THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBER:	**Ms J Jerram**

BETWEEN:

A

Claimant

and

B

Respondent

ON:	**6 - 21 January & 18-20 March 2020, 23-27 March and 14-16 September 2020 in chambers**

Appearances:

For the Claimant:	**In person, assisted by Mr C**
For the Respondent:	**Ms S Keogh, Counsel: 6-21 January 2020**
	Mr J Mitchell, Counsel: 18-20 March 2020

RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant is owed unpaid wages in the sum of £1,472.40 and 1 day's wages in respect of her notice period. Both are payable forthwith if not already paid.

2. The failure of the respondent to provide timed agendas for return to work and formal hearings was indirect disability discrimination and a breach of the duty to make reasonable adjustments.

3. All other claims fail and are dismissed.

4. A remedy hearing will be listed in due course if the parties are unable to resolve the issue between themselves.

REASONS

Claims

1. In this matter the claimant complains that she was unfairly and wrongfully dismissed and was the subject of various types of disability discrimination, harassment and victimisation. She also claimed holiday pay and arrears of pay. The claimant conceded the holiday pay claim during the course of the hearing and agreement was reached between the parties in respect of the unpaid wages as reflected above. The respondent also conceded that 1 day's notice pay should have been paid to the claimant.

Composition of the Tribunal

2. On days 1-5 of the Hearing, a full Tribunal panel including Member Spry-Shute presided. Very unfortunately Mr Spry-Shute was taken ill over the weekend of 11 & 12 January 2020 and was unable to participate in the Hearing thereafter. With the agreement of the parties obtained during two telephone case management hearings on 13 January 2020 and the various possible scenarios being fully discussed, the Hearing proceeded with a two-person panel in accordance with section 4 of the Employment Tribunals Act 1996. Regrettably this development meant that we effectively lost day 6, making an already tight timetable for the conduct of the Hearing even tighter resulting in the matter having to go part heard.

Issues

3. Although the parties were unable to agree a list of issues, we had before us a list prepared by the respondent annotated by the claimant from which it was agreed on day 1 that we would work. Very unsatisfactorily it became apparent on day 5 and again on day 6, that that version did not in fact fully reflect the position. Following full discussion with the parties on the morning of day 6, it became clear that the claimant says her claim also properly includes claims of indirect disability discrimination and breaches of the duty to make reasonable adjustments in respect of the period September 2016 to July 2017. The respondent disputes that those claims are in scope. Further it has conceded the fact of disability, knowledge of condition - but not knowledge of the extent of condition - only for the period from July 2017 onwards. In the interests of finding a proportionate way forward I ordered that the Hearing would proceed on the basis of the list of issues as then drafted (appended to this Judgment) and if the claimant wishes to pursue possible additional claims in respect of the period September 2016 to July 2017, we will go on to consider whether that is appropriate thereafter.

4. The list of issues is long and complex. The evidence even more so (see below). It is helpful to describe in summary the parties' respective positions.

5. The claimant's case is that she was the subject of bullying and harassment by a colleague in 2015 and she complained to her line manager, Ms D, about that treatment in March 2016. Because Ms D was a friend of that colleague,

she and her line manager, Ms E, did not properly investigate the claimant's complaint and rather alleged that she was the problem. This alleged managerial negligence caused the claimant to suffer stress, anxiety and depression which by September 2016 had become a disability. One consequence of the claimant's disability was an extreme attention to detail and at times very lengthy written communication - a cathartic response to psychiatric distress. Because of that disability and prejudicial and discriminatory assumptions about her (relying upon the absence of such treatment to nondisabled employees by way of comparison) the respondent - overseen and directed by its divisional HR manager, Ms F - conducted a campaign of mistreatment against the claimant culminating in a plan to remove her from her employment and replace her with another friend of Ms D. To achieve that end she was referred, in deliberately inaccurate terms, to occupational health (OH) in July 2017 with the aim of engineering the claimant's dismissal. The respondent then took the opportunity of a letter the claimant wrote in August 2017 asking for help in managing work relationships, to unfairly dismiss her due to an irretrievable breakdown in those relationships.

6. The respondent's case is that all complaints and grievances raised by the claimant were properly and appropriately dealt with. There was no campaign against her and she was offered appropriate support and adjustments. Relationships within the team deteriorated to the extent that they impacted on the health and well-being of both the claimant and her colleagues and presented a risk to patient care (because of ineffective team working rather than the claimant personally presenting any risk). Accordingly and ultimately, having explored all appropriate possible alternatives, the claimant was fairly dismissed for some other substantial reason.

Preliminary & Procedural Matters

7. At the outset of the Hearing the claimant referred to her outstanding application for a reconsideration of my order dated 17 September 2019 refusing an application for a stay. The reconsideration application had not been put on the Tribunal file and had therefore not been previously referred to me. I therefore considered the medical evidence that the claimant had sent with her application and heard submissions from the parties. Having considered the application and discussed it with my members (but noting that it was my decision) I refused the application for the reasons given orally to the parties.

8. The stay having been refused, the claimant was very anxious that the matter would conclude within the 12 days listed due to its impact on her health. We discussed and agreed a timetable, and I assured the claimant that whilst I could give no guarantees, I would do what I could to ensure that the Hearing would be completed - at the very least to the conclusion of evidence - within the listed time. In the event, that was not possible due to a combination of certain evidence taking longer than anticipated and witness availability but principally due to the parties being unable to satisfactorily work together to resolve the many interim issues that arose between them. As a result time

was lost on almost every day of the Hearing dealing with 'housekeeping' matters, sometimes significant amounts of time. In particular the afternoon of day 8 had to be used for the claimant to complete the exercise of cross-referencing documentation that she believed had not been included within the bundles. The respondent was very obliging in providing copies to the claimant of her own significant disclosure and working with her on that afternoon to help complete the exercise. The claimant was then able to complete (mostly) the page references in her witness statement in good time before giving her own oral evidence. (This exercise could not be done outside of sitting time due to the claimant's health issues.)

9. At the request of the claimant and following discussion with the parties, a rule 50 restricted reporting order was made for the reasons given orally to the parties.

10. We also had a detailed discussion regarding adjustments that could be made to the conduct of the Hearing to ensure that the claimant could properly engage with it given her disability and her clear distress at having to deal with the issues raised in her claim. Accordingly and with the parties' agreement:
    a. we ensured frequent breaks and encouraged the claimant to ask for further breaks as required;
    b. when possible agreed a daily timetable as well as an overall timetable;
    c. we heard the respondent's evidence first rearranging the evidence of certain witnesses that the claimant would find particularly distressing to question to times when she had support available to her from family members and took the claimant's evidence out of order to minimise distress to her;
    d. we specifically discussed and agreed how Ms D and Ms E would be questioned as the claimant felt unable to question them herself. I gave her the option of either her partner, Mr C, or me asking her questions for her. I explained that if it was me I would simply put the questions to the witnesses and would ask no follow up questions on her behalf. Having considered it overnight, the claimant decided that Mr C would deal. She also later asked that he put her questions to Ms F as well which was agreed. On the occasions that Mr C did ask her questions, the claimant was present and fully participated by prompting/guiding him;
    e. the respondent agreed to limit the number of witnesses that would be present during the Hearing to those who were giving evidence, or about to, or were necessary for giving instructions. Ms F was the only employee of the respondent who was present in the Tribunal room throughout the Hearing; and
    f. in the second week started at 9.30 am as the claimant appeared to be struggling particularly in the afternoons. In the event this did not prove helpful as we ended up simply with overall longer days and we therefore reverted to starting at 10 am but finishing as early as possible. The latest finish we had was 4.30 pm on days 10 and 13.

11. In addition, when the claimant was cross-examining the respondent's witnesses I intervened more than would be usual to guide her as to the appropriateness of her questions, how to use her time to best effect and, on occasion, to help formulate and put questions on her behalf. This was all done within the context of her disability and with the aim of both levelling the playing field between the parties and reducing the obvious distress certain topics caused her.

12. Notwithstanding all these issues and the claimant's disability, she was clearly able - albeit recognising the enormous effort on her part - to fully engage in the Hearing. She was articulate and able to construct her questions and put her case (at times with assistance as described above). She had an extremely good grasp of the detail and was able to refer to it including the many pages of documents (from which she worked electronically). She had the support of both her partner and parents at various stages of the Hearing; she did not attend alone on any day. We were satisfied that the claimant was not materially disadvantaged by her health issues in the conduct of her case.

13. On 6 March 2020 the respondent notified the Tribunal that they may need to make an application for a postponement of the balance of the Hearing as Miss Keogh was unwell. Mr C on behalf of the claimant strongly objected to this possibility (whilst regretting that Miss Keogh was unwell) as any further delay would result in an inordinate and unacceptable amount of further stress and anxiety for her as well as the wasted costs she would incur having already booked travel and accommodation. On my instruction the respondent was notified that if Miss Keogh was indeed unavailable for the Hearing then it would be reasonable for the respondent to instruct another representative given the limited scope of the evidence left to hear and the detailed involvement of their solicitors to date. Accordingly the Hearing did go ahead as planned with Mr Mitchell representing the respondent. In light of the absence of Miss Keogh however, he was given extra time to formulate any re-examination of his witnesses that was required and adjustments were made to the provision of submissions as described below.

14. A feature of this case was the voluminous documentation put before the Tribunal - 16 files which when multiplied by the number of sets required for the Hearing resulted in an unacceptable level of use of resource and cost not to mention logistical difficulties in managing the files in the Tribunal room. It was clear that agreement could not be reached between the parties as to documents generally and there was significant distrust by claimant of the respondent's handling of discovery together the allegations of document tampering. Consequently there was still a lack of clarity regarding bundles on day one and I urged the parties to use the time whilst the Tribunal were reading to resolve those issues as far as possible. This was only partly successful and there were still relevant documents being introduced - by the respondent - as late as days 7 & 8.

15. The claimant - partly in relation to documents and but also on other matters - has made very serious allegations against the respondent's legal

representatives amounting to professional misconduct. This Tribunal has not considered those allegations in detail but we have certainly seen nothing that suggests to us that they are warranted. Any difficulties regarding disclosure and preparation of bundles - even where the respondent could perhaps have done better - did not go beyond typical difficulties in a case of this nature.

16. At the eventual conclusion of the Hearing a provisional remedy hearing was listed for October 2020. Given our Judgment a remedy hearing is now required (unless the parties can agree remedy between themselves) but unfortunately despite significant effort and the panel having met in chamber sin both March and September, it was not possible to finalise this lengthy Judgment in time for that to proceed and it had to be relisted.

Evidence

17. We heard oral evidence from the claimant and for the respondent from:
    a. Ms G, Director of Quality, Governance & Compliance
    b. Mr H, Divisional General Manager
    c. Ms F, Divisional HR Manager;
    d. Ms J, Divisional Director of Operations;
    e. Dr K, Divisional Chair;
    f. Mr L, formerly Associate Director of Children's Services;
    g. Mr M, Chief Pharmacist;
    h. Ms N, formerly Divisional Director of Nursing & Governance;
    i. Ms D, Principal Physiotherapist;
    j. Ms P, General Manager for Women's Services;
    k. Ms E, Principal Physiotherapist;
    l. Ms Q, formerly Chief Therapist; and
    m. Mr R, formerly Divisional Director for Community Services.

18. Because of the impact of the coronavirus and with the agreement of both parties, the first part of Mr L's evidence was heard by telephone on day 13 of the Hearing. His period of self-isolation had ended by the time we heard the remainder of his evidence in person on day 15. Early on the morning of day 14 the claimant made an application for costs against the respondent further to the circumstances of Mr L's evidence and what the claimant considered to be deliberate misleading of the Tribunal by Mr L as to the circumstances of his self-isolation. I did not want proceedings to be delayed further at that stage and therefore ordered that that application will be dealt with on conclusion of the matter (if it is then pursued).

19. The evidence in this case - both written and oral - was extremely detailed. This was compounded by the claimant's extremely detailed communication style - both orally and in writing. She is persistent in both making and repeating her points. She had a genuine and strongly felt sense of injustice. This undoubtedly lengthened the Hearing considerably and, at times, made it harder to identify both her core and her good points. This in turn led to a much lengthier deliberation process and Judgment.

20. Given the at times very stark contrast in the evidence given by the claimant and that of the respondent's witnesses, it is necessary to comment on the witnesses' credibility. It follows from the claimant's central argument that she says some of the respondent's witnesses were untruthful in their evidence and points to occasions when some were factually incorrect in their account of events. Whilst we agree that that did happen at times, we do not conclude those examples supports her argument. Rather, we formed the view that when witnesses recalled events inaccurately that was a product of normal lapses of memory due to the passage of time and nothing more sinister. We have not always found that documents produced by some respondent witnesses were produced either on the date that appears on them or when their evidence was they were produced (e.g. Ms D's note dated 11 May 2016). In coming to those findings, however, we again are not of the view that this shows a deliberate attempt to be untruthful at the time or to mislead the Tribunal. The respondent's witnesses were doing their best to accurately record matters at the time and to give truthful and full answers.

21. We also find that the claimant was doing likewise in that we do not form the view that she ever set out to deliberately mislead the Tribunal or be untruthful. However, there were several examples of where her - genuine - recollection or interpretation of events was simply not credible or reasonable. We have highlighted these in our findings of fact below.

22. The claimant also sought to establish that the properties of the electronic versions of certain of the documents relied upon by the respondent showed they were not written when claimed but much later. Although we have had regard to this argument in making our findings of fact, we found the evidence of the authors, the surrounding context and on occasion the content of the documents themselves to be more helpful in assessing their true date. Electronic properties are not in isolation sufficiently reliable or determinative.

23. A specific issue arose regarding the accuracy or not of Ms D's various documents headed 'personal reflection'. The respondent's position (though Ms D did not personally confirm this in her evidence) was that her usual practice is to keep all her personal reflections in one core electronic document and that she cut and pasted some of those into separate documents as they were needed. The claimant did not accept this explanation as she made the good point that if that was the case, she would have expected Ms D to have said that during the appeal process when they same point was considered. Again, we have taken this into account when assessing the accuracy or otherwise of Ms D's reflection documents.

24. Another specific evidential issue arose in relation to whether a certain comment was made during the private deliberations of Mr M (that were covertly recorded - see below). The claimant alleged that the HR adviser said in a 'sing-song' and sarcastic way that the claimant 'need[ed] breaks for this…and breaks for that…' whereas the transcript provided by the respondent said 'inaudible' and was thus, she says, an example of the respondent deliberately seeking to mislead. Given the claimant's allegation

the Tribunal listened to that part of the recording. It was largely inaudible but we could hear enough to disagree with claimant's interpretation.

