advised that the Claimant would be fit to return to work but, in addition to the previous recommendations suggested a phased return to work and weekly review meetings. In the event the Claimant did not return to work at that stage.

22. On 28 April 2016, the Claimant met with Philip White to discuss his ongoing absence and the two OH reports that had been obtained. On 9 May 2016 Phillip White wrote to the Claimant with a summary of what had been discussed. There was no substantial challenge to the accuracy of that summary and we accept that it broadly reflects what was discussed. It was agreed that the Claimant would return to work on 3 March 2016 initially with reduced duties. The Claimant was then asked about the main stressors he experienced. The Claimant complained about the 'hot desking' arrangements that were in place and the absence of a private office and said that this interfered with his ability to complete his management duties. He repeated his concerns that the operating lists were overbooked despite numerous objections. He complained about communication difficulties with his colleagues. Finally, he said that he was concerned about further stressful situations.

23. Phillip White is recorded as responding to the Claimants concerns as follows:

23.1. He suggested that the Claimant planned 'management half days' to allow him to complete his management responsibilities. He provided the Claimant with his own desk but declined to provide a private office on the basis that it avoided 'cliques'.

23.2. He put in place new rostering arrangements to help manage the overrunning lists. He told the Claimant that the issue with how the lists were booked was being developed as a part of the Trust's Theatre Policy Plan.

23.3. He introduced bi-weekly meetings with the Band 7 staff to alleviate any communication problems.

24. The Claimant returned to work in May 2016. During the remainder of the year the Claimant had four further periods of absence from work. One of these, in August 2016 started as a musculoskeletal problem but developed into depression when the Claimant was unable to return to work.

25. In December 2016, there was an investigation into an anonymous complaint relating to the management of the operating theatre department. The focus being on the management of sickness. The Claimant was interviewed in relation to that complaint. He was recorded as saying that he felt he could raise any concerns that he had and loved working in the department. He mentioned what he perceived as an unfair distribution of work and said that he had raised this with Phillip White. He was asked about the management of his own sickness and described this as having been managed 'appropriately'.

26. The Claimant's absences from work led to a First Stage Formal Sickness meeting that was held with Philip White on 5 January 2017. Again, what was discussed in that meeting was recorded in a letter dated 9 January 2017 the content of which was not challenged. The meeting appears to have been routine. A target for further attendance was agreed and the Claimant is recorded as accepted that no further support needed to be in place. He was told that if that changed he should raise it with Philip White.

27. Separately to the absence management process a decision was taken by Mags Farley to instigate an investigation into the Claimant's compliance with the Sickness and Absence Management Policy. This was prompted by concerns raised by Peter White about failures to report ill health, failures to provide medical certificates in a timely manner and indicating that there would be a return to work only to fail to do so. A comprehensive report was prepared by Felicity Canning a Divisional General Manager. She concluded that there was a case to answer that the Claimant had failed to comply with the relevant policies and recommended that disciplinary action be commenced. That report was then passed to Mags Farley.

28. Mags Farley told us, and we accept, that she took the decision that conducting a disciplinary process would be counterproductive. She decided that the best way forward was to have a frank 'closed door' meeting with the Claimant. That meeting took place on 24 March 2017. Mags Farley's account of that meeting in her witness statement is consistent with a letter she sent on 7 April 2017 summarising the discussion and we accept her account of the discussions. Mags Farley spoke to the Claimant about the importance of complying with the reporting duties when absent from work through sickness. She pointed out to the Claimant that he had taken 107 days of sickness on 15 occasions and that was disruptive to the service. She warned him that his absences would be much more strictly managed in the future and that he would be expected to comply with the relevant policy. She told the Claimant that he would not be paid for a period where he had not supplied a medical certificate.

29. During this discussion, Mags Farley also brought up other concerns about the Claimant's professionalism. She had received a number of complaints about the Claimant's behaviour. She formed the opinion that the Claimant considered that provided that he was in the right he was at liberty to speak to his colleagues in an unprofessional manner. She offered the Claimant the opportunity to attend an anger management course. In short, she pointed out to the Claimant that his unprofessional conduct would no longer be tolerated.

30. On 16 October 2017, an incident took place in one of the operating theatres. A patient had slid towards the floor due to the incorrect operation of the operating table. The patient was not hurt or injured but had been placed at risk. The Respondent, in common with most if not all other NHS trusts has in place a reporting procedure 'Datix'. This is uses to reports risks and concerns about risks. All employees are able to access this. Phillip White believed that the issue had been formally reported. He told us and we accept that some refresher training was organised. When the matter was later independently investigated it was concluded that the matter had not in fact been formally reported. The Claimant did not raise any contemporaneous issue and was not directly involved in this incident. If he had wanted to it would have been open to the Claimant to complete a Datix form himself.

31. The events that unfolded on 15 December 2017 are at the heart of the Claimant's case. He says that on that day he was assaulted by Philip White. In deciding what did take place we have been hampered by the fact that the Claimant was very reluctant to challenge Phillip White's account of the events of that day. After dealing with other matters the Claimant indicated that he had no further questions to ask Philip White without touching on these key events. We gave him a break and indicated that he needed to challenge evidence he disagreed with. Even then the Claimant did not directly put it to Philip White that there has been an assault. We did not know whether the Claimant was reluctant to revisit traumatic events or whether his reluctance to put his case was because he had no confidence in it.

32. On Friday 15 December 2017, the Claimant was responsible for scheduling operations and held the 'bleep' for this purpose. During the week a consultant, Dr Dorman had sought to add an additional patient to the operating list. The operation was an 'ERPC' and was to remove a dead baby from the uterus of the patient. A decision was taken to add the patient to the list after another consultant had finished. The patient was screened on 14 December 2017 by Carron Weekes. She was told that the operation would go ahead and that she would be allowed to go home. The patient was Jewish and it was understood by all that this was important for her. By the time a decision was finally made it was too late to put the patient's name on the operating list.

33. In the event, the other consultant finished her list by around 11:30. Dr Dorman then asked the Claimant to schedule her operation. The Claimant refused to do so and suggested that the Claimant be sent home. We are in no doubt that Dr Dorman was extremely upset by the Claimant declining to assist him. At 11:58, Dr Dorman sent a robust e-mail complaining that the operation had not proceeded. The Claimant had suggested that the procedure would take 90 minutes which was far longer than was actually necessary. Dr Dorman copied that e-mail to a number of individuals including Carron Weekes, Mags Farley, Phillip White and Lydia David. It is very clear from the tone of that e-mail that Dr Dorman was frustrated and disappointed with the Claimant's decision. We asked whether Dr Dorman typically expressed himself in such terms Mags Farley told us that that was not the case at all and that this was atypical.

34. Having heard all the evidence in relation to this decision, we accept that the Claimant's response to Dr Dorman was him exercising his clinical judgment but that he was unnecessarily obstructive. He would have known that the procedure would not last 90 minutes and expressing himself in those terms was bound to inflame the situation. His conduct was entirely consistent with Mags Farley's earlier conclusion that when the Claimant thought himself right he would depart from professional behaviour. We find that this was just such an occasion.

35. Philip White decided that he needed to intervene and he went down to the operating theatre. He met the Claimant and asked what was going on. The Claimant told him that he had opened an operating theatre and Dr Dorman's patient would have her operation at 1pm. The Claimant then went elsewhere. Phillip White discovered that there were other cases that needed to be accommodated. Without any particular difficulty, he arranged for these to be completed by gathering together a surgical team who had sufficient capacity to complete the operations.

36. When the Claimant returned to the area where the Allocations Board was placed, Philip White told him of the arrangements that he had made to accommodate the remaining cases. We have no doubt that Philip White was unimpressed by the Claimant's work on that day. He accepts that during this conversation he said words to the effect 'this is not your finest hour'. At some point, the Claimant handed Philip White the co-ordinator's bleep. He accepted in an account prepared on 18 December 2017 that he had said 'I no longer want to co-ordinate' and placed the bleep on the table. We find that the Claimant was very cross that his judgment was questioned. At some stage, during this disagreement Philip White told the Claimant to go home.