Submissions

25. Agreement was reached with the parties to receive staggered submissions in light of Miss Keogh's unavailability at the end of the Hearing. The claimant was emphatic that she did not want to have to return to the Tribunal on a separate occasion and therefore she provided very detailed written submissions (160+ pages) and addressed us orally on the last day. The respondent was given until 7 May 2020 to provide their written submissions. The claimant said that she would not want to reply to them but it was made clear that she would have the option to do so and in fact she did on 22 May 2020 in a 2-page email supported by a further 30 pages of alleged factual inaccuracies. The respondent sensibly did not seek to reply further to that save in respect of the serious allegations of professional misconduct that the claimant had made in her reply which they denied.

Relevant Law

26. Unfair dismissal: By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

27. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish on the balance of probabilities that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral and the Tribunal must not substitute its own view for that of the respondent but to consider its decision and whether it acted reasonably by the standards of a reasonable employer.

28. In this case the respondent relies upon 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' (SOSR) as the reason for the dismissal. The irretrievable breakdown of a working relationship between an employee and his/her employer and/or colleagues can, depending on all the circumstances, amount to such a substantial reason.

29. In a slightly different but relevant context, Perkin v St George's Healthcare NHS Trust ([2005] EWCA Civ 1174), confirmed that even where the actions of a senior executive of the employer were responsible for a breakdown in confidence between the parties it is still possible for section 98(4) to be satisfied. It was the employee's reaction and ill-founded attacks on colleagues' honesty, probity and integrity that were (or would have been if a fair procedure was used) the reason for the dismissal.

30. Tribunals have been warned to be alert to the possibility of SOSR being used to conceal the real reason for a dismissal (Ezsias v North Glamorgan NHS Trust [2011] IRLR 550). If the dismissal was actually because of the employee's conduct then the disciplinary procedure ought to have been used. Also in Ezsias it was confirmed that it can be reasonable to suspend the employee alone rather than the team given that a service has to be maintained.

31. In determining whether the dismissal was fair, the Tribunal's task is to consider all of the relevant circumstances including any process followed by the respondent and to assess that at the conclusion of the process i.e. once any appeal has concluded. The ACAS Code of Practice on Disciplinary and Grievance procedures does not apply to a SOSR dismissal (Phoenix House Ltd v Stockman [2017] ICR 84). What is required is a fair consideration of whether the relationship has deteriorated to the point that the employee cannot be re-incorporated into the workforce without unacceptable disruption. The principles of the ACAS Code may however still be a useful guide as to a reasonable approach to be taken in a non-disciplinary situation. It is also relevant where a grievance was raised during the course of the employment.

32. Direct disability discrimination: Section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. The protected characteristic need not be the only reason for the treatment but must be a significant influence i.e. more than trivial and the alleged discriminator's motive is irrelevant. Disability is a protected characteristic.

33. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.

34. Direct discrimination is rarely blatant. Notwithstanding the burden of proof provisions referred to below, we acknowledge that it is usually not easy for a claimant to establish that discrimination has taken place. It is rare for there to be an overt discriminatory act. That is why we look carefully at all the evidence and are willing to draw inferences where appropriate.

35. Discrimination arising from disability: Section 15 of the 2010 Act states:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

No comparator is needed.

36. The accompanying EHRC Code of Practice on Employment (2011), a guide to the proper application of the 2010 Act, advises that there must be a connection between whatever led to the unfavourable treatment and the disability. Further that the 'consequences' of disability include anything which is the result, effect or outcome of the disability. It also sets out guidance on the objective justification test.

37. The Court of Appeal decision in City of York Council v Grossett ([2018] EWCA Civ 1105) confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of B's disability. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter; whether there is a causal link between B's disability and the relevant 'something'. It also confirmed that there is no requirement that A be aware that the 'something' has occurred in consequence of B's disability.

38. In Baldeh v Churches Housing Association of Dudley District Limited (UKEAT/0290/18/JOJ), the EAT confirmed it is sufficient for the 'something arising in consequence' of the disability to have a 'significant influence' on the unfavourable treatment. The fact that there may have been other causes as well was not an answer to the claim.

39. In Risby v LB of Waltham Forest (EAT 0318/15), the EAT had previously confirmed that only a loose connection is required between the 'something' and the unfavourable treatment. The meaning of 'unfavourable' was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams ({2015} IRLR 885) and described as having 'the sense of placing a hurdle in front of, or creating a particular difficulty … or disadvantaging a person…'.

40. In Grossett, above, the Court also considered the defence available to employers at section 15(1)(b), commonly known as justification. It confirmed that the test is an objective one according to which the Tribunal must make its own assessment. It may be therefore that the same set of facts can lead to apparently inconsistent outcomes on claims of unfair dismissal and discrimination. The burden of proving justification on the balance of probabilities lies on the respondent.

41. The role of the ET in assessing the employer's justification for the purposes of section 15(1)(b) was also considered in Hensman v MoD (UKEAT/0067/14/DM), which confirmed that:

> "43. … the role of the Employment Tribunal in assessing proportionality … is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself.

> 44. … the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. …"

42. In that decision, Singh J had drawn assistance from the earlier guidance provided by the Court of Appeal in Hardy and Hansons plc v Lax ([2005] ICR 1565), where Pill LJ stated:

> "31. … It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate.

43. Indirect disability discrimination: Section 19 of the Act states:

> "Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

44. Breach of the duty to make reasonable adjustments: Section 20 and schedule 8(20) of the 2010 Act make provisions with regard to the duty to make adjustments. If an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10). Section 212(1) states that "substantial" means more than minor or trivial.

45. The test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

46. In Environment Agency v Rowan ([2008] IRLR 20), the EAT held that in a claim of failure to make reasonable adjustments the Tribunal must identify the PCP applied by the employer; the identity of the non-disabled comparators where appropriate; and the nature and extent of the substantial disadvantage suffered by the Claimant.

47. Harassment: Section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic

and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

48. In Land Registry v Grant ([2011] IRLR 748) Elias LJ said:

> "Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.
>
> Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

49. Victimisation: Section 27 of the 2010 Act provides that A victimises B if A subjects B to a detriment because B does a protected act or A believes B has done or may do a protected act.

50. Protected acts include bringing proceedings under this Act, giving evidence or information in connection with proceedings under this Act and making an allegation (whether or not express) that A or another has contravened this Act.

51. Burden of proof in discrimination claims: The provisions regarding burden of proof are at section 136 of the 2010 Act which, in summary, are that if there are facts from which the Court could decide in the absence of any other explanation that the claimant has been discriminated against, then the Court must find that that discrimination has happened unless the respondent shows the contrary. The Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246) confirmed, albeit when applying the pre-Equality Act wording, that a simple difference in status and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed.

52. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy.

53. At the first stage the Tribunal has to make findings of primary fact. It is for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. At this stage the outcome will usually depend on what inferences it is proper to draw from those primary facts. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test. At this stage the Tribunal does not have to reach a definitive determination. The Tribunal must assume that there is no adequate explanation for those facts. It is

appropriate to make findings based on the evidence from both the claimant and the respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

54. If the Tribunal is satisfied that there is evidence to suggest that there was an act of unlawful discrimination, the burden of proof shifts to the respondent. To discharge that burden the respondent must prove, on the balance of probabilities, that they did not commit such an act. Case law suggests that the Tribunal is entitled to expect cogent evidence to discharge that burden because the facts necessary to prove an explanation will normally be in the possession of the respondent.

55. Time limits for bringing complaints under the 2010 Act: any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123). Where the alleged discriminatory act is one of the failure to act, sections 123(3) & (4) provide that the failure occurs when the person in question decided on it and in the absence of evidence to the contrary, that failure is taken to occur when that person does something inconsistent with doing the act, or otherwise on expiry of the period in which they might reasonably have been expected to do it.

56. The burden is on the claimant to convince the Tribunal that the discretion should be exercised (Robertson v Bexley Community Centre [2003] IRLR 434 and O'Brien v Department for Constitutional Affairs [2009] IRLR 294 CA). The Tribunal has a very wide discretion in determining whether to do so. It is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so.

57. The Court of Appeal has also confirmed that when considering this discretion, Tribunals should adopt as a checklist the factors mentioned at section 33 of the Limitation Act 1980 (Chief Constable of Lincolnshire Police v Caston ([2010] IRLR 327). Namely the balance of prejudice together with all the circumstances of the case.

58. Where there is a series of distinct acts of alleged discrimination the time limit begins to run when each act is completed, whereas if there is conduct extending over a period the time limit begins at the end of that period (section 123(3)(a)). Where an employer operates a discriminatory regime, rule, practice or principle then that will amount to an act extending over a period (Barclays Bank plc v Kapur ([1991] ICR 208 HL). When deciding if there is such conduct, it is the substance of the complaints in question — as opposed to the existence of a policy or regime — that is relevant and whether they can be said to be part of one continuing act by the employer (Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686). In considering whether separate incidents form part of an act

extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents (Aziz v FDA [2010] EWCA Civ 304, CA).

Findings of Fact

59. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts. These findings have been organised by broad topic and chronologically within each section. A number of these topics, however, overlapped chronologically and where relevant we have cross referred between the sections.

60. Background

61. The claimant commenced employment with the respondent in June 2014 and in July 2015 moved into the role of specialist physiotherapist (band 6) in the haemoncology therapy team, a team that comprised occupational and physiotherapists and was line managed by Ms D. Until 1 December 2016 Ms D reported to Ms E (who had joined the respondent in March 2016) but thereafter Ms D was promoted becoming Ms E's peer. They both reported to Ms Q until her retirement in July 2019. As their manager, Ms Q became aware of the relationship difficulties that arose within the team and the steps being taken to try to manage that as the issue was reported to her from time to time as part of normal supervisions and line management responsibility. She did not become involved in the detail however until she chaired one of the later grievance appeals.

62. Prior to March 2016, the claimant participated fully in and considered herself part of the wider Trust community - for example taking part in fundraising activities. She also enjoyed a good relationship with Ms D who had a good opinion of her professional abilities as later shown in the terms of her reference for the claimant's application for a Master's in research (MRes). Indeed the claimant's clinical abilities have never been questioned and although much later there were references to concerns about patient safety, these concerns arose as a potential consequence of the breakdown in communication between the claimant and, in particular, her supervisor and the impact this could have on supervision of and feedback to the claimant. The claimant acknowledged that this was a multidisciplinary team in which she had to work closely with other specialists and that good communication with colleagues was necessary. She also acknowledged that in this environment line managers need to be able to feed back to their team and that if there was a breakdown in communication this presented a potential risk to patient safety.

63. The respondent operates a number of relevant HR policies and procedures of the sort one expects to see in a major NHS Trust. In particular:
    a. Disciplinary Procedure;
    b. Grievance Procedure (which contains sufficient flexibility for different stages of that process to be carried out at the same managerial level as the previous level and for managers to conduct hearings as they

see fit and, only as far as reasonably practicable, for certain timescales to be met). There was an issue between the parties as to the version of the procedure before us and the claimant suggested that Ms F had specifically updated it to defeat the claimant's procedural argument. That was not a credible argument.)

c. Data Protection and Confidentiality (which provides that any breach of confidentiality of personal information may be regarded as gross misconduct);
d. Dignity at Work - A Policy Against Harassment and Bullying; and
e. Policy on the Employment of Disabled People (the intended outcome of which is stated to be that disabled employees feel their needs are taken into account and all efforts will be made to retain employees who become disabled).

64. 2016 - prior to secondment

65. Unknown to the claimant, in late 2015 an occupational therapist (OT) in the team, Ms S, had raised with her supervisor, Ms HH, that she was finding the relationship with the claimant to be difficult and had been making her own detailed notes of their interactions. The claimant had also raised her own concerns about both the OT team generally and specifically Ms S with Ms D e.g. on 25 February she sent her a text that specially named Ms S as someone she had to have a sit down with to 'try to smooth things out'.

66. On 8 March the claimant met Ms D and Mr T (who were at the time job sharing Ms E's role) following an approach from the claimant. There are various notes of the meeting but the date upon which those notes were made is contested. Having considered their content and the style in which they are written, we find that the notes of Ms D (headed 'personal reflection') and DC (headed 'witness statement') were not written contemporaneously but at the request of Ms U who later investigated these events as part of the claimant's first grievance.

67. In any event those notes are clear that the claimant complained in that meeting about relationships within the team and specifically that Ms S had called her a 'headfuck'. The corresponding notes of the claimant are also found in her later grievance in which she set out in detail her recollection of the meeting (based on her own contemporaneous diaries) which does not differ materially with Ms D's or Mr T's.

68. The claimant alleged during the Tribunal Hearing however that the managers' notes were produced after she raised her grievance (with which we agree) but that they were 'falsified' and had been written to support management and show they had done their job when in fact they had not. Further that Ms D had let her friendship with Ms S affect her. In cross examination however the claimant agreed that Ms D and Mr T had suggested she make a formal complaint (which accords in general terms with their notes) and that she declined to do so as she did not want to make things worse (which again accords with their notes). She said however that she asked them to be more present on the wards and to help her.

69. The claimant's allegations of a conspiracy at this stage between individuals (she referred to Ms D being godmother to Mr T's son as well as the friendship of Ms D and Ms S), despite the notes of all three parties being broadly in agreement and in accordance with the claimant's own evidence at Tribunal, is an example of where we consider the claimant lacks credibility in her interpretation of events. On occasion she sees ulterior motives when in fact there were none.

70. We do agree with the claimant, however, that her complaint in March 2016 was specifically about Ms S and the 'headfuck' comment rather than, as the respondent says, a general complaint about the whole team. The respondent was therefore at that point aware of her specific concerns regarding Ms S.

71. In any event, Ms D increased her presence on the ward (as the claimant had asked).

72. The previously good relationship between the claimant and Ms D deteriorated from this point to the extent that by June Ms D was physically shaking and crying after an informal feedback session she held with the claimant and in a separate incident she blocked the claimant from her Facebook account. The claimant says the deterioration was down to Ms D's reaction to her complaining about her friend, Ms S.

73. A supervision took place between the claimant and Ms D on 13 April. There is a dispute between the parties as to the documentation provided to the claimant at the time. The claimant says that she was only provided with a one-page handwritten supervision record which she countersigned on the day. The respondent's position is that attached to that document and left in the claimant's in-tray was a two-page handwritten document prepared by Ms D. The claimant categorised the additional two-page document as 'fraudulent' and said that it was created after a subsequent grievance to show stress management procedures were followed when in fact they were not. Unfortunately the claimant's position regarding this document only became clear after Ms D had concluded her evidence and therefore she was not asked directly about it. However, Ms Q considered exactly this point when she subsequently dealt with the claimant's stage 3 grievance in April 2017. Her finding was that the two-page document was Ms D's recollection of the conversation she had with the claimant on that day and consequently was not documented on the usual supervision form. Having considered the format of the documents, we find that the official supervision record was indeed the one-page document signed by the claimant and that the additional two-page document was Ms D's own reflection which was not attached to the official record. It would be very surprising for a document of this nature to be simply left in an in tray given its contents about the claimant and members of the team. We do find, however, that the reflection was written at the time and accurately records Ms D's position at the time and her discussion with the claimant. The way it is written, including corrections and shorthand and the structure of the document suggests this to be the case. Again, in coming to this conclusion, it leads us to doubt the credibility

of the claimant when she alleges elsewhere that documents have been falsified.

74. In any event, the significance of these documents is first that the official supervision record is brief and consists of a series of bullet points indicating areas of discussion. These included an update on dynamics within the team, that the claimant was doing a fantastic job with patients but put pressure on herself and a reference to pace of work and reducing intensity to help relax into role. The reflection document is more detailed and noted the claimant's increased stress levels and a change in her communication when she is stressed, specifically that her tone changed and she appeared more abrupt. It noted that Ms D gave the claimant examples of poor communication and how to develop stress management strategies. In a discussion about how things were working on the ward it noted that the claimant reported ongoing friction with the OTs especially Ms S and related this to previous conversations. A note by the entry seems to indicate that the claimant and Ms S should have a one-to-one. Specifically there was a note:

> 'discussed working through stress management questionnaires again to help identify triggers and find solutions/management plan'

and to reduce pace as a means of reducing stress.

75. At a further impromptu supervision on 11 May Ms D's lengthy handwritten notes, which again were not signed by the claimant perhaps suggesting they were another personal reflection document, record that she held the session with the claimant as she had appeared upset at a training session and had not engaged with the team. The notes show that the claimant reported not feeling part of the team and feeling bullied by them. She also gave an example of Ms S being rude to her though Ms D noted that she had witnessed the conversation in question, and did not find anything inappropriate. The claimant also reported feeling bullied by the nurses on the ward, that she did not trust Ms S and that her relationship had changed with Ms D. Ms D noted that the claimant started raising her voice and that she had to raise her voice in turn to get her to listen. At the conclusion of the discussion Ms D noted that they discussed again stress management and staff support and that she wanted the claimant to try to slow her pace down, stop and breathe to help her reflect on her communication and give her time to communicate calmly.

76. The claimant's evidence was that this note was 'fraudulent', prepared much later than 11 May and not an accurate reflection of their meeting. She also said that it was after she specifically said she felt bullied by Ms S that Ms D diverted the conversation to the allocation of bank holidays, that she had not become angry, she had not raised her voice and in fact was crying. The claimant's later additions to the notes of a meeting on 18 May (see below) support her case that at the meeting on 11 May she specifically said that she felt bullied by Ms S.

77. We find that Ms D's notes were contemporaneous and broadly accurate but also that the claimant did specifically say she felt bullied by Ms S. Perhaps Ms D did not record that in terms as she had already formed the view that the claimant was mistaken.

78. Following that meeting, Ms D discussed the situation with Ms E. Again they both prepared notes of that discussion dated 11 May which they say were contemporaneous but the claimant says were prepared later. The contents of Ms D's typed note do suggest that it was written after 11 May. For example, it states:

    'HR was going to explain the next day to AK…'

    which would not naturally be the way to express that if written on the day. Also, in this note Ms D repeats information that was contained in her handwritten note made on 11 May. This does suggest that the claimant is right that the typed note was written later - and logically that would be for the grievance investigation in which case Ms D should not have dated it 11 May. We conclude however that it was broadly accurate.

79. Ms E's note does read however as if it was written on 11 May and she confirmed that in her compelling evidence that she always keeps contemporaneous records. We find that the note was written on 11 May and is accurate. Ms E records that Ms D told her that the examples given by the claimant did not amount to bullying or harassment given the context and explanations. It was agreed to arrange for a neutral party to attend the next supervision between Ms D and the claimant (which would have to be rescheduled) given the concerns raised about their relationship. Also, that Ms D would:

    'subtly observe and enquire from ward staff regarding bullying behaviours towards AK'.

80. This was a flawed approach. It is plain that the claimant had made express allegations that warranted proper investigation and even though the claimant had in March said she did not want to pursue her complaint about Ms S formally, matters had clearly moved on and she was now also making wider and more serious allegations. There was nothing in Ms D's handwritten note of 11 May to suggest that the claimant was then saying that she did not want matters to be addressed. It was simply not good enough for Ms E to accept Ms D's assessment that the claimant was mistaken and that investigating the claims would be problematic. At the very least the claimant should have been reminded of the existence of the grievance procedure.

81. Ms D's evidence was that having discussed stress management with the claimant more than once, she both handed a copy of a stress risk assessment tool to her and left a copy in her in tray. She refers to a diary entry on 16 May - which says '*stress survey*' - to support that. The claimant says she was not given a copy, that such a sensitive document would not simply be left in an in-tray and that the diary entry was deliberately backdated. She also says that if she was given the stress survey at that

point why was it not mentioned in the next meeting - her postponed supervision - on 18 May.

82. At that meeting on 18 May the claimant, Ms D and Ms E were present. Ms D sent notes of it to the others later in the day. The claimant replied on 24 May having added to the notes. Those additions were not agreed to be accurate by Ms D or Ms E though there is no evidence that they challenged them at the time. We also note that even on the respondent's case, Ms D and Ms E knew the claimant's position by the 24th.

83. The notes show that the meeting opened with a discussion about the claimant's allegations of bullying (albeit that there is a stark difference between Ms D and Ms E saying that she reported bullying by the whole team and the claimant saying - in her additions - that she felt bullied by Ms S). An unchallenged section of the note reads:

> '[The claimant] discussed examples of interactions with the band 6 0T, Ms E explained that as we were not present we are unable to pass judgement on what happened, but was upset to see how distressed [the claimant] was recalling the examples.'

84. The respondent says that during this meeting the claimant made no allegation of ongoing bullying and that her references were all to past bullying and that even in her additions she does not state the issues were ongoing or specifically ask that any action is taken in that regard. This is not a compelling argument. Even on the respondent's notes, the opening sentence naturally reads that at that time she felt bullied by the team and by the nurses and, in the next paragraph, that she was feeling isolated, excluded and physically sick. Given these statements all sorts of alarm bells should have been ringing for Ms E and Ms D. It is notable that they do not seem to take advice from HR and appear to have made the decision that the problem stemmed from the claimant's stress/communication issues/personality.

85. The conversation then moved on to discussing provision of support for the claimant and to work towards resolving the issues and help her deal with the pressure she was under. This was followed by a discussion regarding professional boundaries and some members of the team feeling their professional opinion was not respected by the claimant. They fed back the outcome of their subtle observations in relation to the reported bullying. They also discussed the issue of bank holiday rota allocation and why the claimant's concern about this was not justified and the way the claimant had communicated about this issue. They went on to give examples of how they had observed changes in the claimant's communication and interpretation of events when under pressure. They emphasised that there was no blame associated with the conversation, that they were acting out of concern and there was no slight on the claimant's professional abilities or commitment to the job. The agreed actions to move forward were for the claimant to speak with staff support and that if she had concerns about any other member of staff's clinical duty to raise that directly with Ms D and to follow up with regular supervision with Ms D and a review meeting with Ms D and Ms E in one month.

86. The final addition by the claimant to this note included:

> 'Again many thanks for your support and advice throughout this difficult time. Regarding the aforementioned concerns the last two weeks have been particularly hard for me and both emotionally and physically draining… Again thanks so much for your support and advice, as always it's much appreciated and welcomed.'

87. The claimant's categorisation of this meeting is that the conversation went from her saying what had happened to her to Ms D and Ms E projecting blame for those circumstances onto her and that as a result she felt intimidated and threatened. She also says that it was at this time that she was applying for her MRes and was reliant upon Ms D and Ms E to provide references for her. The way she expressed her thanks in that comment, however, and a subsequent email exchange with Ms E on 24 May, does suggest that her gratitude was genuine rather than simply expressing it to keep them onside for her references. That email exchange also shows Ms E following up with the claimant on how she was doing, prompting her to speak to staff support and making it clear that they were more than happy to support her in any way they could.

88. Ms E wrote a personal reflection on 18 May in which she noted that she spoke to the claimant after the supervision in case she wanted to discuss anything without Ms D present. She noted that the claimant went over the same points raised in the supervision. She said that she remained concerned that the claimant was displaying behaviours associated with stress and noted under personal action points to:

> 'Continue to support [Ms D] to encourage [the claimant] to work through Stress Risk Ax'.

89. The claimant is correct that the stress survey was not specifically discussed during the supervision. It is clear however that the claimant's wellbeing generally was discussed and concern was expressed by the managers. This, together with Ms D's statements to the claimant in their meeting on 11 May and Ms E's specific reference to it in her own action points on 18 May as well as the diary entry which we do not find was backdated and a subsequent refence in the OH referral described below, leads us to conclude that the claimant was given a stress survey by Ms D prior to that supervision taking place.

90. Ms D and Ms E undoubtedly could and should have taken more formal steps at this stage. They clearly were very worried about the claimant, expressed genuine concern for her wellbeing and sought to support her informally. Yet even on their own version of events she was presenting a set of circumstances that clearly could have warranted her raising a grievance but they did not mention this possibility to her. Further she was making wide ranging allegations that required more targeted attention. We do not conclude however that this was as a result of any deliberate decision to harm the claimant or leave her unsupported. The terms of the claimant's own email support that.

91. On 2 June Ms D approached the claimant at the end of the day to express her concern about the claimant's communication with her earlier that day.

An acrimonious exchange followed between them. They both gave very different accounts, each saying that the other behaved unreasonably and was responsible. Again notes were made in relation to events. Ms D had a type written note, in the style of her earlier reflections, although not expressly called that on this occasion. The claimant also prepared a typed reflection. The claimant has again alleged that Ms D's document was prepared much later for the grievance and backdated. Whichever account is the more accurate, it is clear that both left at this meeting extremely upset and in the case of Ms D, she says, feeling intimidated by the claimant's aggressive behaviour.

92. Ms E spoke to Ms D and prepared a note of their conversation. The claimant again alleges that this document was created after she had raised her grievance. She did confirm however that she saw Ms D and Ms E talking in the office on that day and she assumed it was about her. We find that Ms E's note was contemporaneous and accurate.

93. She recorded that Ms D had felt intimidated, vulnerable and fearful of the claimant due to her aggressive body language, tone and stance. Ms E agreed that a supervision would be arranged at the earliest opportunity between them with Ms E present as a neutral party to explore immediate concerns regarding their apparent fractured relationship.

94. That supervision took place on the following day, 3 June. Ms E made a note on the same day. On this occasion the claimant did not challenge the authenticity of the note although she did say in her evidence that during the meeting she also referred to ongoing bullying by Ms S and that Ms D's friendship with her meant that it was not being addressed. Ms E heard from each in turn as to their account of their interaction the previous day and then spoke to each of them separately. The agreed outcome was that she would arrange for mediation between them and refer the claimant to OH. On 6 June Ms E emailed the claimant attaching her notes of the meeting and confirming the arrangements regarding mediation (booked for 22 June) and that she had made the OH referral. In an exchange of emails with Ms E on 7 July, regarding the OH referral, the claimant confirmed that 'as discussed' she was already seeing her GP and external support as she did not want it to interfere with her work and to remain confidential.

95. The OH referral made by Ms E was dated 3 June. Given the claimant's complaint about this and later referrals, it is necessary to quote the reason given for referral in full. It stated:

> 'I have become increasingly concerned about [the claimant's] health and well-being in recent months. She has been for a long period now displaying a change in behaviour and I believe she is suffering from stress/severe anxiety which often manifests as physical symptoms… She often appears highly anxious which has started to impact on her relationships with work colleagues and has the potential to impact her performance in the longer term. I have encouraged [the claimant] to access the support offered by Staff Support although she has been reluctant so far to access this. She tells me that she has booked to see a councillor (sic) outside of work and has seen her GP regarding her physical symptoms. We have encouraged [her] to work through the Stress Risk Assessment also.'

96. The claimant's criticisms of this referral include that as she had given Ms E good reasons why she did not want to access staff support it was misleading to simply say that she had been reluctant to do so. She also of course disagrees that she had been encouraged to work through the stress risk assessment. The principal criticism, however, is that there was no reference in the referral to the claimant's allegations of bullying and harassment and, she says, by writing it in this way the complaints were again being ignored and the issues arising were being deflected to portray her as mentally ill and that she was the one to blame. She again says that the allegations of bullying and harassment were not referred to because of the friendship between Ms D and Ms S.

97. It is clear, even on the respondent's case, that the claimant had by this stage made allegations of bullying and harassment. Even if Ms E thought they were historic allegations (and given the compressed timescale it is hard to see how she could) it seems extraordinary that she does not mention them in this referral. We can see why the claimant felt that that important part of the narrative was missing for no good reason.

98. On 7 June the claimant was notified that she had been offered a place on the MRes programme. She sent an email to Ms E and Ms D effusively thanking them for being her referees and for the support and advice given. This was clearly a major achievement by the claimant and she was very excited to be taking part.

99. The OH appointment was held on 9 June and a report was sent to Ms E on 14 June. It was inconclusive in terms of providing an assessment in the absence of further information. It did record, however, that the claimant told OH that she had raised concerns with Ms D in relation to one of her colleagues (identified as a band six OT) on multiple occasions between September 2015 and May 2016 and that she had highlighted on 11 May 2016 that she felt bullied by the band six OT (clearly a reference to Ms S). This is compelling contemporaneous evidence that the claimant had specifically told her managers that the problem lay with Ms S. The OH asked for more information of the issues and instances that had been raised.

100. The report also recorded that the claimant denied she had been appearing anxious and stressed. Her unconvincing explanation in evidence was that she was in fact anxious and stressed but was so shocked when she was shown the content of the OH referral that she became 'petrified' and therefore denied having appeared that way.

101. Ms E replied to OH on 15 June. The bulk of her reply described the claimant's behaviour and her reaction and responses to colleagues. The clear emphasis was on the claimant's communication and shortcomings with that. In one short paragraph she did refer to the claimant having:

> 'expressed to me emotions of mistrust and suspicion towards individuals and also the wider Team (office and ward), sometimes projecting that staff are talking about her and that her reputation has been sullied in the absence of a factual basis.'

but did not refer to the specific allegations of bullying that the claimant had made. The general tone of the reply, however, reads as being genuinely concerned for the claimant's well-being and wanting to be supportive. The claimant's evidence was that whilst on paper it looks like Ms E was trying to support her, in reality she was trying to undermine her and that this was a deliberate laying of a false paper trail. We do not agree with that categorisation of Ms E's approach. Although we find that both Ms D and Ms E at and by this stage had not managed the situation as well as they could, we do not find that they had any ulterior motives for that. At worst, they had formed their own view of what was happening and as a result were not properly listening to the claimant - exactly what the intervention of a neutral third party would have provided.