37. Phillip White then went to a small narrow office occupied by Sister Linda Jones who was working at her desk. She later provided a statement about what occurred. When she was later formally interviewed about these events she maintained her account. During that interview, she makes a number of very favourable statements about the Claimant. From that we infer that she has no axe to grind and that here statement made at the time is likely to be correct.

38. The Claimant suggests that from the point that he returned to the Allocations Board Phillip White was shouting and aggressive. He says that Philip Jones changed his mind about him being sent home and then pushed his shoulder and pushed the door closed on his leg to stop him from leaving. Phillip White denies that there was any physical contact at all. He says that the Claimant said that he was 'behaving as if he would like to punch him in the face'. Phillip Whites account is supported by the account that Linda Jones gave at the time.

39. We do not find that on the balance of probabilities the Claimant has satisfied us that there was any physical assault or attempt to stop him leaving the office. We would accept that there was an angry exchange of words but that is all.

40. On 18 December 2017, the Claimant raised his allegations in a formal complaint to the Respondent's HR team. Both Philip White and Lydia Jones were asked to prepare a statement and each did so on the same day. As we have said above all parties maintained the same, or broadly the same, accounts throughout the process.

41. The Claimant attended work on both 19 & 20 December 2017 but on each occasion, went home before completing his shift. The Claimant then commenced a period of sickness absence and did not return to work before his resignation.

42. On 22 January 2018, Mags Farley wrote to the Claimant as she understood that the Claimant wished to elevate his allegations against Philip White into a formal grievance. She invited him to meet with her or if he felt unable to do so to speak with her on the telephone. The Claimant met with Mags Farley on 29 January 2018. It is during this meeting that the Claimant says he made the first of his protected disclosures. Mags Farley accepts that the Claimant raised the following matters:

42.1. The allegations of assault against Philip White; and

42.2. The management of the Operative Services Department; and

42.3. The incident on 16 October 2017 when a patient slid down the operating table; and

42.4. The adequacy of the operating theatre 'room 6'

43. Mags Farley told us, and we accept that she was somewhat taken aback by the Claimant referring to many concerns not obviously connected with his grievance and some of which appeared historic. We further accept her evidence that the Claimant did not ask her to take any action in respect of these other matters at the time. That said of her own volition she spoke to Dr Katrina Erskine, an Associate Medical Director about room 6. She was told that whilst there were some issues with room 6 it was considered by her to be safe. She spoke to Philip White about the incident on 16 October 2017. She was told that there had been an unfortunate near miss which was recorded on Datix and that additional training had been given. She concluded that no further action was necessary in relation to the additional matters the Claimant had raised.

44. Mags Farley commissioned an investigation into the allegations that the Claimant had made against Philip White. She asked Darren Bolt, the Head of Access to undertake an investigation. Whilst Darren Bolt was known to be taking time off to get married and was a short-term appointment at this stage it was genuinely believed by Mags Farley that the issues were narrow and that he would be able to complete the investigation in a reasonable time.

45. During this period, the Claimant's absence was being managed by Lydia David. She had written to the Claimant complaining that he had not sent in medical certificates promptly. She had indicated that the Claimant would not be paid for a period not covered by a medical certificate. The Claimant had protested that this was unfair. Lydia David referred the Claimant to the occupational health advisors and a face to face assessment took place on 15 February 2018. The report that followed included the following:

> *'Mr Matthews is still experiencing symptoms like, insomnia, fatigue and poor concentration. He is implementing measures including therapy, to ensure his symptoms do not worsen. He will at present not be able to cope with the physical and mental demands of his role and is likely to make clinical errors at work……*
>
> *…we need to start a return to work plan to aid his psychological wellbeing.*
>
> *Returning to work temporarily in a non-clinical role where he temporarily does not have to have interactions with the manager he has put a grievance against. This can be on-site or working from home.'*

46. The report then went on to make further recommendations for a phased return and a gradual return to clinical duties.

47. Lydia David invited the Claimant to a sickness review meeting on 16 February 2018. Lydia David was accompanied by Dionne Siley an HR Business Partner who prepared a letter summarising the content of the meeting. The Claimant asked for amendments to be made. We are satisfied that that amended letter is broadly an accurate account of what was discussed. It is clear that the Claimant's concerns

dominated the meeting and that there was little discussion about his health or how his return to work might be facilitated although Lydia David did say to the Claimant that she had received the OH report and wound attempt to find work for the Claimant where he would have no interaction with Philip White. The Claimant intimated that he may resign and claim constructive dismissal.

48. The Claimant relies upon this meeting as the 3rd occasion where he made protected disclosures. We are satisfied that he raised the following:

48.1. An absence of policies and procedures within the department

48.2. The problems with room 6

48.3. Allegations of poor management.

49. We are not satisfied that the Claimant referred to the incident with the patient on 16 October 2017 during this meeting. There is no reference to that in the amended letter and had it been raised we would have expected the Claimant to have insisted on it being recorded (as he did other matters).

50. During the meeting, the Claimant was told that if he wanted to raise any of these matters as a grievance he should do so. On 7 March 2018, the Claimant sent an e-mail to Mags Farley informing her that he wished to bring two further grievances. The first concerned an allegation of a lack of support following on from the Claimant's period of work related stress in early 2016. The second alleged a 'lack of policy, structure and standards within Operative Services'. Mags Farley telephoned the Claimant on 16 March 2018 to discuss how these additional matters might be addressed. She proposed that the existing terms of reference for the grievance be expanded. The Claimant relies on this as the 4th occasion where he made protected disclosures. We are satisfied that the Claimant referred to the two areas where he advanced new grievances. His witness statement does not tell us exactly what was discussed.

51. On 22 March 2018, the Claimant sent an e-mail to Mags Farley in which he said that following advice from his union he thought that the complaint about a lack of policies and standards should be addressed separately to the complaint about the alleged assault. This caused Mags Farley to seek advice from HR as to the proper process moving forward.

52. Mags Farley sent the Claimant an e-mail on 8 April 2018 as her attempts to contact him by telephone had failed. She asked him for further details of his grievances in order that she could determine whether it was appropriate to deal with them under the ordinary grievance procedure or under the Respondent's whistleblowing procedure ('Freedom to Speak Up Policy'). The Claimant responded on 8 April 2018 in a long e-mail. That e-mail considerably expanded the areas of complaint. Mags Farley took advice from the Head of Employee Relations and subsequently from Daniel Waldron the Director of Organisational Transformation who was the 'Designated Manager' under the whistleblowing policy. At much the same time she had to contend with a CQC inspection.

53. By an e-mail sent on 19 April 2018, Mags Farley wrote to the Claimant informing him that his complaints concerning Philip White would be dealt with under the Grievance procedure whereas his complains concerning the department more generally would be dealt with under the whistleblowing policy. She also told him that proposals about alternative employment to enable him to return to work would be made shortly. She included the extended terms of reference for the grievances against Philip White.

54. On 24 April 2018, the Claimant sent an e-mail to Mags Farley in which he asked whether any alternative role could be 'off site'. Mags Farley responded on 25 April 2018. She informed the Claimant that he would be expected to work in Brooksby House which was a different building to the building housing the Operating Department. She sent a further e-mail on 27 April 2018 which contained proposals for a phased return. The Claimant replied the same day indicating that he would return to work on those terms. On 30 April 2018, the Claimant sent a further e-mail in which he informed Mags Farley that he was not well enough to return to work because it was too stressful to work on site. He later provided a medical certificate confirming he was unfit for work.

55. The Claimant attended the hospital on 9 May 2018 in order to access his e-mails to support his allegations being investigated under the whistleblowing procedure. He subsequently sent Mags Farley some e-mails that he considered were relevant. On 11 May 2018, the Claimant and Mags Farley agreed the terms of reference for the complaint under the whistleblowing procedure.