102. The claimant was then seen by Dr V of OH and she sent a report to Ms E on 27 June. He stated that the claimant had no underlying medical conditions impacting on her health or well-being. She had been reviewed by her GP for work-related stress but was not on medication and had been referred to a counselling service. He also stated that the claimant had reported that:

> '…she has a number of workplace concerns which I understand have not yet been addressed including reports of being bullied by another member of staff. She has understandably found this unpleasant and this may account for her being upset at times. My medical opinion is that this is a normal reaction to a stressful event, including physical symptoms of nervousness prior to a meeting with her senior management. She reported that she was unaccompanied by a friend or union rep and found the meeting difficult.
>
> I understand that mediation has been commenced with her line manager however due to sickness absence this has temporarily been placed on hold.
>
> Fitness to work
>
> [The claimant] is medically fit for work and requires no adjustments. She does have stress symptoms in relation to work issues that you are aware of. However, the stress has not progressed to mental ill health. She has no past history of mental ill health. My recommendation would be for you to address her workplace concerns in line with hospital stress policy. It may be beneficial for you to discuss this with your HR advisor given that she is currently under mediation with her line manager to resolve the issues that is causing her stress. You can also seek guidance from HR in relation to her being accompanied by a friend or Union rep if this is permitted under Trust policies and procedures as she finds these meetings stressful.'

103. Ms E's evidence was that she believed the reference in this report to the claimant being bullied by another member of staff was a reference to Ms D as the claimant had already raised concerns about her. Even if that was Ms E's genuine interpretation of the report, we do not find it to be a reasonable one given Ms E's knowledge that the claimant had specifically alleged she was bullied by Ms S. Further the report clearly talks about 'another member of staff' as well as 'her line manager' and a natural reading of that document would suggest that these were two different people.

104. A mediation session was held with the claimant and Ms D on 22 June (911A-13). A strategy and follow up session six weeks after working together was agreed. However, Ms D started a period of surgery related

sick leave on 23 June and the claimant also had a period of sick leave due to surgery and work-related stress which meant that they only worked together for a very few days before the claimant started her MRes secondment. The mediation therefore was in practice ineffective.

105. The claimant was referred to OH again by Ms E on 15 August. That referral, at section B, stated the then most recent absence to have started from 18 July for 41 days due to 'complications following tonsillectomy and work-related stress'.

106. The process for creating referral documents is that section B, which is free text, is populated by the referring manager based upon information contained within the e-roster system which has options for the reason for any absence only from a drop-down menu. As a result sometimes one reason has to be selected in e-roster that does not exactly fit the actual reason(s) for the absence. The referring manager can either copy the information as it appears on e-roster or may choose to amend or add to it from their own knowledge.

107. There was an exchange between the claimant and Ms D on 2 September which they each remember very differently and interpreted very differently at the time. This is a good example of the difficulty they had in communicating with each other, regardless of if and where any blame lays for that. Ms D set out in a note - which does not read as exactly contemporaneous and may well have been prepared or modified later - her recollection of the exchange and in that note described feeling uncomfortable going into a private room with the claimant and then feeling intimidated by what she said (that Ms D was ignoring her emails, she would not be coming to a supervision and needed the union present for any meetings with her as the OH had said must happen) and feeling quite shaken after the exchange. In contrast the claimant emailed Dr V, the mediator and her union representative on 2 September with her interpretation of the exchange (which was that to avoid confrontation she agreed to attend without a representative but felt slightly stressed).

108. Whichever recollection is the more accurate, it is clear that during that exchange the claimant asked if she could be accompanied by her union representative in a supervision booked for later that day and referred to the OH report from June (that had referred to the possibility of a friend or union representative being present if that was permitted by policy). The respondent's case is that their policies do not provide for union representation at supervisions and that the union also indicated to them at this time that it would not be appropriate though there was no direct evidence of that indication.

109. The supervision did not happen as the claimant went home sick.

110. The claimant sent a further email to her union representative on 5 September on the same topic. She said in that email:

> 'I'm actually shaking post conversation with my B7 and I can't go on another day coming into work like this. All I want is for you to accompany me to a supervision meeting and she replied that it isn't within policy and procedures and it is not suitable to have another B6 within my supervision session and is insisting on Jonathan T or Ms E.'

111. That email continued and referred to continuing problems with 'the B6 OT MN' as well as with her B7 and that the situation was 'bordering on emotional abuse'.

112. On 8 September Dr V emailed Ms E, with a copy to the claimant. He confirmed that the claimant was reporting workplace stressors impacting her wellbeing. He confirmed she was not medically fit for work and anticipated that that would be the case for a further two weeks. He said that he would be happy to see her upon her return from her MRes.

113. Ms Q having intervened with the respondent's finance department to ensure she could be released at the relevant time, the claimant commenced her one-year secondment to St George's University (located on the same site as the respondent) on 19 September during which she successfully completed her MRes.

114. <u>Grievance 1</u>

115. On 6 September the claimant lodged her first grievance with Ms Q. In the covering email she stated:

> 'The issue which has led to me lodging this grievance concerns bullying and harassment and began September 2015.
>
> I have previously tried to resolve these problems at work informally with both the harasser and by also raising the issue with my management. However I have not had any success trying to resolve the issue informally in this way and unfortunately matters have become worse which is why I am now pursuing a more formal route.
>
> I would very much like us to address the problem internally and provided the appropriate investigations and disciplinary action is carried out, without the need for any legal action.
>
> … I would like to be accompanied to these meetings by my union representation.'

116. In the body of the grievance itself, the first paragraph does suggest that the substance of the grievance was the failure by Ms D and Ms E to address concerns previously raised about bullying by Ms S. In the second paragraph, however, there is a reference to the behaviours exhibited towards the claimant getting worse. The third paragraph again refers to the managers not resolving the issue but that subsequently the bullying and harassment continued to get worse and examples were given of 'ongoing bullying' by Ms S. In the penultimate paragraph, the claimant stated that she looked forward to a resolution of 'this grievance and ongoing bullying and harassment without unreasonable delay'.

117. This together with the covering email naturally reads as a grievance about both the alleged underlying and ongoing harassment by Ms S and failure of management to deal with it.

118. Also in this letter there was a reference to the disability discrimination provisions of the 2010 Act and the requirement of employers to make reasonable adjustments. In evidence, the claimant confirmed that she was saying that going forward the respondent needed to make reasonable adjustments. She confirmed that she was not saying they had already breached that duty.

119. Upon receipt of this grievance Ms Q forwarded it to Ms F asking for advice. She replied on 6 September and advised that the best way forward was, effectively, to split the grievance into two with the allegation that Ms D and Ms E had failed to discharge their duties at a stage 2 grievance hearing and that any allegations about treatment by Ms S should be done via the Dignity at Work (DAW) policy and addressed separately:

> '…as although being the underlying reason for her grievance, does not appear to [be] the basis for her grievance itself.'

For the reasons above that appears to be a misreading of the grievance but there was nothing fundamentally wrong in adopting that approach and the actions then taken by Ms F were in keeping with what the claimant was saying.

120. Ms F wrote to the claimant on 7 September noting that she wished to lodge a grievance against Ms D and Ms E regarding alleged failures to discharge statutory duties germane to her health and safety at work. She told her that it would be heard by Ms W and gave her procedural information regarding how that would be progressed. She also noted that the claimant referred to ongoing bullying and harassing behaviours by Ms S and referred her to the DAW policy suggesting that the most appropriate way for her concerns to be addressed was through that process. She was invited to set out in writing the details of how she believed she had been treated and that an investigating officer would be appointed and Ms S asked to comment on the allegations.

121. This was the first time that Ms F became actively involved in the management of the claimant's issues. The referral of the grievance to her by Ms Q was entirely appropriate and there is nothing about Ms F's response to indicate the beginning of what the claimant has described as a campaign by Ms F to remove her from employment.

122. The claimant replied on 8 September stating concern at Ms W hearing the grievance as she was Ms E's line manager, that she wished to bring her union representative with her, that she would invoke the DAW policy regarding Ms S and set out some adjustments to her workplace that she required. The tone of and language used in this letter is notable. Whilst it was polite it was also unnecessarily confrontational in some respects. With regard to union representation, prior to any response having been received to her request, she referred to specific parts of the ACAS Code of Practice on time off for trade union duties. She also suggested that if she shared further information in advance of the hearing it would give managers the opportunity to 'collude/conspire'. In relation to the adjustment she sought

(the reallocation of Ms S from the team) she stated that she was willing to 'tolerate' her remaining until she left for her secondment 'on the understanding that' she would have been moved permanently by the time of her return in 2017.

123. This extremely detailed and negative approach continued throughout the claimant's correspondence thereafter with the inevitable result of lengthier and increasingly defensive replies than would be expected throughout which in turn prompted further detailed correspondence from the claimant. Indeed Ms F's reply on 12 September to that letter plus an email also sent by the claimant on 8 September regarding access to work emails whilst on sick leave, was detailed and did not respond positively to everything the claimant requested. That in turn prompted a detailed reply from the claimant. Ms F did however agree that Mr L rather than Ms W would hear the grievance and that the claimant could be accompanied at the grievance hearing by both her union representative and an employment specialist from Wandsworth Psychological Therapies but the latter would not be allowed to participate in the hearing.

124. The claimant submitted further lengthy evidence in support of her grievance on 27 September including over 50 documents and, on 30 September, a 31-page statement.

125. <u>Part one of grievance one: September 2016 - April 2017</u>

126. On 7 October, Mr L wrote to the claimant inviting her to the stage 2 grievance hearing on 25 October. On 17 October Ms X of HR, who was supporting Mr L, wrote to the claimant on his behalf asking for a structured document outlining the grievance and supporting issues, given the level of detail contained within the pack she had submitted. Ms X also made it clear that the issue of whether Ms S was guilty of bullying behaviour would be the matter of a different investigation. A first draft of this email was provided to Mr L and Ms X by Ms F. The claimant sees this as evidence of Ms F coordinating matters with regard to her. We agree that she was taking that coordinating role but at this stage there was nothing intrinsically wrong with that. In fact, it was sensible given the volume of paperwork being generated and the importance and sensitivities of the matters raised.

127. On 20 October the claimant sent what was headed 'a succinct, structured document to lead through the case'. It comprised just over 6 pages of close typed, small font text.

128. On 19 October Ms D and Ms E completed a detailed management statement of case, including detailed accounts of various meetings, in response to the claimant's grievance which was provided to Mr L. Some latitude was given to them as this document should have been produced earlier. It is the attached personal reflection documents and witness statements that the claimant says were written in October rather than at the time of the actual meetings/events as opposed to her own reflective diary which she says was kept throughout the year.

129. The grievance hearing was held as planned on 25 October. It commenced at 2.30pm and had not concluded by 5pm (given the volume of information submitted by the claimant this was perhaps inevitable and the respondent should have anticipated this and scheduled a longer meeting). It was adjourned to 9 November. That was the first date available given the claimant's representative's (Mr Y) annual leave. The claimant did suggest that she could meet a week earlier if she was accompanied by a different representative but Mr L' evidence was that he recommended they wait for Mr Y to aid continuity and they settled on that with no argument. The claimant says he refused to let her change and therefore that was a breach of policy. The notes of the meeting do not confirm either way but given that Mr Y was present at the second meeting if it had been as described by the claimant we would expect him to have said something to that effect which he did not. We conclude therefore that it was as Mr L described.

130. On 8 November the claimant emailed to Mr L and Ms X clarifying information she had given at the previous hearing and attaching 10 examples of bullying behaviour. The grievance reconvened on 9 November (at the outset Mr L expressly confirmed with the claimant that this timing was acceptable as she was due to see Ms U regarding that grievance in the afternoon).

131. On 10 November Ms X emailed a colleague referring to a statement by the claimant in their meeting the previous day where she said she was taking legal advice and considering submitting a civil claim as well as 'an ET' and that she felt her mental health had been significantly impacted by a failure in management's duty of care.

132. On 23 November the claimant chased Mr L for the outcome to her grievance but acknowledged that the timeframes specified within the policy were guidance.

133. On 28 November Mr L requested and received further statements. He also requested information from Dr V but this was only received on 19 December (it having been sent to the claimant for approval in the meantime).

134. In other exchanges with Mr L in this period the claimant also stated:

> 'Unfortunately I have lost all trust, confidence and faith in my management considering that they have also falsified documents to represent official supervision records which is also against the law and fraudulent.'

135. The claimant chased Mr L again for an outcome on 21 December. He replied the same day saying that he would try to ensure the decision would go out by close of play on Friday (which would be the 23rd). The claimant replied asking for the outcome at his earliest convenience specifically stating her concerns about the lack of availability of healthcare over the Christmas period and that she may not be able to access any help she needed without causing undue stress to her family on Christmas Eve. Whilst it is clear that the claimant was urging Mr L to send his response as quickly as possible, it is equally clear that she did not ask him not to send the response on Friday

23rd which is what he did - both by email and post. We do not conclude however, as was alleged by the claimant during her evidence, that he did this deliberately to cause her distress.

136. In his outcome letter, Mr L summarised the steps he had taken in considering the grievance, the information presented by the claimant and Ms D and E, the additional information he had received from his enquiries after the hearings (including that he had reviewed the question of digital finger prints on documents that the claimant had alleged had been falsified but this could not be pursued further) and then his summary/outcome.

137. In that last section he stated it was clear the claimant had felt bullied by Ms S and that she had highlighted this to management in February 2016 but that her description of her relationship with her managers on the whole throughout had been at odds with her written communication. He accepted Ms D's and Ms E's explanation that in the meeting on 18 May 2016 bullying by Ms S was not discussed but that the more general complaint of bullying within the team was, was investigated and reported back to her. He also stated that he thought there was no doubt the claimant's health was poor and that this may have had some bearing on her ability to communicate concerns with management at that time. He found that her managers' assumptions and actions were reasonable and appropriately supportive in the circumstances. As far as the specific steps taken to support the claimant under the stress policy were concerned he concluded, whilst acknowledging there were differences of opinion, that Ms D and Ms E had raised concerns about the claimant's well-being and had attempted to support her in dealing with her stress. He noted that the claimant acknowledged that she had received a copy of the stress risk questionnaire.

138. Whilst Mr L did not uphold the grievance he did express the view that management could have done more to support the claimant and explore her issues and that earlier input from OH and a more structured and well documented approach to application of the stress and DAW policies may have helped to avoid any misunderstanding. He recommended that he pick up these issues with Ms Q.

139. Mr L emailed Ms D and Ms E on 23 December and arrangements were made for them to meet after the Christmas break. There were no notes available of that meeting but Mr L' evidence was that he felt management should have insisted that the claimant fill in the stress questionnaire and referred her to OH earlier. He also confirmed in his evidence that he did not reprimand them in any way as it was not required and also that what they had done was adequate but they could have done more. In an email he sent in March 2017, Mr L said this meeting had been about giving feedback to the managers about what would happen next.

140. Given that the claimant's grievance was that management had not done enough to support her and Mr L found that to be the case, it is surprising that it was not at least partially upheld. We do not agree with the claimant's description that Mr L 'just agreed with management and shooed me on my

way' but we can see why, in all the circumstances, she thought that was the case. The outcome seems to indicate management were being protected.

141. On 24 December the claimant requested an extension of time to file her appeal against the grievance outcome which was granted to 27 January 2017. In that email she also referred to taking advice from her solicitors and trade union senior officer.

142. On 19 January the claimant submitted the appeal to Mr Z, Director of HR. The covering letter again stated that she had suffered work related stress due to bullying and harassment. It identified 16 reasons for appeal and enclosed a 14-page document headed 'explanation and evidence' together with 55 appendices (as a side note, because of the way the bundle was organised it was not always easy to locate and/or identify which documents comprised which appendices). The grounds of appeal included a failure to follow the grievance procedure and flawed investigation and insight by Mr L. It is clear that the claimant considered she had a claim in negligence against the respondent but she did not refer either expressly or impliedly to the 2010 Act. In an email also on 19 January the claimant said that she was unavailable to attend the appeal hearing after 16 February (21 days later).

143. The appeal was formally acknowledged by Ms DD of HR on 23 January and the claimant was advised that Ms N would hear it. She said it may not be feasible to hear it by 16 February as requested due to Mr L' absence until 23 February.

144. An exchange of emails between HR and Mr L between 23 & 25 January shows that Ms F was putting pressure - albeit softly - on him to prioritise the appeal hearing in his diary. The claimant has categorised this exchange as showing that the respondent was treating the matter as a joke and specifically referred to Ms F saying 'LOL' in one of the emails. We do not share that view and regard the claimant's view as plainly not reasonable in all the circumstances. Ms F described her tone in the emails as 'informal' and that she was trying to 'cajole' Mr L; we accept that description. It is also apparent however that Mr L was not prioritising the matter as he should have done. He was (or should have been) very aware of the importance of the issue to the claimant and its impact on her mental health.

145. On 27 January the claimant sent another lengthy email to Ms F, copied to others, relating to the arrangements for the appeal hearing and enclosing a letter from her GP which stated that the grievance was having a large impact on her quality of life and requested that the issue be resolved promptly.

146. Also on 27 January Ms F emailed Mr Z and others stating that she would respond to the claimant's letter and that they had a date agreed. She also said:

> 'The issues about timescales are part of her appeal and [Mr L] will respond to them… The appeal panel ([Ms N] and myself) at stage 3 will reach a decision if the process was not

handled well in terms of timescales and other issues. (from what I have seen/know this is not the case).'

This email is significant in two ways. First, it shows that Ms F considered herself to be part of the decision-making function of the appeal panel despite what she told us in evidence and what appears in the paperwork and second, that she was very arguably the wrong person to be involved in that panel process as she was already expressing a view regarding one of the grounds of the appeal. She was effectively going to be policing her own actions and should have completely stepped back.

147. On 30 January Ms DD wrote to the claimant confirming that the stage 3 grievance hearing had been arranged for 21 February, that it would be heard by Ms N accompanied by Ms F and Mr L would attend to explain the reasons for his decisions at stage 2. The claimant was advised of her right to be accompanied and to call witnesses. She also stated that the claimant's concerns about the timescales with the stage 2 hearing would be a matter 'considered and decided upon by Ms N' (in contrast to Ms F's comment above).

148. The claimant replied on 3 February confirming that Mr Y would attend as a witness and also requested again that her psychological support worker as well as Ms EE, as her representative, could attend. This was all acknowledged and agreed by Ms DD on 6 February.

149. On Thursday 16 February Ms DD informed the claimant that a pack containing the management documents for the appeal hearing was available for collection. She said that it was all documentation that the claimant had already seen but put together in one pack. The claimant replied that she was away for the weekend and would not be able to collect it until after 4:30pm on February 20, the day before the appeal hearing. She queried whether the hearing would need to be postponed until she had had an appropriate opportunity to review the pack and consult with her representative. Ms F replied to the claimant further explaining what was contained in the pack and confirming that it included the notes of the stage 2 hearing that had not previously been provided to the claimant (notwithstanding her requests). She did suggest that they may be able to scan (and presumably email) some parts of the pack to get them to the claimant earlier.

150. Ms EE emailed Ms DD and Ms F on 17 February stating that this late notification of documentation was unacceptable especially as the claimant had submitted her bundle over five weeks previously. She therefore requested a postponement to review the management submissions and consider the stage 2 hearing notes.

151. Ms EE wrote again to Ms F on 24 February with availability for the revised hearing pointing out a number of omissions from the management pack that had by then been collected. Most significantly it seems that the claimant's 'reasons for appeal pack' submitted on 19 January was not included. She also requested a list of original Microsoft word electronic

documents (not scanned PDF versions). Further medical evidence was also enclosed from the GP, dated 21 February, asking for proceedings to be expedited due to the significant impact it was having on the claimant's mental health and well-being. Ms EE also stated that the claimant's symptoms had been exacerbated and requested all future correspondence to be directed to Ms EE and copied to the claimant. She stated:

'[The claimant's] already damaged health is of the utmost importance and should be treated as such throughout what is a stressful time and in which you are aware that such procedures can exacerbate.'

152. Ms F replied on 27 February confirming that arrangements were being made to reschedule the hearing, the minutes of the hearing would be sent shortly and that she would forward the request for original other documents to Ms D and Ms E. She also requested that further correspondence be limited to the minimum necessary to make the arrangements for the hearing. This was not an unreasonable approach given the detail that was appearing in correspondence from the claimant and her representative.

153. On 7 March Ms EE chased for an update in relation to dates for the hearing. This led to an exchange of emails - at times lengthy - between her, Ms DD, the claimant and Ms F. Ms F gave a detailed explanation as to the difficulties HR were facing in setting a new hearing date. The claimant said in her evidence that she believed Ms F was deliberately prolonging matters to affect her mental health. We disagree with that suggestion. The content of Ms F's emails clearly show that she was trying to progress matters in difficult circumstances and there is absolutely no evidence to support an allegation that she was doing the contrary let alone doing so with that motive.

154. In the course of that exchange, the claimant said in an email dated 11 March:

'I have understandably lost trust and confidence in my management who failed me abhorrently…'

155. Eventually the appeal hearing was scheduled for 27 March to be chaired by Ms Q (essentially a peer of Mr L being at the same grade in different structures and both reporting to Dr K) as Ms N was by then unavailable. Ms DD wrote to the claimant on 20 March informing her of these arrangements.

156. Lengthy and unhelpful correspondence continued between the claimant and Ms F/Ms DD between 11 and 19 March. In addition the claimant wrote letters of complaint to Mr Z and to the chief executive of the respondent. In her letter to the latter she referred to her workplace as a:

'toxic environment whereby fear, intimidation and collusion substituted incompetent and poor managerial skills.'

She also referred to being subjected to:

'further covert victimisation and retaliation'.

157. This led to a further exchange of emails between the claimant and Ms F (and others) between 21 and 24 March. In some respects the claimant was seeking reasonable clarification of the process to be followed but because of the argumentative way she framed her requests, the correspondence ballooned into the unhelpful type described above. It culminated in the claimant expressing the hope that the grievance appeal could be heard and an outcome delivered 'fairly, equally and without bias assumptions'.

158. It was during this exchange that the claimant first asked for an 'agenda' for the appeal hearing to be sent no later than three working days beforehand so that she could prepare. In reply Ms F said the basis of the discussion would be her grounds of appeal and Mr L' response to them. The claimant responded that she was aware of that but she had asked for a clear agenda due to her medical condition to help lessen her anxiety and that providing structure in the form of a clear agenda would be a reasonable adjustment under the 2010 Act. She stated:

> 'Such structure in the form of an agenda would help reduce my stress and anxiety by identifying who and when statements are reviewed or said, questions asked, identifying planned scheduled breaks etc.'

159. When she had not received a reply to that request within 24 hours, the claimant repeated it to Mr Z. Ms F replied the following day stating that she was not clear what further agenda she could provide but did describe the normal format of a grievance hearing. She repeated that the claimant should use her union to support her and reduce her anxiety as that was their role and they were experienced in it. The claimant replied that she did not know what the normal format was, that she had never been in a stage 3 hearing before and that she was looking for a simple layout in a separate document of the structure the grievance would take. She again referred to a clearly planned structure with scheduled breaks and referred to her anxiety and this being a reasonable adjustment under the 2010 Act. Ms F replied stating that the chair would adjourn the hearing as appropriate and that she could make as many requests for adjournments as she needed and that this was entirely normal. However she said she could not predict when a break would be taken to formalise it into a timetable. Ms F was taking an unnecessarily 'corporate' and inflexible view here. Given her experience as a senior HR manager, it would have been easy for her to draft the sort of agenda the claimant was asking for - e.g. with scheduled breaks, order of witnesses and likely timescales - whilst making it clear it would be indicative only. There seems to be no good reason why she did not especially given the claimant's reference to her disability (which by this time the respondent had knowledge of).

160. In that reply Ms F also said that in view of the claimant's comments and assumptions as to prejudice or bias her colleague Mr FF, another divisional HR manager, would replace her in supporting Ms Q and hoped that this would reassure her regarding a fair hearing. This was undoubtedly a sensible approach however Ms F clearly did continue to be heavily involved thereafter and specifically did continue to support Ms Q not only in a co-

ordinating role but also by briefing and drafting. This was poor judgment but there was no evidence that this was because of or related to the claimant's disability or because of any campaign/conspiracy.

161. The appeal hearing was held as planned on 27 March chaired by Ms Q with Mr FF in attendance. The claimant attended with two union representatives. She confirmed at the start of the hearing that she was happy with Ms Q chairing it. Mr L attended to explain his decision at stage 2. No witnesses were called. Brief manuscript notes were made but a full account of the meeting was contained in Ms Q's later outcome letter.

162. The claimant indicated that there were a number of outcomes she wanted from the appeal in addition to stage 2 being overturned including disciplinary action against Ms D and Ms E, verbal and written apologies from them, not to have to work with Ms E again and to have mediation with Ms Rickets, supervisions with Ms D themselves to be supervised, counselling, removal of the OH referrals from her file and the report and feedback from the process to be submitted to the respondent's Board.

163. After the meeting Ms Q contacted Ms D for further information regarding the stress survey which she provided by email on 3 April and included her relevant diary notes from April and May 2016.

164. In the outcome letter sent on 4 April (the first draft of which was prepared by Mr FF and which he also sent in draft to Ms F) Ms Q went through each of the claimant's 16 grounds of appeal and gave detailed reasons as to why they were not upheld. Our findings only comment on those parts of the letter relevant to the issues before us.

165. In respect of the first ground, the grievance policy not being followed, she noted that Mr L had accepted the process had taken too long and apologised for that. However she stated that the delays would not have changed the outcome and therefore that part of the grievance was not upheld. Again, there has been a finding that something was amiss, even if this was not technically a breach of the process (due to the 'as far as reasonably practicable' caveat on timings) yet the claimant's complaint was not upheld. This again is surprising. Upholding this part need not have resulted in any further action but simply a recognition - as had already been acknowledged - that the process had indeed taken too long.

166. Similarly in respect of ground two, which related to the failure to provide copies of the meeting notes, even though there was no formal requirement to provide the notes, Ms Q's conclusion seems particularly protective of Mr L. She again did not uphold this ground because the delay in sending the notes would not have made any difference to his decision. This approach fails to acknowledge the undoubted impact on the claimant who the respondent knew was unwell.

167. The fourth ground was regarding allegedly prejudicial assumptions made by the chair, in particular where Mr L had stated in his outcome letter that the claimant's health was poor and that this may have had some

bearing on her ability to communicate her concerns with management. Ms Q noted that Mr L had apologised and stated he had chosen his words poorly but said he was attempting to highlight her general communication which was confused and that there were several examples of her saying one thing but appearing to mean another and that this lack of clarity confused her managers. Mr L repeated this explanation in his evidence before us. Ms Q agreed with Mr L that on occasion the claimant's communication had been unclear which may have led to confusion; she noted his apology and explanation and did not uphold the complaint.

168. The sixth ground included a discussion about the rules for time off for NHS interviews or whether annual leave should be taken. The parties have resolved the matters relating to and paid annual leave between them but Ms Q, notwithstanding not upholding this part of the grievance, accepted that the claimant may have been disadvantaged by the confusion and recommended that time be given back to her.

169. The tenth ground was poor investigation and insight into the additional information obtained by Mr L. Ms Q considered and agreed with Mr L' explanation as to his conclusions in this regard and found that there was no evidence that Ms S had manipulated her managers and that the statements from Ms GG, Ms W and Dr V were clear.

170. The eleventh ground was falsified documents presented as evidence by Ms D and Ms E, specifically the supervision record dated 13 April 2016. Ms Q recorded that she had spoken to Ms D and accepted her explanation that the longer document was her reflection of a conversation she had had with the claimant on the same day and that is why it was not documented on the usual form.

171. The sixteenth and final ground of appeal was that evidence provided by management had been backdated. This is a reference to the word documents containing statements and reflections and whether the properties of those documents show that they were created after the event. Mr L explained the enquiries that he had made after his hearing and that he had felt a forensic IT investigation was not justified as, on the balance of probabilities, he was confident that the managers created those documents when the matters were being discussed not after receipt of the grievance. Ms Q was reassured by Mr L' investigation. In her evidence Ms Q said that she vaguely remembered being shown screenshots by the claimant during the appeal to show that these documents had been created after the grievance was submitted. She also said in evidence, which does not appear in the outcome letter, that she spoke to the head of IT and that her understanding was that a forensic IT investigation was not possible because there is only a two-week period within which a date could be proved and that have passed. At the very least, if that was the case, she should have explained this in the outcome letter.