56. In June 2018, when Mags Farley was on holiday, the Claimant corresponded with a member of the Respondent's HR Team O'Mega Augustus. He indicated that as his entitlement to full sick pay had expired he would return to work. On 18 June 2018, in the role identified at Brooksby House. The Claimant raised a concern about the time it was taking to resolve his grievances and a meeting was then arranged for 12 June 2018 the intention being to bring the Claimant up to date with the progress. The Claimant did attend that meeting but he asked to have a protected conversation and the meeting did not achieve its original purpose.

57. Following the extension of the terms of reference into the grievances against Phillip White, Phillip White had initially refused to engage in the process relating to the expanded complaint until the original allegations of assault had been dealt with. This caused some delay to the process. Philip White was eventually interviewed on 12 June 2018.

58. Darren Bolt produced his investigation report into the allegations against Phillip White on 2 July 2018. He had concluded that there was insufficient evidence to uphold any of the grievances. He went one step further in describing the allegation of physical assault as 'spurious' and suggesting that that might be taken further. He did however make recommendations relating to the communication of operating lists to all concerned that demonstrates a recognition that the events of 15 December 2018 might have been avoided had there been better communication.

59. Mags Farley considered that Darren Bolt's report conclusions were supported by all the evidence and she decided to adopt the conclusions. She disregarded the suggestion that the allegations of assault were spurious believing that this would be a

matter best addressed informally. She considered that both the Claimant and Phillip White had behaved unprofessionally.

60. The Claimant appealed against the decision not to uphold his grievance. That appeal hearing was conducted by Dylan Jones on 11 September 2018. Having heard from the Claimant and from Mags Farley who presented the management case Dylan Jones upheld the decision to dismiss the grievance in most regards. He did however agree that Peter White's handling of the Claimant's sickness absence in 2016 was 'sub optimal'. He made recommendations in that respect. The Claimant was notified of the outcome of the appeal by e-mail sent on 2 October 2018.

61. The grievance under the whistleblowing process took longer to complete. An external investigator, Karen Wise, was commissioned to carry out an investigation. She provided a draft report to Daniel Waldron on 10 September 2018. He thought that some of the recommendations required expansion and a final report was not completed until 26 September 2018. At that stage, Daniel Waldron wrote to the Claimant and offered a meeting to discuss the report and its recommendations.

62. On 4 October 2018, the Claimant sent an e-mail to Daniel Waldron asking for the report in writing saying that he did not want to attend a meeting on site because he was about to tender his resignation. He resigned by e-mail on 4 October 2018.

63. The report under the whistleblowing policy did not identify any serious or urgent matters. In particular, it did not conclude that room 6 was unsafe. However, the report made several recommendations in respect of how the running and management of the Operating Department could be improved. The Claimant raised some questions about the report. These were in the main questions about how and when the recommendations would be acted upon.

64. During this final period, Lydia David remained responsible for managing the Claimant's absence from work. She had invited the Claimant to attend a 'Step 2 Formal Sickness Meeting' on 10 September 2018. During that meeting the Claimant repeated his position that he was willing to undertake any work but not at the Homerton Site. On 11 September 2018, Lydia David sent the Claimant a letter recording what was discussed. She said that she would look for a role off-site but needed 2 weeks to see if anything was available. On 2 October 2018, Lydia David wrote to the Claimant informing him that it had not been possible to find any role for him off-site.

The legal framework – protected disclosures

65. The protection for workers who draw attention to failings by their employers or others, often referred to as 'whistle-blowers', was introduced by the Public Interest Disclosure Act 1994 which introduced a new Part IVA to the Employment Rights Act 1996. Section 43A of the Employment Rights Act 1996 provides that a disclosure will be protected if it satisfies the definition of a 'qualifying disclosure' and is made in any of the circumstances set out in Sections 43C-H. The statutory definition of what amounts to a qualifying disclosure is found in Section 43B of the Employment Rights Act 1996 which says:

43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

66. To amount to a 'disclosure of information', it is necessary that the worker conveys some facts to her or his employer. In ***Kilraine v London Borough of Wandsworth*** **2018 ICR 1850, CA** the meaning of that phrase was explained by Sales LJ as follows (with emphasis added):

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the

present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)…….

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

67. As a general rule each communication by the employee must be assessed separately in deciding whether it amounts to a qualifying disclosure however, where some previous communication is referred to or otherwise embedded in a subsequent disclosure, then a tribunal should look at the totality of the communication see ***Norbrook Laboratories (GB) Ltd v Shaw*** **2014 ICR 540, EAT** and ***Simpson v Cantor Fitzgerald Europe*** **EAT 0016/18** (where the employee had failed to make it clear which communications needed to be read together). Ms Criddle referred us to ***Barton v Royal Borough of Greenwich*** **EAT 0041/14** in support of the proposition that communications could not be aggregated. Some commentators have suggested that these cases are inconsistent. We find no inconsistency. We would accept that distinct and separate communications could not be aggregated to amount to a qualifying disclosure. However, where the later communication explicitly or implicitly incorporates some other communication then that last communication must be read as including the earlier information.

68. The effect of Section 43B Employment Rights Act 1996 is that to amount to a qualifying disclosure, at the point when the disclosure was made, the worker must hold a belief that (1) the information tends to show one of the failings in subsection 43B(1) (a) – (e) and (2) that the disclosure is in the public interest. If that test is satisfied the Tribunal need to consider whether those beliefs were objectively reasonable. The proper approach was set out in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)*** **2018 ICR 731, CA** where Underhill LJ said:

26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1).

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he

was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

69. When going on to consider what was required to establish that something was in the public interest Underhill LJ said at paragraph 37:

"….. *in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors'*

hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

70. The 4 relevant factors identified by Underhill LJ were (at paragraph 34):

"(a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

71. Section 43C provides that a qualifying disclosure will be a protected disclosure if it is made to the employer.

72. Section 47B provides (as far as is material):

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

> *(a) by another worker of W's employer in the course of that other worker's employment, or*
>
> *(b) by an agent of W's employer with the employer's authority,*

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

73. The meaning of the phrase *'on the grounds that'* in sub-section 47(1) has been explained in ***Fecitt v NHS Manchester (Public Concern at Work intervening)*** **[2012] ICR 372** where Elias LJ said:

'the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.'

74. Section 48(1) of the Employment Rights Act 1996 provides for a right of enforcement in the employment tribunal. Sub section 48(2) provides that:

'(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

75. The effect of Sub section 48(2) of the Employment Rights Act 1996 is that once the employee proves that there was a protected disclosure and a detriment the Respondent bears the burden of showing that was not on the grounds that the employee had made a protected disclosure. The fact that the employer leads no evidence or that the explanation it does give is rejected does not lead automatically to the claim being made out. It is for the tribunal looking at all the evidence to reach a conclusion as to the reason for the treatment. See ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT*** **0072/14** and ***Kuzel v Roche Products Ltd*** **2008 ICR 799, CA**. Where there is no evidence or the employer's explanation is rejected it will be legitimate for the tribunal to draw an inference from the failure to establish the grounds for any treatment.

76. Where, as in the present case, there are several alleged protected disclosures and a number of alleged detriments it is necessary to take a structured approach. Guidance was given in ***Blackbay Ventures Ltd T/A Chemistree v Gahir*** **UKEAT/0449/12/JOJ** where it was said a tribunal should take the following approach:

a. Each disclosure should be separately identified by reference to date and content.

b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

c. The basis upon which each disclosure is said to be protected and qualifying should be addressed.

d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to

show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 of ERA 1996 under the 'old law' whether each disclosure was made in good faith; and under the 'new' law introduced by S17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.

f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

g. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest.

Discussions and conclusions – the detriment claims

77. Applying the law set out above to the facts of this case we have come to the conclusions set out below.

Did the Claimant make protected disclosures?

78. It is necessary to deal with each alleged protected disclosure in turn.

29 January 2018 – oral disclosure to Mags Farley

79. The list of issues identifies 4 alleged protected disclosures on this occasion. These are said to relate to (1) the assault by Phillip White (2) a serious patient incident on 16 October 2017 (3) an absence of any policies in Operative Services (4) problems with the operating Theatre in Rm 6.