172. Ms Q stated that overall she appreciated it had been a difficult time for the claimant but she was confident that Mr L carried out an appropriate and reasonable investigation, considered all the relevant information and that on

the balance of probabilities his decision had been correct and that therefore the appeal was not upheld.

173. Ms Q also responded to each of the 12 resolutions that the claimant had identified she was seeking from the appeal process indicating in respect of each either why it was not appropriate or depended upon other parties and what further steps needed to be taken.

174. As far as the claimant's wish to continue with mediation with Ms D was concerned, Ms Q stated;

> 'As you know, mediation is a voluntary process and it will be a decision for you and Ms D if both of you wish to continue with mediation.'

175. The claimant replied on 6 April in a 14-page, small font close typed letter setting out why she disagreed with the outcome. She stated that she felt it was clearly biased, unfair and an inaccurate outcome in support of management. Mr FF forwarded the letter to Ms F. On the same day the claimant wrote to Mr Z, in relation to the decision not to pursue her appeal against part two of the grievance referred to below.

176. <u>Part two of grievance one: September 2016 - April 2017</u>

177. On 14 September, as advised, the claimant submitted her formal complaint pursuant to the DAW policy against Ms S with a lengthy supporting statement attached. In those documents the claimant refers to bullying and harassment and parts of the statutory definition of harassment but also made it clear that it was the alleged treatment of her by Ms S that led to her stress, anxiety and reactive depression. It does not read that she was bullied/harassed because of or in relation to those conditions. This was acknowledged by Ms F on 19 September and in October she again wrote to the claimant confirming that Ms U, General Manager, had been appointed to investigate her concerns. On 11 October the claimant said no apologies were required for the delay in response as she appreciated the complexity in organising both grievances. She then requested to be accompanied by both her union representative and her employment psychological specialist and enclosed supporting evidence (it is not clear from the bundle what that supporting evidence was).

178. On 2 November Ms U wrote to Ms S informing her that the claimant had made a serious complaint of bullying and harassment against her and asked her to submit a written statement in response by 16 November.

179. The hearing was scheduled, with the agreement of the claimant, for 11am on 9 November, the claimant by then already having been asked to attend the reconvened hearing with Mr L that afternoon of 9 November. At the outset of the meeting Ms U informed the claimant that she hoped to have the investigation completed, report written and recommendations made by Christmas.

180. The meeting comprised almost entirely of the claimant describing the behaviour towards her by Ms S and others. She said that she thought it would be helpful for Ms U to talk to Ms E, Ms D, Ms HH and Ms JJ. The claimant concluded by saying that whatever disciplinary action was deemed appropriate for Ms S would be fine with her, that she could not work with her and she wanted others in the team to be told she had been bullied. She also referred to suing for constructive dismissal and having instructed a lawyer. Notes of the meeting were sent to the claimant on 23 November (in contrast to Mr L) who replied with some amendments.

181. On 14 November the claimant sent further details of her complaint to Ms U and a list of, in total, 56 members of staff with whom she had worked and that she thought Ms U may wish to interview.

182. On 16 November Ms S sent a lengthy statement to Ms U together with 26 appendices. In summary she disputed the claimant's assertions and said that she in turn had found the claimant's behaviour to be tough and upsetting to try to manage. She gave a detailed reply to each of the allegations made. Ms U and Ms S met on 21 November and the events in issue were discussed in detail.

183. On 8 December Ms U met Mr T, Ms D and Ms JJ and asked them all relevant questions regarding their involvement in the events in question.

184. On 21 December the claimant chased Ms U for an outcome to her complaint. Ms U replied the following day apologising for the delay (due to absence of witnesses) and said she would endeavour to complete it as early as possible in the new year. The claimant again chased Ms U on 10 January who replied the following day, again apologising for the delay (due to sickness and leave of key witnesses) and endeavouring to conclude as soon as possible.

185. On 18 January 2017 Ms U met Ms HH to discuss her involvement in the events in question.

186. On 27 January 2017 Ms EE chased Ms U on the claimant's behalf for a conclusion to the process and enclosed a letter from her GP asking for a prompt resolution due to the effect of on her health. Ms U replied to Ms EE on 30 January stating that the investigation had been concluded and that the claimant would receive a report that week. That was then delayed and on 3 February MS F informed Ms EE, on Ms U's behalf, that the outcome would be sent on 8 February.

187. On 8 February the outcome letter was sent together with a detailed and comprehensive report. Ms U's finding was that on the balance of probabilities she did not believe that Ms S was harassing claimant and the allegation was not upheld. She recommended that both the claimant and Ms S be offered mediation to resolve their working relationship which, she noted, Ms S had agreed to however the claimant had not. Given the level of stress and anxiety reported by the claimant, however, she recommended that she be supported to return to her professional post in September 2017

and her request not to work in the same department as Ms S to be honoured. In practice this was achieved in any event as Ms S was due to and did rotate into a different department.

188. The claimant's request for an extension of time to appeal that outcome was granted to 24 March and then again to 7 April. We note that when Ms EE made the first request Ms F asked her to direct it to Ms KK which was done. The request was granted but Ms KK forwarded it to Ms F who in turn forwarded it to Ms U for information. This does indicate that notwithstanding Ms F by then having officially stepped back, she was still heavily involved in at least a co-ordinating role.

189. On 6 April the claimant wrote to Mr Z thanking him for the extensions of time, but confirming that whilst she categorically still disagreed with the outcome of her grievance, due to her ill-health - which she stated was as a result of unaddressed workplace bullying, harassment and managerial negligence - despite respectfully disagreeing with the outcome she was unable to appeal. She went on to say that as a result of invoking the grievance five people had de-friended her on social media and two other immediate team members joined in and:

> '… wrote seriously slanderous and false statements about me with the intent to discredit my grievance and professional reputation.'

She went on to say, however, that she thanked Ms U for the recommendation that she not to be required to work in the same department as Ms S and was looking forward to being able to return to her post in September 2017.

190. <u>Breach of confidentiality complaint: March 2017 - May 2017</u>

191. On 14 March 2017 the claimant emailed Ms Q informing her that a copy of the OH referral made on 16 (sic - 15) August 2016 had been saved onto the NHS clinical support J drive which is accessible by any member of staff within the therapy department. She enclosed a screenshot of that drive showing that the document had been saved and last modified by Ms E on 15 August. She stated that this was a gross and negligent breach of confidentiality. She referred to her ongoing grievance process and alleged that Ms D and Ms E had then victimised her for raising her concerns and again that as result of their behaviour she developed anxiety and depression. She asked that the document should be removed with immediate effect, stored appropriately and that she wanted to be informed about appropriate disciplinary action being taken as well as a documented written apology.

192. Ms Q spoke to Ms E who confirmed later that day that she had moved the document from the J drive to her personal a drive and that she had also changed all login passwords. On the following day Ms Q contacted the IT department informing them that the document appeared to have been saved to the J drive rather than the K drive and that the creator of the file (Ms E) maintained she had only saved it on the K drive and could not account for it

in the J drive. She asked for advice on how this could be investigated. Also on that day Ms Q replied to the claimant (having sought advice from Ms F) stating that she was most concerned about the content of her email and apologising for the potential breach on behalf of the respondent. She advised that an investigation was underway to determine the cause and that she would be advised of the findings in due course. She informed the claimant that the file had been removed from the shared drive and reassured her that it appeared it had not been accessed by anyone from that location. Further, she said that if there was evidence of wilful or negligent misconduct she would manage it in line with Trust policy but the claimant would not necessarily be advised of the outcome. The claimant replied in a lengthy email on 18 March stating that this was a clear, marked and evident breach of trust and confidentiality and further that it was wilful harassment, incompetence and negligent misconduct. She stated that a written and documented apology from Ms E accompanied with appropriate formal disciplinary action for her gross professional misconduct would suffice. She asked whether she should submit a further grievance, for disclosure of the preliminary investigation documentation, attached a summary sheet of evidence of wilful and negligent misconduct, requested that any investigation was carried out by someone impartial and in the final paragraph referred to the misconduct and clear incompetency of the two physiotherapy managers (presumably Ms D and Ms E), stated that she had sustained a personal injury as a result of unaddressed workplace bullying and harassment and the clear gross managerial negligence which they displayed and their abuse and misuse of power. She concluded:

> 'I have ultimately lost all faith, trust and confidence in these two managers who failed me abhorrently, please do not let me loose the same confidence in an organisation and department in which I love and am proud to be a part of.'

193. Ms Q replied on 22 March (again having taken advice from Ms F confirming that IT were investigating and it was premature to state that there was wilful, incompetent or negligent misconduct. She repeated that if misconduct was identified it would be a matter for the Trust to decide on future action. With regard to the query about a further grievance, she said that she understood the claimant had already submitted further correspondence related to this issue in the grievance appeal which she (Ms Q) was due to hear the following week.

194. The claimant replied later that day restating some of her previous points and also attaching GP letters confirming the effect on her health of unresolved procedures and asking for a timeframe for the investigation and outcome.

195. An initial IT enquiry on 17 March confirmed that they had spoken to Ms E and asked her to save a document on to her K drive to see if it then appeared on the J drive which it did not. Ms Q sought further explanation as to how the referral ended up on the J drive and on 4 April IT confirmed that whilst not conclusive and evidence-based, it looked like an 'accidental user-initiated action' which presumably means a mistake. Ms Q asked four further questions that IT were unable to answer as they were unable to

restore data back to 15 August 2016 as it was only saved for a 14-day period. Upon receipt of that advice Ms F informed Ms Q:

'We need to craft a response to [the claimant]. Let me have a think about this and come up with a form of words today'

196. The claimant's interpretation of 'craft' was that this showed a deliberate intention to deceive whereas Ms F when asked about it said that she used the word 'craft to mean 'draft with care'. We accept Ms F's evidence on that. We also find that Ms Q carried out as much investigation as she reasonably could with IT in relation to this issue.

197. In the meantime on 5 April Ms E was invited to a disciplinary investigation hearing with Ms Q and she produced a statement on the same day.

198. That investigatory meeting was held on 11 April. Ms Q was accompanied by Ms F and Ms E by Ms D. The notice of the meeting show that Ms E was properly and appropriately questioned about the incident. They also show, however, that she expressed no remorse nor expressed any apology and that she sought to downplay the sensitivity of the document describing it as routine and pointing out that the claimant had been open about the reason for her sickness on social media. This betrays a lack of appreciation by Ms E for the seriousness of the incident.

199. After the meeting both Ms E and Ms D provided further information to Ms Q and later on 11 April Ms Q wrote to Ms E confirming her conclusion that there was insufficient evidence to substantiate or disprove the allegations and therefore it was not her intention to pursue the matter under the disciplinary procedure any further. Given that IT had effectively said this was due to a mistake and that mistake had to have been made by Ms E, this was a lenient outcome (although reasonable in respect of the allegation that it was a deliberate action). At the very least one might expect Ms Q to have formally reminded Ms E of the need to be very careful in relation to such sensitive personal information. This outcome may well have contributed to the claimant's perception that management gave greater weight to more senior employees'' statements than hers.

200. On 26 April Ms Q wrote to the claimant informing her that the matter had been investigated by IT from a technical perspective and also by herself under the disciplinary policy. She gave an appropriate description of the investigations that had been carried out and said that they had been inconclusive. She repeated her apology that this had occurred and that she would be ensuring a review of all documents saved in the shared folder would take place and would reiterate with all management the need to keep electronic filing systems as confidential as paper based.

201. The claimant replied in a lengthy email on 28 April setting out her disagreement with Ms Q's decision and indicating that she wished to appeal. She also asked for copies of the evidence. On the same day she emailed Mr LL (Director of HR) and Mr Z setting out her view of events to date and again indicating that she wished to appeal Ms Q's decision.

202. On 18 May Ms Q emailed the claimant apologising for the delay in responding and advising that there was no right to appeal the findings of the investigation but that if she had any concerns the appropriate framework for handling them would be the grievance procedure. In the first instance, however, she invited the claimant to meet so that she could understand her findings and reasons. She further advised that if following such a meeting she chose to raise a formal grievance that would be heard at stage 3 as her investigation would amount to stage 2. On 22 May the claimant replied, declining the invitation to meet and repeating her request for copy evidence.

203. Grievance 2 - May 2017 to September 2017

204. On 22 May the claimant wrote again to Mr LL to lodge a written formal grievance in relation to the breach of the Data Protection Act 1998 as well as the Trust's own policies by Ms E saving the OH document in an open access shared drive. She did not refer to the 2010 Act either expressly or impliedly.

205. We note that in that letter the claimant also said that she had previously sought 'informal resolutions'. Given the terms of her first reference of the matter to Ms Q, referred to above, in which she requested 'appropriate disciplinary action taken as well as a documented written apology', that is a disingenuous description of her approach at the time.

206. Ms F acknowledged that letter on 22 May and on 24 May confirmed that the grievance would be considered at stage 3 and a hearing would be arranged as soon as possible.

207. The claimant replied on 6 June challenging the process that would be followed believing that it should instead be considered at stage 2 and expressly confirming that Ms Q was not the subject of the grievance but Ms E was and that therefore Ms E should be present at the hearing.

208. In an exchange of correspondence between the claimant and Ms Q following on from the claimant's request for copy evidence referred to above, the claimant stated:

> 'I genuinely am most concerned about the extremely harmful, repeated, deliberate and incompetent behaviours Miss E continues to display'

209. Elsewhere in that exchange the claimant stated to Ms Q that she had trusted her to resolve the matter fairly and unbiasedly without the need to invoke the grievance procedure and that she had expected a simple apology from Ms E. Again, this is a disingenuous categorisation of her expectations at the time.

210. Ms F approached Mr H on 13 June asking him to chair the grievance as he was outside of the Division and at least the same or higher grade than Ms Q.

211. On 14 June the claimant again wrote to Ms F repeating concerns about the application of the grievance process and asking for confirmation that Ms

E would be present to personally give her reasoning and answer for the 'gross professional malpractice'.

212. Ms F replied on 14 June agreeing to revert to stage 2 in the grievance procedure whilst not agreeing that there had been an error. She made it clear that the matter had been investigated and would not be reinvestigated and that the purpose of the grievance was to let her make any points she wished about the issue. She said it would be up to the chair of the hearing to determine the format and from whom he/she wished to hear.

213. The claimant wrote again to Mr LL on 14 June but we have not been able to locate that in the bundle. In any event Ms F replied on 16 June saying it would not be helpful to engage in long protracted dialogue as to arrangements for the hearing as it would delay the resolution of the grievance. As for the attendance of Ms E at the hearing, she reiterated that it was the decision of the chair to decide format but that her letter would be passed to the chair to consider what he deemed reasonable in all the circumstances which included that the matter had already been subject to a disciplinary investigation and Ms E had provided a response to Ms Q. In the absence of any dates to avoid, the hearing was provisionally arranged for 4 July.