80. Both the Claimant and Mags Farley had retained hand written notes of that meeting and from those notes we were able to ascertain that the Claimant did refer to all the four matters identified in the list of issues. What is harder for us is to identify what, if any, information was provided in relation to each matter. The Claimant's witness statement was light on detail. That said Mags Farley agrees at paragraph 25 of her witness statement that all 4 issues were raised.

81. We are prepared to infer that the Claimant repeated his account of the events of 15 December 2017. We are satisfied that the information, if true, would tend to show (1) that a criminal offence had been committed and (2) that the Claimant's health and safety had been put at risk. However, we have found that there was no such assault and that the information was untrue. Section 43B requires the employee to have a subjective belief that the information tends to show a breach of a relevant obligation. That subjective belief must be reasonable see ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed***. We have considered the possibility that the Claimant has convinced himself of his version of events and did subjectively believe his account of events. We accept that is a possibility however if he has, then his believe is not objectively reasonable. For this reason, we do not find that in providing an inaccurate account of the events of 15 December 2017 the Claimant made a protected disclosure. We reach the same conclusion for the same reasons when assessing whether the Claimant reasonably believed that his disclosure was in the public interest.

82. We are satisfied that the Claimant provided information about the patient incident that occurred on 16 October 2016. The notes suggest that he referred to the patient sliding from the operating table and made references to the controls for the table. He also suggested that the incident had not been reported. As a matter of fact, Whilst Phillip White believed that the incident had been reported, the conclusions of the Whistleblowing investigation were that it had not been although appropriate remedial steps were taken. We are satisfied that the Claimant disclosed 'information' and that he subjectively believed that the health and safety of an individual had been put at risk. His belief was objectively reasonable. There can be little doubt that there had been a risk to the patient even if it had fortunately been averted. We find that the Claimant subjectively believed that his disclosure was in the public interest and that it was reasonable for him to believe that. We consider that it would almost always be in the public interest to expose actual or potential failings in the treatment of patients.

83. Mags Farley's notes record a long discourse about an absence of policies in the Operative Department. Amongst those are references to the absence of a policy about wearing 'scrubs' only within the Department. There are references to excessive workloads. We are satisfied that this amounts to 'information'. We are also satisfied that the Claimant subjectively believed that the information he was provided tended to show that there was a risk to patients. That is their health was, or was likely to, be endangered. In relation to the issue of the wearing of appropriate clothing we note that the independent report into the Claimant's grievances dealt with under the whistle-blowing policy recommendations were made that the policies in force should be reviewed and more clarity provided. This supplies evidence that the Claimant's subjective beliefs were objectively reasonable. We repeat our conclusions in relation to the public interest element that we have set out above. We find that in this respect the Claimant did make protected disclosures.

84. Finally, Mags Farley's notes show that the Claimant raised the issue of the Rm 6 Operating Theatre. There was no dispute before us that the design of that room had caused issues. Its' size necessitated the use of a sliding door which could and had been impeded when objects were placed in the area or the door. We note that the Claimant seemed very concerned to blame Phillip White for the design. Even if he was acting in bad faith, under the amended legislation that does not mean that in disclosing information he could not make a protected disclosure. Karen Wise in her whistle-blowing report records that others shared the Claimant's concerns. We do not have to

be satisfied that the Claimant was correct to conclude that Rm 6 endangered patients. It is sufficient that his subjective belief was reasonable. We have regard to the guidance in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed*** and conclude that the belief he held was reasonable. Again, we find that the Claimant did subjectively believe that his disclosures were in the public interest and were not exclusively motivated by malice towards Philip White. We are further satisfied that that belief was objectively reasonable.

3 February 2018 – the formal grievance

85. If the List of Issues intended to suggest that the Claimant repeated all the matters he talked about with Mags Farley in his formal grievance on 3 February 2018 then that is incorrect. At that stage his formal grievance consisted only of his complaint about Philip White's conduct on 15 December 2018. It contained no other information. We have set our reasons why we do not find that the information about the 'assault' was a protected disclosure. We repeat them here and conclude that there were no further protected disclosures on this date.

16 February 2018 oral disclosures to Lydia David

86. We find that a reliable summary of the matters raised/disclosed by the Claimant is found in Lydia David's letter to the Claimant summarising the meeting that took place on 16 February 2018. The Claimant proposed amendments to that letter by an e-mail sent on 24 February 2018 adding the suggestion that he had raised the performance of Band 7 employees. When he did so he did not say that the letter had omitted reference to the 'serious patient incident' on 16 October 2018. We are not satisfied that the Claimant mentioned this incident on this occasion.

87. The letter of 16 February 2018 is not a verbatim note and contains only a brief summary of what was discussed. We are satisfied that the Claimant repeated his concerns about the Rm 6 Operating theatre. Furthermore, we find that he did raise his concerns about the management of the operating theatre. It seems that the concerns about management that were summarised are in the same vein as those related to Mags Farley on 29 January 2018. Some of those concerns would have had an indirect impact on patient safety. For example, the reference that is recorded to there being a 'toxic' environment might reasonably be believed to be capable of affecting the functioning of the department and the treatment of patients.

88. Despite the vague nature of the allegations we are prepared to accept that it is more likely than not that the Claimant disclosed information about Rm 6 and about the management of the operative department. In each case we accept that the Claimant subjectively believed that the information tended to show that the health of patients was being or was likely to be endangered. Given the context, and considering the subsequent recommendations of Karen Wise, we conclude that whilst the Claimant might have been overly concerned his subjective opinion was one which a reasonable person could hold. We therefore find that the Claimant did make further protected disclosures relating to Rm 6 and the management of the operative department.

16 March 2018 further written grievances.

89. These grievances are in writing but are made by e-mail of 7 March 2018 and then discussed with Mags Farley in a telephone call on 16 March 2018. They were subsequently expanded on and clarified in an e-mail sent on 8 April 2018 from the

Claimant to Mags Farley. We are satisfied that the Claimant would have raised during his telephone call the matters that he subsequently set out in writing in his e-mail of 8 April 2018

90. In that e-mail the Claimant sets out a detailed criticism of:

90.1. The manner in which the patient incident on 16 October 2017 was dealt with

90.2. The Room 6 Operating Theatre setting out details of why he said it was unsafe; and

90.3. Allegations under a heading 'lack of line management' in which the Claimant gives details of alleged failings of junior staff that had not been addressed by senior staff.

91. Whilst we accept that the Claimant might not have given all the detail he gave subsequently we accept that such detail that he did give amounted to 'information' that he subjectively believed tended to show that the health of patients had been, was being and was likely to be endangered in respect of each area. For the same reasons as we have given above, whether or not the Claimant was 100% correct his opinions could have been reasonably held.

92. We therefore conclude that the Claimant made protected disclosures in respect of:

92.1. The patient incident on 16 October 2017; and

92.2. The safety of Rm 6 operating theatre; and
92.3. The failures of management to address failures by junior staff.

<u>Was the Claimant subjected to a detriment because he made a protected disclosure?</u>

93. Below we make findings in respect of the reason for the Claimant's treatment. Before we do so we set out some general findings relevant to each allegation. We find that Mags Farley's approach to managing the Claimant and his grievances showed patience thoroughness and tolerance. Both she and Lydia David made genuine efforts to assist the Claimant back into the workplace.

94. We consider that the approach to the issues raised by the Claimant in his grievance against Philip White was fair and balanced. Whilst the most serious allegations were rejected as untrue the process did find fault on both sides.

95. The Claimant's complaints dealt with under the whistleblowing procedure were thoroughly investigated and were not dismissed out of hand. The final report was again fair and balanced. Some issues raised by the Claimant prompted changes.

96. We had no evidence at all that would suggest that this Respondent had a culture of supressing whistle-blowers. On the contrary the Claimant appears to have been entirely confident to raise his concerns although he did so only after his serious disagreement with Phillip White.

97. We have taken those matters into account when looking at the reasons for the treatment that the Claimant complains of.

'Delay in dealing with [the Claimant's] complaints and concerns'

98. The general findings of fact set out above do show that dealing with the Claimant's concerns took many months. We have set out the various reasons for those delays. We accept that delays in any grievance or disciplinary process are undesirable and could be a matter of reasonable complaint. In the present case the Claimant bears some responsibility for some delays as he only gradually revealed the full extent of his grievances. However, there were other delays for which he was not responsible. The reason for these included;

98.1. The need to consider the appropriate process; and

98.2. The size and scope of both investigations; and

98.3. Phillip White's initial refusal to be interviewed in relation to the expanded allegations; and

98.4. The need to deal with a CQC inspection; and

98.5. The need to accommodate annual leave.

99. We considered whether the Philip White's refusal to co-operate was on the grounds that the Claimant had made a protected disclosure. If it was then the Respondent would be liable for his actions. We find that it was not. Philip White took the stance that the Claimant had made a false allegation against him and that that should be dealt with before any further allegations were added. We have found above that the Claimant's allegations in relation to 15 December 2018 were not protected disclosures. It was the existence of those allegations which caused Phillip White to act as he did and not any wider protected disclosures.

100. We accept that the process could have been faster but on the other hand, acknowledge that it was thorough. Looking at all the reasons for the delay we are satisfied that none of the other reasons for the delay were materially influenced by the fact that the Claimant had made protected disclosures.

'The finding that the Claimant's allegation of assault against Mr White was false'

101. We have found that the Claimant has not shown that he was assaulted by Phillip White. As such he cannot reasonably complain that Darrien Bold, Mags Farley and finally Dylan Jones came to the same conclusion. We do not find that the Claimant has established that he was subjected to a detriment.

102. If we are wrong about that then we must ask what were the grounds for the treatment. In other words, why was a conclusion reached that the assault had not taken place. We find that the answer is plain and obvious. There was simply more evidence that the assault had not taken place as alleged than evidence to support it. We have no doubt that conclusions expressed in his report by Darren Bold were his genuine conclusions. In addition, Mags Farley adopted the conclusions and reasons in good faith as did Dylan Jones.

103. Having regard to the entirety of the evidence, we are satisfied that the Respondent took the Claimant's concerns seriously and investigated them fully. There is nothing that would support the suggestion that the Respondent sought to brush those concerns under the carpet.

104. We are satisfied that the reasons or grounds for not accepting the Claimant's account of the assault were not materially influenced by the other matters raised by the Claimant.

'The failure to investigate his concerns properly, or at all.'

105. We can deal with this allegation shortly. It is simply not the case that there was a failure to investigate the Claimant's concerns. There was a thorough investigation and two detailed and lengthy reports produced. We have detected no failure in the process. Clearly there is always more investigation that could have been carried out.

106. We detect that the Claimant's true complaint is that the investigators did not completely agree with him. If that is the case then we ask if the reason for that is that there were protected disclosures. We are satisfied that the fact there were protected disclosures did not materially affect the process followed and conclusions reached in the grievance and whistleblowing processes. The conclusions reached appear well reasoned and supported by evidence. There is no reason whatsoever to conclude that the investigations were not undertaken in good faith with the aim of establishing a true picture of events and making appropriate recommendations.

107. We do not consider that the Claimant has established that he suffered any detriment at all in this regard but if he had then the reasons for it had nothing to do with his protected disclosures.

Delay in providing the outcome of the appeal.

108. The Claimant indicated during the hearing that he did not wish to pursue this allegation. We consider this concession was rightly made. There was only a minor delay in the Claimant being told of the outcome of the appeal and no evidence at all that such delay was by reason of having made a protected disclosure. Dylan Jones was not challenged on his evidence in this regard and it would not be open to us to come to any other conclusion.

Deciding to split the two processes and undertake them in a protracted manner in order to protect itself in the light of the allegations.

109. The Claimant indicated that he did not wish to pursue this allegation during the hearing. Again, the concession was wise. There were obvious good reasons for splitting the grievances and these were recognised by the Claimant at the time when he expressly requested that the grievances were considered separately. We do not find in those circumstances that the Claimant has established that he has suffered any detriment.

'Threatening disciplinary action and possible dismissal and/or failed to offer him an offsite post.'

110. There are two parts to this allegation. Our understanding is that the 'threatened disciplinary action' related to the reference in Darren Bold's report to the assault allegations being 'spurious' and suggesting that Mags Farley might wish to take action against the Claimant.

111. In the light of our finding that on the balance of probabilities there was no assault on the Claimant, we consider that describing his allegation in that regard as 'spurious' was emotive but not inaccurate. It is not uncommon or unreasonable for an employer to take action against employees where they have made false complaints. In the present case Mags Farley decided that she would take no formal action against the Claimant. In those circumstances we are not persuaded that there was any detriment of which the Claimant could reasonably complain. However, if we accept that the use of the emotive term 'spurious' was inappropriate and could amount to a detriment we need to consider whether the fact that the Claimant had made protected disclosures played any part in the reason for that language being used.

112. We did not hear directly from Darren Bold. However, we had his full and comprehensive report in which he sets out the reasons that he concluded as he did. He had gathered a great deal of evidence about the events of 15 December 2017. The most serious allegation made by the Claimant was of the physical assault said to have been inflicted by Philip White. Darren Bold had spoken to Linda Jones who had all the appearance of being a disinterested witness. She flatly contradicted the Claimant's account however elsewhere described the Claimant in glowing terms.

113. We have no hesitation in finding that the only reason why Darren Bold used the word spurious and raised the possibility of disciplinary action was because he had concluded that the allegation of a physical assault was false. The fact that the Claimant had made protected disclosures had nothing to do with it.

114. The second part of this allegation is the failure to secure on off site role. We accept that the Claimant did not want to work on site. We are not satisfied that he had any good reason for that other than his personal wishes. We struggle to see how he can say that he was subjected to a detriment in this respect. However, on the assumption that he was we shall go on to consider the reason for that decision.

115. We heard evidence as to why the Claimant was not found an off-site role both from Lydia David and Mags Farley. They have explained that they found no suitable vacancy. In Lydia David's letter of 2 October 2018, she sets out the reasons why no role would be found. The question for us is not whether those reasons were sound but whether the reason for not securing a role was influenced by the fact that protected disclosures had been made. That said if there were sound reasons that might support the suggestion that they were the true reasons.

116. We have examined the reasons put forward in the letter of 2 October 2018 with care. That letter included a list of vacancies that had been considered. The Claimant agreed in cross examination that he had not suggested at the time that any of the vacancies were suitable. During the hearing, the Claimant did not point to any particular vacancy and suggest that it was suitable.

117. The Claimant had proposed that he carried out non-clinical work for Theatres off site. In her letter Lydia David explains that that could not be done without some attendance at the Homerton site and that he would need to have some contact with her as his line manager. She considered that taking patient records off site would have data protection ramifications. We consider that her reasons for rejecting this proposal were rational.

118. Ultimately, we are entirely satisfied that the reason that the Claimant was not offered work off site was that it was genuinely believed that there was no suitable vacancy and that creating a role for the Claimant was impractical. Those were the only reasons for the decision and it had nothing whatsoever to do with the fact that protected disclosures had been made.

Equality Act Claims – general

The Statutory Code of Practice

119. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before Parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *"The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings."*

The burden and standard of proof – discrimination cases

120. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

121. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> "*136 Burden of proof*
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

122. Accordingly, where a Claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ. 1648** Lord Justice Underhill reviewed the case law and said:

> *"17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ. 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ. 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ. 1913, [2018] ICR 748, and Madarassy remains authoritative.*
>
> *18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> > *'(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
> >
> > > *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
> > >
> > > *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

> *(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:*
>
> > *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*
>
> *He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.*'

123. Inferences can only be drawn from established facts and cannot be drawn speculatively or based on a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

124. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference in treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances, it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ. 1279** per Sedley LJ at para 19.

125. Where there are several allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be considered in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

126. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ. 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said:

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*

127. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the

claim. We shall indicate below where we consider that it is open to us to follow this approach.