214. This prompted another lengthy reply from the claimant complaining about the suggested dates and that neither she nor her representative would attend any hearing until Ms E was present to answer and to be held accountable. In that letter she also stated:

> 'Given that evidence proves Ms E continues to lie… Of all the lies she has said I will never forget the deliberate, malicious and harmful lies she told and documented to other members of staff alluding I was mentally unwell/bipolar and in which remains on my employee file and not one manager within the HR department or the trust involved in this case has had the integrity to address the malpractice… and remove it……'

215. In the background, Ms E was being 'kept in the loop' and Ms Q asked for a meeting with her to give her an update which initially she agreed to. On 20 June however Ms F told Ms Q that Ms W had had a meeting with Ms E who was extremely upset and anxious. Accordingly Ms F briefed Ms E and no meeting was necessary with Ms Q.

216. On 23 June Ms F wrote to the claimant confirming that the stage 2 grievance hearing had been arranged for 14 July and would be heard by Mr H accompanied by Mr FF, that Ms Q would be present to respond to the grievance and that Mr H would decide if he wished to call Ms E (although she was unavailable on that day). She was reminded of her right to be accompanied and also advised that should she choose not to attend the hearing it would proceed and a decision would be made. She was strongly encouraged to attend. On the same date Ms F contacted Mr H saying, not unreasonably, that she needed to brief him on the matter.

217. On 26 June 2017 the claimant wrote to Ms F covering much of the same ground as in her previous correspondence and also stating that she noted the presence of Mr FF who had been in attendance at a previous grievance

hearing which had been wrongfully and biasedly not upheld. She enclosed a document that responded to Ms E's statement in her disciplinary process in April showing that it had at some point been sent to the claimant in the correspondence setting up the stage 2 hearing.

218. Ms F replied confirming she had passed the claimant's letter and enclosures to Mr H. She repeated in short form the point she had already made about the arrangements for the hearing and encouraged her to attend.

219. The claimant replied to that repeating her position and confirming that she would not be attending the grievance hearing unless Ms E was present 'to answer for and be held accountable for this gross breach of data protection'. She repeated her request for various documents. It is apparent that the claimant was seeking, through her grievance to rerun the disciplinary case against Ms E.

220. On 12 July Mr H emailed the claimant urging her to attend the hearing on 14 July so that he could make an informed decision on how to proceed and to ensure that she was given a proper opportunity to have her grievances heard. The claimant replied the following day confirming that neither she nor her representative would attend due to the 'continued biased protection and omission of the manager against whom the grievance is about'. She went on to explain why she felt the grievance was straightforward and that she would leave it in his hands. She asked for minutes of the hearing and the outcome within seven calendar days.

221. At Tribunal the claimant put to Mr H that he chose not to call Ms E to the grievance hearing because she was not disabled. He denied that. His evidence, which we accept, was that as Ms E had not been available and he was not clear what redress the claimant was seeking and given there had been a disciplinary hearing (in fact there had been a disciplinary investigation and the decision made not to proceed in that process) he wanted to meet the claimant first so he could understand her position and then start an investigation.

222. No minutes were made of the meeting that took place on 14 July attended by Mr H and Mr FF. Mr FF later confirmed to the claimant that they had discussed the matter, the meeting had lasted about 30 minutes and all the relevant information was captured in the outcome letter.

223. That outcome letter was sent on 18 July 2017 and it described the background events and the decision that the grievance was not upheld because the claimant had refused to attend and therefore Mr H could not fully understand the background or know the resolution she was seeking. Further, he stated his belief that if an individual submits a grievance then they must fully engage with the process, including attending the grievance hearing. She was advised of her right to appeal.

224. Mr H accepted in his evidence that the grievance procedure does not necessarily require the person raising the grievance to attend the hearing. In that respect, therefore, his outcome letter was inaccurate. We do agree

with Mr H however that it is usually reasonable to expect the person to attend and the claimant was certainly strongly encouraged to do so, more than once, on this occasion. Therefore it was not unreasonable per se for him to proceed in her absence. It was also not unreasonable for Mr H to ask the claimant to attend at least a first meeting without requiring Ms E to be present.

225. It is less clear cut whether it was reasonable for Mr H not to uphold her grievance because he did not fully understand the background or know the resolution the claimant was seeking. There was a clear statement in her original grievance letter of the resolution she was seeking - disciplinary action against Ms E. Unfortunately, as was often the case with correspondence from the claimant, it is understandable if that was not apparent to the respondent as it was buried within lengthy and detailed correspondence. Notwithstanding that it seems a shame that Mr H, having reviewed all of Ms Q's investigation, did not engage with the claimant's arguments as far as he could despite her absence. His approach was not unreasonable however and it is clear that the reason for the claimant's non-attendance was because Ms E would not be there rather than her disability or anything arising from it.

226. On 25 July (at 15.11) the claimant submitted her appeal against Mr H's decision to Mr LL. She set out 18 reasons for her appeal (in summary in the covering 3-page letter and in a detailed 10-page attachment - these included a failure to comply with the 2010 Act). She stated that she wanted Mr H's decision to be overruled and for him to carry out the investigation he was appointed to complete but if that was not possible then for Ms E to be present at the stage 3 hearing for further investigation. She also stated that she would prefer Mr LL to oversee the grievance as:

> 'Neither the appointed divisional managers from HR nor management I feel have been fair, impartial or considerate in their dealings or communication with me.'

227. The appeal was acknowledged on 31 July by Ms McCullough.

228. Ms N wrote to the claimant on 4 September advising her that she would be dealing with the stage 3 hearing on 28 September. She confirmed that it would not be a rehearing of stage 2 and she would only be considering whether Mr H's decision was appropriate based on the evidence presented to him and that he would be present to explain his reasons. The claimant was advised of her right to be represented and the arrangements regarding witnesses.

229. In the course of correspondence between the claimant and HR a letter from her GP dated 29 August was forwarded which referred to the hearing having been scheduled for 28 September. It said that the delay was impacting the claimant's mental health, exacerbating her anxiety and depression and asked for matters to be expedited.

230. Although the delay in arranging this hearing was regrettable, we accept the respondent's position that the delays were due to difficulties in securing

appropriate managers to deal with it. Further, Ms N was on leave for two weeks in September and therefore it could not be heard any sooner.

231. The claimant replied to Ms N on 6 September reluctantly agreeing the date proposed and stating that her entire complaint remained outstanding as it had not been investigated nor even discussed at stage 2. She also asked for confirmation that Ms E would attend. She attached a number of documents in support of her position.

232. On 27 September Mr MM, the claimant's union representative, sent a letter from the claimant's GP to Ms N which said that since the claimant had been notified of her suspension on 11 September (see below) she had become significantly unwell and would be unable to attend the hearing. It asked that the hearing go ahead without her and consider the evidence provided.

233. Ms N replied on the same day confirming that the hearing would proceed as scheduled and the claimant's statement of case would be fully considered and the outcome sent on completion. She also stated that she was keen to ensure the claimant's side of the case was heard and even if she was not fit to attend proposed that, if she wished, her chosen representatives could attend in her place or if, on reflection, she felt able to attend she would ensure that the hearing was conducted taking full account of her state of health. She also said she would inform Dr K that the claimant would not be attending the hearing with him the following day and would forward the GP's letter to HR.

234. The hearing proceeded as scheduled on 28 September chaired by Ms N with Ms NN in attendance from HR. Mr H attended to present the management response and, as expected, the claimant did not attend. No notes of the meeting were prepared but a full account of the process was set out in Ms N's outcome letter sent to on 29 September.

235. Ms N set out in detail the reasons for her decision. In summary that it was within Mr H's remit to decide what he deemed reasonable to include and whether people should be present. She stated that it was not clear what resolution the claimant was seeking because it had been made clear to her that the breach of confidentiality had been subject to a formal disciplinary investigation and that she would not be advised of any resulting disciplinary action. Ms N said she believed the issue of breach of confidentiality and data protection had been investigated and that whilst there had been delays the claimant had been fully informed of the reasons for that. She said she would have liked the claimant or her representative to attend as some of the allegations required further clarification and that it was reasonable to expect her to attend as it was her grievance. She stated that the claimant's repeated non-attendance and lack of engagement had not helped process. She confirmed that the grievance was not upheld and that was the end of the process.

236. <u>Ms D's referral to OH/support: June & July 2017</u>

237. On 26 June 2017 Ms D emailed Ms W. She referred to the fact that she had had 'a meltdown' the previous week. She said that she was embarrassed but she was getting so stressed and worried about having to work with the claimant again and getting panicky going on the wards in case she was there. She said that she was embarrassed that 'it's turning me into a nervous emotional wreck.'

238. They met on 30 June and discussed Ms D's concerns about how best to support the claimant's forthcoming return to work from her secondment. In an email sent to Ms W later that day Ms D said that she was anxious about the upcoming return and had genuine concerns for the well-being of the team and for patient safety. She also asked for advice on whether she should talk to staff support/mediation services to see if they had any advice on creating a safe working environment for the claimant, the team, the patients and herself on the claimant's return. This certainly seems to indicate that at this point Ms D was expecting the claimant to return and was looking for constructive ways to manage that. She also referred to an OH referral that they had discussed and thanked Ms W for making another referral for her.

239. Ms W replied on 3 July in supportive and concerned terms confirming that she had completed two new referrals for her to OH and asked her to confirm she was happy with the contents to which Ms D replied she was.

240. In mid-July Ms F helped put in place some internal coaching support for Ms D with regard to how to manage challenging employees. In doing so Ms F said that Ms D was:

> 'currently managing a very challenging employee and is very understandably finding this difficult'

We find that this does not indicate any bias on the part of Ms F but rather just a reasonable statement of how she saw the situation.

241. The OH referral was emailed by Ms D herself to OH on 7 September. It cited 2 absences - one for hip surgery and one for work related stress - and asked for support but gave no other context. There was no apparent reason for the delay other than it was finally sent prompted by Ms D's absence for stress. The claimant says that the referral was part of the predetermined plan to remove her and was therefore timed just before her suspension. We do not find that to be the case. The referral was sent prompted by Ms D's sick absence.

242. The resulting OH report was sent to Ms W on 20 September. It included:

> 'She was off sick for 5 days recently with work-related stress
> We discussed the position she finds herself in at work - the difficulties she faced when line managing a particular staff member and the anxiety she is experiencing at the thought of this all starting again when the staff member returns from study leave
> Having previously been happy and confident in her role she is currently struggling psychologically with, what she describes as, a negative atmosphere in the working environment.

This is impacting on her mental, emotional and physical well-being and [Ms D] is experiencing somatic problems and anxiety
… she states that she continues to be subject to emailed personal and professional criticism from the colleague that she line manages'

243. Management of the claimant's planned return to work: July 2017 - 25 August 2027

244. On 6 July a meeting was held between Ms Q, Ms W, Ms QQ and Ms D. Neither Ms D nor Ms Q had a clear recollection of this meeting. The only note of what was discussed appears in Ms QQ's statement made in October for Ms P's investigation into the breakdown of working relationships. She said:

'There was broad agreement, as I recall it, that it was unsatisfactory for [the claimant] to return to her current role, for all concerned, but it was also recognised that we required some… HR guidance about what options might be fair and reasonable.'

245. They met again (without Ms W) on 18 July and again Ms QQ's statement contains an account of that meeting:

'[Ms D) and I subsequently met with [Ms F] from HR on 18.07.17. I gained the impression that before any alternatives could be explored it was necessary to exhaust all possibilities for [the claimant] to return to her existing post. At all meetings, it was apparent that Ms D remained distressed about the prospect of managing the relationship and [the claimant's] return to work. I was increasingly concerned about Ms Rickett's well-being.… [She] was now referring to fearing opening emails because of the nature of correspondence she was receiving from [the claimant].… I was also shown a file of correspondence relating to this relationship. The size of the file alone persuades me this relationship is severely and probably irreparably compromised. The tone and content of some correspondence from [the claimant] also raised concerns for me about her own mental wellbeing,… It was agreed that in view of this, [she] should see occupational health before resuming clinical duties.'

246. Ms QQ emailed Ms F, copying relevant others, on the same day confirming the agreement reached at the meeting and that the claimant would be invited to meet to discuss return to work arrangements (the invitation letter to be drafted by Ms F) and also notified of the intention to refer her to OH. Ms QQ also referred to 'the apparent practice burden for [Ms Rickets] in all of this' and that Ms F would explore what could be provided/supported by the respondent as support for the team and Ms D.

247. On 18 July the claimant had emailed Ms Q referring to the anxiety and reactive depression she believed she had sustained due to her treatment at work and that she would welcome continuing the mediation from the previous year with Ms D prior to her return (but was only available from 24 July to 31 August). She referred to being anxious about returning to work, having lost trust and being fearful of further retaliation and hurtful gossip. It was clear therefore that in the claimant's mind those issues had not been resolved.

248. Ms Q replied on 25 July (at 13.53) informing her that Ms D would be arranging a meeting to discuss plans for her return to work and suggested that she raise with Ms D the possibility of further mediation. She reminded the claimant that mediation is voluntary, that Ms D needed to agree and that the mediation service would need to take a view as to whether it would be effective:

> '…in view of your previous mediation with [Ms D] and the employment processes that have followed.
>
> If following discussion, you are both agreeable, I am willing to liaise with the staff support service accordingly to facilitate this.'

249. It is apparent that Ms Q was not saying that the claimant could not or would not be allowed to mediate. She was accurately and reasonably saying that mediation is voluntary (as the claimant herself accepted in cross-examination). There was no lack of response by Ms Q, as alleged by the claimant in her further particulars, nor was there any deliberate avoidance of the claimant's request for support. It was unfortunate, however, that Ms Q referred to the 'employment processes' and it is understandable that the claimant was concerned by that comment.

250. Ms F's evidence was that also on 18 July Ms D had told her she was very fearful of mediation but that she had strongly encouraged her to attend.

251. On 24 July Ms D had confirmed to Ms F that she had come up with a plan to rebuild her confidence to assert herself as the team lead and:

> 'best provide A with feedback in a manner that she can understand is not a personal attack or in any way related to the grievance.'

252. Again this indicates that at this stage Ms D was assuming that the claimant would be returning to work and that she would be managing her and was trying to put herself in the best position able to do that.

253. Also on 24 July Ms D wrote to the claimant inviting her to a return to work meeting on 9 August, with Ms QQ present to support them both. It said:

> 'Ahead of your return I would like to meet with you to discuss arrangements for your return and expectations, update you on workplace changes, and to develop a framework for our future professional working relationship in view of the difficulties experienced before your secondment commenced. It will also be an opportunity to discuss your fitness for work as I am aware that you have been experiencing anxiety & depressive type illness.
>
> With this latter in mind, and in order to ensure as much support as possible, I have arranged for a referral to Occupational Health for you… I enclose a copy of the referral for your information.'