128. The 'shifting burden' provisions apply to all claims under the Equality Act 2010. Guidance as to their application in reasonable adjustments case has been given in Project ***Management Institute v Latif*** **2007 IRLR 579, EAT**. which was dealing with the position under the Disability Discrimination Act 1995 but has been held to be of equal application under the Equality Act 2010. Elias J (as he was) said:

> *50 In this connection Ms Clement relies upon para. 4.43 of the Disability Rights Commission's code of practice: Employment and Occupation which provides as follows:*
>
> *'To prove an allegation that there has been a failure to comply with the duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty had arisen, and that it had been breached. If the employee does this the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard.'*
>
> *This certainly implies that something more than the two conditions of an arrangement resulting in a substantial disadvantage is required before the burden shifts……*
>
> *53 We agree with Ms Clement. It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.*
>
> *54 In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*
>
> *55 We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.'*

Disability – the statutory test

129. The test that must be applied in determining whether a person has a disability for the purposes of the Equality Act 2010 is that set out in Section 6(1) of that Act. That says:

> *(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

130. Section 6(5) of the Equality Act 2010 provides that:

> *(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

131. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) of the Equality Act 2010. Para 12 of Schedule 1 of the Equality Act 2010 provides that a tribunal must take account of that guidance where they consider it to be relevant.

132. Further guidance as to the proper approach to the test in sub-section 6(1) is given in the statutory code of practice published by the Equality and Human Rights Commission and an employment tribunal is obliged to have regard to that guidance. The guidance is found in Appendix 1.

133. The question whether a person has an impairment is to be addressed using a functional test rather than a medical test. The EHRC Employment Code says at paragraph 7 of appendix 1 that:

> *'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause'.*

134. Stress and upset are not themselves impairments but may lead to other conditions such as depression which might give rise to an impairment. In ***J v DLA Piper UK*** **[2010] ICR 1052** Underhill P (as he was) said:

> *"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning*

of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or -if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."

135. The distinction between an adverse reaction to life events and an impairment was further considered in ***Herry v Dudley Metropolitan Council*** **2017 ICR 610, EAT** where HHJ Richardson said:

"56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

136. The meaning of the word 'substantial' in sub-section 6(1) of the Equality Act 2010 is defined in Section 212 and means 'more than minor or trivial'.

137. Paragraphs 9 and 10 of the EHRC Employment Code give guidance on how to assess whether an impairment is substantial and read as follows:

> "9. *Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.*
>
> *10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a* sustained period of time."

138. It is not an essential requirement that a tribunal has expert medical evidence of any impairment (or of how long that might last) but in the absence of such evidence there may be insufficient material to conclude that a person has a disability for the purposes of the Equality Act 2010. That is particularly the case where there is said to be a mental impairment. In ***Royal Bank of Scotland plc v Morris*** **EAT0436/10** Underhill P (as he was) said:

> *"The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). (We should acknowledge that at the time that Morgan was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P's observations were specifically related to that point.)"*

139. Where a person is having treatment for any impairment Paragraph 5 of Schedule 1 to the Equality Act 2010, so far as material, provides that:

> *"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:*
>
> *(a) measures are being taken to correct it, and*
>
> *(b) but for that, it would be likely to have that effect.*
>
> *(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."*

140. 'Likely' in this context has been held to mean 'could well happen' see ***Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)*** **2009 ICR 1056, HL**. Any finding of such a deduced effect must be supported by evidence. However, in ***J v DLA Piper*** UK LLP it was said:

'there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped'

141. There is no longer a statutory definition of 'normal day to day activities' but guidance is given in the EHCR Employment Code where, at paras 14 and 15 of appendix 1, it is said:

What are 'normal day-to-day activities'?

14. They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

15. Day-to-day activities thus include – but are not limited to –activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day-to-day activities also encompass the activities which are relevant to working life.

142. The meaning of 'long term' is set out in para 2(1) of Schedule 1 to the Equality Act 2010. The effect of an impairment is long term if it:

142.1. Has lasted for at least 12 months

142.2. Is likely to last for at least 12 months, or

142.3. Is likely to last for the rest of the life of the person affected.

143. The meaning of the work 'likely to last' means that 'it could well happen' **see *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)* 2009 ICR 1056, HL**. The relevant time for assessing whether a person has a disability is the time of the alleged discriminatory act – see ***Cruickshank v VAW Motorcast Ltd* 2002 ICR 729, EAT.** That includes satisfying the long-term condition and in making that assessment of whether a condition is likely to last 12 months a tribunal must not rely on the benefit of hindsight but may only rely upon the state of affairs at the time.

144. Paragraph 2(2) of Schedule 1 of the Equality Act 2010 provides for recurring conditions. It says:

> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur*

145. Likely in the context of a recurring condition means that 'it could well happen'. For there to be a recurrence it must be the same condition and not two distinct periods of ill health. The Guidance gives the following examples which explain the distinction:

> *A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).*
>
> *In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long-term requirement.*

146. The burden of proof is at all times upon the Claimant to establish that the statutory definition is met ***Joseph v Brighton & Sussex Hospitals NHS Trust*** **UKEAT/0001/15**

The legal framework – reasonable adjustments

147. Paragraph 6.2 of the Code of Practice describes the duty to make reasonable adjustments as follows:

> *The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.*

148. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

149. The material parts of Section 20 of the Equality Act read as follows:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)…..

150. The phrase 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

151. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

152. The proper approach to a reasonable adjustments claim remains that suggested in ***Environment Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

a) The provision, criterion or practice applied by or on behalf of the employer; or

(b) The physical feature of premises occupied by the employer;

(c) The identity of non-disabled comparators (where appropriate); and

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

153. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see ***Nottingham City Transport v Harvey*** **UKEAT/0032/12JOJ**. This might

be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

154. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

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

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

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

155. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT**.

156. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

Lack of knowledge of disability, etc.

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b)in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

157. In ***Gallop v Newport City Council*** **[2014] IRLR 211,** the Court of Appeal explained that what is required for knowledge of a disability is actual or constructive knowledge of the facts that allow the employee to satisfy the definition of disability. In ***Donelien v Liberata UK Ltd*** **[2018] EWCA Civ 129** it was emphasised that this means each element of the statutory definition i.e. that there is an impairment that has a substantial and long-term effect on the ability to carry out day to day activities. If the employer is unaware (or ought not to be aware) of one of those elements then they will not be fixed with the requisite knowledge. The employer must decide for itself if the employee is disabled and cannot simply rubber stamp the conclusions of any occupational health advisor although it may take those opinions into account.

Did the Claimant meet the statutory definition of disability if so when?

158. In this section, we refer to the medical records disclosed by the Claimant together with a statement made by him in accordance with the case management orders of EJ Russell. We have made further findings of fact in relation to that evidence.

159. An issue arose during the hearing when the Claimant referred to GP records found in his bundle which differed from those in the bundle prepared by the Respondent. In the respondent's bundle the GP records ran to 7 pages whereas in the Claimant's bundle there were 2 additional pages covering the period from January to May 2018. The Claimant has alleged that these were deliberately omitted from the bundle. The Respondent says that they were never disclosed. There was no objection to us seeing them and we gave the Respondent time to consider them. Both parties sent correspondence after the hearing re-asserting their positions. We saw no

evidence that would suggest that there had been any deliberate omission from the Respondent's bundle and do not find that there was any basis for making that allegation.

160. The Claimant's GP records show that on 19 August 2014 he attended the surgery complaining of a low mood over the past 2 years. He was prescribed 20mg of Citalopram daily. The Claimant's statement repeats those facts and adds that he had a course of CBT which had good therapeutic effect. He says that he has remained on an anti-depressant from this time. He says nothing about the period between then and the events of February 2016 other than asserting that without the treatment he had received he would not have been able to maintain the activities of daily living. There is no entry in the Claimant's GP records referring to depression directly between 19 August 2014 and January 2018 when the records refer to 'stress at work'. That said we note that the Claimant's GP records on several occasions in this period refer to a 'medication review'. This is consistent with the Claimant's account that he was prescribed anti-depressants throughout this period. In addition, the Claimant is recorded as having told Afua Baffour on 15 March 2016 that he was taking medication 'to good effect'. We conclude that during this period the Claimant was taking anti-depressants and that any symptoms were under control. Other than the Claimant's assertion there is little evidence from which we could assess the deduced effect on the Claimant if we disregarded his treatment.

161. On 21 April 2016, the Claimant had a further consultation with Afua Baffour. We have set out the material parts of the report that was produced on that date above. We note that the Claimant required a new antidepressant. It is recorded that he was seeing his GP weekly. It seems that the Claimant has not obtained the relevant GP records as the records do not substantiate what the Claimant has told us. We do not understand why the Claimant was able to include one page from 2014 and then entries from late 2016. However, we are clear that in early 2016 the Claimant had a downturn in his condition that required additional medical intervention.

162. As recorded above the Claimant had further absences from work. In late 2016 he had a muscular skeletal condition and this led to a period when he was unable to work through the knock-on effects on his mental health. Again, we do not have any GP records for that period. That said we are prepared to accept the Claimant's account of this.

163. We have a more complete following the events of 15 December 2017. In the early months of 2018, the Claimant 's GP records show that he had reported that he was suffering from 'stress at work'. The entries refer to symptoms such as anxiety and sleeplessness and by March 2018 his medication is increased. The medication is increased on two further occasions. By August 2018, the GP records show that the Claimant wished to reduce his use of antidepressants. He did not do so before he resigned.

164. We have not found it easy to decide whether the Claimant met the statutory definition of disability. He as not assisted himself as much as he perhaps could have. In particular his 'Personal Statement' does not tell us a great deal about his impairment but focusses on his criticism of the Respondent.

165. We consider it important that the Claimant's GP thought it appropriate to prescribe and maintain a regime of anti-depressants from 2014 onwards. The Claimant has given no evidence to suggest that he had any difficulties with day to day activities between August 2014 and the events of 2016 when he had a period of absence from work following the first significant disagreement with Philip White. As such in order to show he was disabled by the time of those events the Claimant would need to persuade us that if we disregarded his treatment his ability to carry out day to day tasks would be substantially affected.

166. We are persuaded, if only just, that it is more likely than not that had the Claimant not been treated with anti-depressants his abilities to cope with ordinary day to day activities would have been affected in a way that was more than trivial during the period from August 2014 to March 2016. Our reasons are as follows. Whilst having no doubt that on some occasions anti-depressants might be prescribed fairly readily but it is very unlikely that the Claimant's GP would recommend and prescribe such medication over such a long period unless they thought it necessary to control the symptoms of depression. When the Claimant presented to his GP in 2014 his PHQ-9 score was 22/27 suggesting severe depression.

167. We note that when the Claimant's symptoms increased in 2016 he is recorded as sleeping only 4 hours a night. This was despite the anti-depressants. We find that symptoms of insomnia that severe would certainly impact on the ability to do day to day activities. We have in mind particularly the ability to concentrate but accept the Claimant's assertion that without antidepressants his ability to function emotionally and psychologically. We infer that up to that point the anti-depressants were mitigating such symptoms. From these facts we infer that had the Claimant not been prescribed anti-depressants his abilities to do normal day to day activities would have been substantially affected.

168. The Claimant's impairment met the 'long term condition by 19 August 2015 one year after his condition first arose. At that point he met the statutory definition of a disabled person.

169. If we are wrong to find that the deduced effect of the impairment persisted from 2014 onwards. Then we would go on to consider whether the period of absence from work in 2016 was a recurrence of the impairment that first surfaced in 2014. In the case of each episode we are satisfied that the depression was sufficiently severe that it would have substantially interfered with the Claimant's ability to do normal day to day activities.

170. We are equally satisfied that if we look only at the two 'flare ups' they are a recurring condition. Our principle reason for doing so is the fact that the treatment for this condition was continuous. Accordingly, even if we are wrong to assume that without medication the condition had sufficiently improved between August 2014 and March 2016 such that it would not have had the substantial effect required we are satisfied that paragraph 2(2) of Schedule 1 of the Equality Act 2010 deems it to have had a continuous effect.

171. For the same reasons we are satisfied that the final period of ill health in 2018 was sufficiently severe that it would have interfered with normal day to day activities. Secondly that it was the same underlying condition which had recurred.

172. For these reasons we are satisfied that the Claimant met the statutory definition of disability at all material times.

Reasonable adjustment – Discussion and Conclusions

173. The agreed list of issues sets out 4 alleged PCPs said to have been applied to the Claimant. We shall deal with each in turn dealing with the issue of knowledge individually in respect of each, if it arises.

'Failing to act upon EHMS/Occupational Health Recommendations'

174. The Claimant needs to show that there was a 'Provision', 'Criterion' or 'Practice' of not following the recommendations of the OH advisors. He has certainly not shown that there was a provision or criterion to that effect. We do not accept that there was a practice of not following recommendations either. A practice must entail a degree of repetition whether actual or hypothetical. The Claimant says that the OH recommendations were not followed in his case but has not advanced any evidence to show that the same would happen to others. Having regard to the guidance in ***Nottingham City Transport v Harvey*** we accept the argument put forward by Ms Criddle that what the Claimant is complaining about is what happened only to him on a one-off occasion and even if he can establish that there was a failure to follow recommendations that by itself is not a 'PCP'.

175. We recognise that there might have been other ways that the Claimant could have put his case on reasonable adjustments in relation to the events of 2016 but it is not for the Tribunal to look for the best case for him.

176. Had we considered that the Claimant had properly identified a PCP we would have needed to ask whether a policy of not following OH reports put people with the Claimant's impairment at a substantive disadvantage in comparison with others without that disability. We are not satisfied that the Claimant has demonstrated that. A person who was returning from a period of ill health without a disability where there had been an occupational health report with recommendations would be placed at the same disadvantage if those recommendations were ignored. Had we got that far the claim would have failed for that reason.

177. Finally, the reasonable adjustments proposed by the Claimant are that the OH recommendations were acted upon. In respect of a phased return to duties they were acted upon. The Claimant suggests that there was no 'structured interview' or 'stress risk assessment'. Assuming the Claimant to be right, the difficulty he faces is that neither of those steps by themselves alleviate any disadvantage that he has identified. They are preliminary steps to gather information. They are not adjustments in themselves. Applying the reasoning in ***Tarbuck*** this aspect of the claim cannot succeed.

178. Has we needed to consider the matter we would have found that there was no failure to follow the spirit of the recommendations of the OH report. There was an in-depth interview with the Claimant where the issues said to cause him stress were discussed. We do not consider that there is any magic to a stress risk assessment or any particular form it should take. What is necessary is to identify the source of stress

and take reasonable steps to address it. Taking reasonable steps is not the same as eliminating all stressors. Had the Claimant identified any particular stressors that affected him disproportionately because of his disability then we would have examined that carefully. He did not and again it is not for us to seek out a case for him.

179. For these reasons this allegation fails. We do not need to address the point made by the Respondent that the claim was presented outside the statutory time limits or the question of knowledge.

'Failing to deal with the Claimant's grievances in an adequate or timely manner'

180. We consider that there are two separate parts to this allegation. Where the Claimant refers to 'adequacy' it appears that he is referring to the quality of the investigation. That is distinct from his allegations of delay.

181. We have some concerns about the way this PCP is described. It presupposes that there has been a 'failure'. We rely on our findings above but to make the position clear we make the following findings:

181.1. He Claimant's initial Grievance was limited to his allegations against Phillip White in relation to the incident on 15 December 2017. He raised that grievance formally on 3 February 2018. On the same day Darren Bold was appointed to hear that grievance.

181.2. On 2 March 2016, Darren Bold Met with the Claimant to discuss his grievance.

181.3. On 7 March 2016, the Claimant indicated that he wanted to bring two further grievances one further grievance against Philip White and a more general complaint in relation to the Department.

181.4. It was the Claimant who indicated that his grievances should be considered under separate processes.

181.5. That the Claimant's additional grievances were more wide ranging and complex than his initial complaint.

181.6. Agreed terms of reference for the expanded grievances against Phillip White were sent to Darren Bold on 19 April 2018.

181.7. Terms of reference for the grievance under the whistleblowing procedure are agreed and sent out on 9 May 2018.

181.8. There was a brief delay in dealing with the grievances against Philip White due to him insisting, before relenting, that the assault issue be dealt with first.

181.9. Darren Bold prepared a comprehensive report by 2 July 2018 and the outcome is delivered formally to the Claimant on 27 July 2018.

181.10. We consider that the investigation into the allegations against Phillip White was thorough. A number of individuals were spoken to and that took some time. We have not identified any failings in the investigation process.

181.11. In his appeal against the dismissal of his grievances against Phillip White the Claimant principally argues that his version of events should have been preferred.

181.12. The appeal process in respect of the first grievance is completed by 2 October 2018.

181.13. The whistleblowing investigation is completed by 10 October 2018.

181.14. We find that investigations that were conducted were carried out in good faith. There was delay in the process but that was principally because the nature and scope of the grievances expanded considerably.

181.15. It was entirely reasonable to split the personal grievances from the organisational complaints. It is very clear from the depth and detail into which both investigations went that the allegations were taken seriously.

182. It follows from our findings that we do not think there was any failure to deal with the Claimant's grievances adequately. A process is not inadequate just because it does not give the outcome that the Claimant wanted.

183. We agree that he processes took some time. That said they were thorough and robust. We would not use the expression 'failure'. We conclude that in the circumstances the grievances were dealt with in a reasonable time.

184. These findings may not be enough to dispose of this aspect of the Claimant's case. Our findings that the process and outcome were fair and reasonable does not necessarily mean that the Claimant was not placed at a substantial disadvantage. A disabled person might be disadvantaged by a perfectly proper process.

185. If we are prepared to assume in the Claimant's favour that because of his anxiety flowing from his disability he was particularly disadvantaged by the process or the time it took the question is whether the Respondent should have made adjustments to that process.

186. The allegation of assault against Phillip White was very serious indeed. It could have been career ending if found true. The complaints in respect of the department were also very serious. Amongst then was the Claimant's contention that an operating theatre was unsafe. Both sets of allegations merited a full and proper investigation.

187. It would not have been a reasonable step to expect the investigators to agree with the Claimant in order to alleviate his anxiety. Neither do we find would it have been reasonable to have expedited the process in all the circumstances of the case. There was delay but it was not inordinate. In assessing what was reasonable we have

considered the fact that those involved in the Claimant's grievance had a primary responsibility to operate a hospital. Managing a grievance process is often and was in this case an additional administrative burden.

188. For the reasons set out above we do not consider that there was any failure to make reasonable adjustments to the grievance processes or outcomes.

'A requirement to submit complaints formally in order [for them]to be addressed'

189. It was not easy to understand the Claimant's case in this respect. However, it seems that he is saying that he was asked to make it clear in writing what his complaints were before any formal process was started. It is correct that the Claimant did raise his initial complaint to HR who did not initially treat it as a grievance and that he raised further complaints with Mags Farley and Lydia Davis neither of whom acted upon them until it was made clear by the Claimant that he was bringing a grievance.

190. We would accept that there was a both a policy and a practice of requiring any grievance to be submitted formally before any formal process would commence. As such we find that the Claimant has established a PCP. That said we find that there was no practice of policy that meant that an employee could not raise informal concerns. We have identified above a number of instances where concerns raised informally were acted upon.

191. The next issue we need to consider is whether the Claimant was placed at a substantial disadvantage by any requirement to institute a formal grievance compared to a person without his disability. There was no evidence that the Claimant was placed at any disadvantage at all. His disability did not stop or hinder him in any way from setting out his concerns formally. He produced numerous long documents that set out his concerns.

192. The Claimant has failed to show that the PCP placed him at any disadvantage whether compared to another person or not. As such this aspect of the Claimant's claim cannot succeed.

'Requiring the Claimant to work in an onsite role'

193. The report from Occupational Health dated 15 February 2018 first suggested the Claimant was offered a non-clinical role where he would not have any interaction with Philip White either on or off site. At the time the Claimant was unfit to return to work in any event. The Claimant was seen again on 5 April 2018 and there was, for the first time during that period of absence, a suggestion that he could return to work. There was no suggestion that the Claimant could not work on the Homerton site.

194. On 8 April 2018, Mags Farley wrote to the Claimant in the following terms:

> *'In relation to your return to work, I have managed to source a position for you which hopefully will enable you to come back but will not involve direct contact with the Operative Services Management. We are able to give you some work within the Patient, Safety and Quality Team and you will be working closely with the PQSMs for each division and assisting them with a range of governance*

tasks……let me know when you are able to come back to work and I can make the necessary arrangements'

195. The Claimant first raised the possibility of an off-site role on 24 April 2018. In her response Mags Farley told the Claimant that the desk space she had found was in Brooksby House and that he was very unlikely to come into contact with his previous team. We had evidence about the distance between the two departments and are satisfied that Mags Farley was correct that the chances of the Claimant running into his previous management team were minimal. In an Occupational Health Report dated 17 May 2018 it was suggested that it might be worth discussing an off-site role.

196. On 30 May 2018, the Claimant indicated that he would return to work on 16 June 2018. He was asked if he meant the Brooksby House role and he indicated that that was his intention. On 15 June 2018 the Claimant indicated that he would not attend work on site. In September Lydia David attempted to find a role that was off site but was unable to do so.

197. We are satisfied that the Respondent required the Claimant to work at the Homerton site. As such he has established that there was a criterion or practice that was applied.

198. We do not accept that the Claimant was placed at any substantial disadvantage by the requirement that he undertake a role at Brooksby House. That role was ideal in all respects. It was work that the Claimant was capable of doing. It was situated a significant distance from the Operative Department. The prospects of meeting Phillip White or anybody else involved in the grievance were remote. The Claimant could have had no rational objection to doing that job. We accept that that is not an answer to the Claimant's case and that he may say that whether rational or not his disability meant that it was substantially harder for him to comply with this requirement. This is exactly the sort of issue where we would have been assisted by medical evidence. Here there was none. We do not take the suggestion in the OH report that an off-site role might be discussed as being a positive statement that the Claimant's disability meant that he would be disadvantaged by working on site. It reads more like a pragmatic proposal than a medical opinion. We are simply not in any position to decide that the Claimant's disability was the cause of him not being willing or able to work at Brooksby House. We accept that it is a possibility but not the only one. At this point the Claimant was seeking to engage the Respondent in a protected conversation and later intimated the present proceedings. His decision not to take up a perfectly reasonable offer of work may have been tactical he may simply have chosen not to take up the offer for his own reasons. In short without medical or other sound evidence to show that it was the Claimant's disability that gave rise to a substantial disadvantage in taking up the role we are not prepared to infer that this was the case.

199. If we are wrong and on the evidence, we should have concluded that the Claimant was placed at a substantial disadvantage we turn to the question of whether the Respondent knew or ought to have known that was the case. We do find that at this stage the Respondent ought to have known that the Claimant had a disability we do not find that he Respondent knew or ought to have known that the Claimant was placed at a substantial disadvantage by the requirement to work on site. Even before us the Claimant has not provided sufficient evidence that was the case.

200. Again, if we are wrong about that we turn to the question of what it was reasonable for the Respondent to do. We accept the evidence of the Respondent that it did look for a suitable off-site role but here simply was not one available. We accept that would not have been feasible to permit the Claimant to undertake any role from home for the reasons set out by Lydia David in her letter to the Claimant sent on 2 October 2018. In short, the Respondent did all that was reasonable to facilitate a return to work.

201. For the reasons set out above we do not consider there was any failure to make reasonable adjustments to the PCPs identified by the Claimant.

Employment Judge Crosfill
Date: 23 March 2020