254. The comment about discussing fitness for work was alleged by the claimant to be a highly discriminatory comment. Ms F's evidence was that this was just a choice of phraseology to reflect what she understood to be the position. She accepted that she had made an assumption about a possible issue of fitness for work but based that on the correspondence she had seen. In all the circumstances this was not unreasonable.

255. The OH referral enclosed was drafted jointly by Ms F and Ms D. It was reasonable for HR advice to be taken in this regard. Again, it is necessary to quote it in detail.

256. In section B, it stated, inter alia:

Date	No of days	Reason
9-9-16 to 19-9-16	11	Anxiety/stress/depression
2-9-16 to 2-9-16	1	Gastrointestinal
18-7-16 to 29-8-16	43	ENT

257. This information was taken from the e-roster by Ms D which, again, was reasonable. The claimant says this information was inaccurate (and deliberately so). As far as the number of days is concerned, as the referral was not for the purposes of monitoring sickness absence, it was appropriate for the number of calendar days to be stated. Whether, as the claimant says, there were further inaccuracies regarding part days worked, it was reasonable for Ms D to rely upon the information provided by e-roster and in doing so there was no failure on her part properly to check facts and/or information. As for the reason for the absence, because of the drop-down menu on e-roster and the limited number of categorisations of absence as well as, on occasion, there being more than one or linked reasons for absence (e.g. the certificate for the 43 day absence referred to ENT and work related stress but only one reason can be entered into e-roster), there was no failure to check facts or information when relying upon e-roster even if the information provided did not fully describe the situation as the claimant would have wanted. The claimant expressly compares the treatment of her absences in this respect to the description of Ms D's absences when she was referred to OH which was full and complete. Ms D's referral was much briefer, however, with a more straightforward background and it was written by Ms W.

258. Under reason for referral the boxes ticked were:

'To determine fitness before or soon after return to work'

and

'Staff continuing at work but concerns about health, performance or behaviour'

259. At section C which identifies specific questions to be answered, the box that states:

'Advice on fitness for full duties for current job when he/she returns to work'

was ticked.

260. Then under 'Other' it stated:

'[The claimant] has been on secondment since 19th September 2016 …Prior to that time, she experienced sickness absence due to anxiety/stress/depression. It is my understanding that this related to concerns she had in the work environment relating to her relationships with others, including myself.

[The claimant] and I attended mediation through Staff Support in June 2016 following difficulties experienced in my managerial relationship with her after having to give her feedback on her performance in relation to her communication with colleagues and in respecting the clinical views of other professionals.

[The claimant] was managed under the Trust's Stress management policy and was referred to the occupational team, and was under the care of Dr V and was signposted to staff support.

Following commencement of her secondment, [the claimant] has raised grievances against myself and another member of the management team, and a bullying and harassment complaint against a band 6 OT colleague. These have been heard in full under applicable Trust policies. [The claimant] expressed significant dissatisfaction at the application and outcome of these policies.

[The claimant] has also raised a further grievance which is currently being addressed.

[The claimant] has repeatedly cited that she considers she has been subject to injury arising from these workplace issues and that handling of her concerns has had an impact to her health of anxiety and reactive depression. During grievance meetings, [the claimant] has been very emotional, tearful, angry, and has demonstrated that she is on significant medication to manage her mental health condition. It is clear that [the claimant] has been significantly unwell and I am concerned as to whether she will be fit to return to work at the end of her secondment to undertake her research. She is due to return on 18 September 2017.

[The claimant's] role as a band 6 physiotherapist is to provide input into the treatment of haematology and oncology patients. The care of these patients requires a MDT approach necessitating good team working.

The team in which [the claimant] works is very small and we work in close proximity. [The claimant] will need to work closely with both myself and other physiotherapy and occupational therapy colleagues.

I would be grateful if you could review [the claimant] and advise on her fitness to return to work in September.'

261. On the following day the claimant was sent details of an appointment with Dr PP on 18 August. She wrote a 13-page letter to him on 27 July asking for errors in the referral to be corrected and for the appointment to be rearranged after 11 September (due to her having broken her foot as well as her study commitments continuing until that date).

262. In summary the areas of disagreement she had with the referral were:
    a. job title (it was not fully quoted but was in substance correct);
    b. error in the number of days absent - comparison between calendar and working days;
    c. reasons for and coding of absences;
    d. it did not make it clear that work arose related stress was underpinning her absences (although we note that Ms D did state her understanding that some absences out of relationship concerns in

the work environment) and omitted her previous allegations of bullying;

e. inaccuracy and dissatisfaction in the descriptions of her management under the stress management policy, her complaints regarding Ms S and her grievances;
f. Ms D's general description of her behaviour and attitudes generally and how she had been previously managed;
g. It was made deliberately to trigger the absence policy (although we note that there was no warning in place at that time); and
h. it was not objective when coupled with those inaccuracies, was trying to influence the outcome to lead to her removal from employment and further that because management knew about her attention to detail the errors were deliberate so that she would pick up on them and cause her further extreme distress.

263. On 28 July the claimant emailed Ms Q, copying Ms D, saying she was unable to attend the return to work meeting as requested but suggested alternative dates (and referred to liaising with her trade union so that they could attend with her in a supportive capacity). She also reported that there had been another breach of the Data Protection Act and referred to numerous errors and inaccuracies in the OH referral that she had had to submit to the ICO. She was specifically concerned that her personal data had been shared with Ms QQ. She concluded the email:

'As a result of the inappropriate disclosure… I feel further humiliated and upset… I feel that this inappropriate disclosure…has sullied my clinical and academic professional reputation, further denied me of my dignity, respect and right to confidentiality pertaining to sensitive details of my mental health and caused unnecessary upset, anxiety and injury to feelings.

I would greatly appreciate your prompt response and advice to this most humiliating and distressing concern.'

264. Ms Q took advice from Ms F and replied to the claimant on the same day simply advising her to liaise with Ms D directly in relation to the meeting and stating that in relation to Ms QQ that it was more than appropriate for her to be aware of the issues in hand. The claimant has complained that Ms Q failed to apologise in this reply and failed to offer support for the claimant's condition. We do agree with the claimant that, notwithstanding the difficult correspondence that had by then been exchanged between the parties and no doubt some genuine exasperation on the part of management, this was a perfunctory reply by Ms Q to the claimant's email in which she had expressed genuine distress.

265. On 28 July the claimant also wrote to Mr LL informing him that she considered the OH referral to have breached data protection principles and asking for advice as to what she should do. She stated a preference for the matter to be dealt with informally but that if required she would invoke the grievance procedure again.

266. On 7 August Ms D wrote to the claimant, copying Ms Q. She said that she was sorry to hear about the claimant's injured foot. She encouraged her to try and find a date earlier than 12 September for the return to work

meeting. As far as the claimant's reference to trade union support was concerned, she said:

'As this would be an informal meeting, representation from your trade union would not be appropriate. The right to be accompanied at a meeting by a trade union representative is limited to meetings held under formal trusts policies or procedures (e.g. disciplinary or grievance). This is neither. As stated, it is simply an opportunity to welcome you back and update you, for example on some of the structural changes within the therapies department that have occurred since you were last working in the team.'

267. Clearly what she said about the legal right to representation is correct but this does seem to be perhaps an overly technical response and a more imaginative employer may well have thought that getting the union involved could be helpful. Ms D's description of the meeting as a welcome back and update contrasts with her letter on 24 July where she expressly referred to the difficulties previously experienced and the opportunity to discuss fitness for work.

268. An email from Ms D to staff support at 12.54 on 8 August shows Ms D's mindset at the time. She set out a short history of the previous mediation, that the claimant wanted a further session and asked for advice. She stated:

'I really want to find a way to support her back into her role within the team, I wasn't sure if this [mediation] was an appropriate step to take or if there was anything else that you might recommend?'

269. Also on 8 August there was a further exchange of emails between Ms Q and the claimant in the course of which Mr Q, quite reasonably, asked her to raise any future employment concerns 'in a professional, and non-accusatory manner'. In her reply, the claimant said she had been deeply upset and distressed at that comment. Rather, she said:

'… I feel I am professionally communicating factual evidence, presented before me in which I feel was deliberately carried out by two of your managers in which has caused unnecessary hurt, distress and injury.'

270. Later on 8 August (at 15.57) the claimant replied to Ms D's email of 7 August. The opening paragraph can only be read as a sarcastic comment on Ms Rickett's expression of concern regarding the claimant's foot. The claimant continued:

'I am also still currently suffering from reactive depression and anxiety as a result of unaddressed workplace bullying, harassment, managerial negligence, prolonged grievance procedures and the unwarranted retaliation in which distressingly took place thereafter.'

She also stated that she had a disability of anxiety and depression and referred to the facility to request reasonable adjustments under the 2010 Act and stated that the presence of her trade union representative within a supportive capacity would be a reasonable adjustment. She stated:

'…I would feel more comfortable and supported with such a measure to be kindly considered and put in place at the upcoming return to work meeting.'

271. Ms D sought advice from Ms F and Ms Q on how to reply. She asked whether they knew what the 'the unwarranted retaliation' the claimant was referring to and also stated:

> '[Illegible] all of the investigations and grievances have not been upheld, it is quite inflammatory language, to still be citing this at us.
>
> I don't want to appear unsupportive in suggesting that her union that is not required at this meeting. It is just on the background of last year when she would refuse to meet with me for supervision unless unison or CSP representation was there, the advice we were given at the time was to not allow this as it would formalise an informal process and the CSP said that it wasn't appropriate either as they shouldn't be attending informal meetings and supervision. In addition, it took more time away from the rep's clinical caseload for a non-essential meeting. I don't want to create a problem now, but worry it sets a precedent for future meetings if we start off with representation.
>
> Has the 'disability' now been confirmed? Previously occupational health said that she didn't require any adjustments, so I can definitely be guided by them when they assess her in September.'

The terms of this email, even after she has received the sarcastic email from the claimant, certainly seem to indicate that Ms D was still expecting the claimant come back to work and to put in whatever support was needed. She certainly is not saying that she cannot possibly work with her again.

272. Ms F drafted a reply for Ms D to send to the claimant. It was sent on 10 August and read as follows:

> 'Please may I kindly request you stop making such remarks as you have in your opening sentence suggesting that there remains unaddressed workplace bullying, harassment, managerial negligence. These issues have been considered through Trust procedures and your complaints have not been upheld. Whilst you may not be happy with the outcome of your grievances, they are concluded. I find the language inflammatory towards me, particularly in light of my genuinely well-intended efforts in trying to set up a meeting to help support your return from secondment and support the transition following the difficult period.
>
> I remain of the view that you do not need to be accompanied by a trade union representative & by nature it is contrary to the very essence of meeting - to re-establish our working relationship to create a formality that is not needed. I will however on this occasion agree to this as a gesture of goodwill. I must be clear however that a trade union representative will only be permitted to attend to offer emotional support, and they will not be able to participate in the meeting. Nor will the meeting be delayed if for any reason they are not available on the date of the meeting.
>
> As you have requested a union presence, I will additionally secure HR representation to attend the meeting. I will confirm the name to you shortly. Ms QQ will still be present for the reasons previously indicated.
>
> …
>
> I must also be categorical that in future everyday management meetings that I may need to have with you in our ongoing relationship, you will not be permitted to be accompanied by a trade union representative as this would be unworkable.'

Confirmation was then given that the return to work meeting would be held on 12 September. Finally, Ms D asked the claimant to raise any further matters at the meeting not in correspondence.

273. There was also an exchange of emails between Ms D and the claimant on 10 August regarding annual leave on which Ms D sought advice from Ms F . It shows that Ms D and Ms QQ were wondering if the claimant would be able to return to work prior to receiving OH clearance. Ms F replied to 'wait and see'. She referred to having met Dr PP for other reasons but had raised with him that she had some,

'real concerns about [the claimant's] health and whether she was a risk to herself/others if she returned to work'.

She also referred to an option of putting the claimant on authorised paid leave if they were unable to get an OH assessment prior to her return date and referred to that perhaps becoming essential if her behaviour escalated or showed no sign of dissipating.

274. Ms D also referred to the return to work meeting having been scheduled for 12 September and asked for someone from HR to attend to take notes (as indicated above to the claimant). Ms F said that she planned to attend and that,

'no doubt she won't like it being me, but we are running out of HR staff!'

275. Notwithstanding Ms D's request for further matters to be raised in the meeting, the claimant wrote to her on 10 August commenting in detail on her email and taking issue with many of the matters raised. Specifically in relation to attendance or otherwise of a trade union representative, she stated that she had a contractual right under Trust policy. Further, in light of Ms D's statement that HR would now be attending the meeting, the claimant requested permission to bring her solicitor. In the context of a paragraph concerning the contractual relationship between the parties whilst the claimant was on secondment, she stated:

'However in light of the many to what I felt where deliberate evidenced obstacles I had to overcome and the verbal threats received from both you and your colleague Miss E in not allowing me to pursue the scholarship I had gained as well as other various evidenced unfounded allegations of poor clinical and interpersonal performance I would have understandably found it an act of victimisation and retaliation had the trust and not agreed to my release…'

276. Also on 10 August Ms Q wrote to the claimant (in reply to her email of 8 August) stating:

'I am sorry but your repeated, lengthy and adversarial email exchanges must come to an end.

… My concerns stem not from the existence of you holding a concern or raising them and seeking clarity, but the manner in which you presented these issues.…you make a claim that a breach of trust and confidentiality has taken place by your managers without first taking steps to seek to establish the facts. This is not appropriate and your behaviour could be deemed malicious and/or vexatious. Whilst you obviously feel very disenfranchised,

> [Ms D] is seeking to support you upon your return from secondment…but continuing with such accusatory remarks without establishing the facts, has the potential to undermine this and may lead to an irretrievable breakdown in relationships which nobody would wish. I am aware that you have been unwell, and I am unclear if part of your ongoing behaviour in raising complaints in the manner & style that you do, may be a symptom of your condition. I will therefore be asking [Ms D] to put this question to Occupational Health to assess when they see you…so that if this is a factor, appropriate support can be given.'

She concluded by requesting that the claimant should not reply to the email. Given the previous correspondence Ms Q's comments in this email were not unreasonable especially as she expressly set out the reasons for her concerns.

277. Ms F drafted an email setting out the further question that Ms Q had requested be put to OH. Ms D agreed to send it a few days before the scheduled appointment so as to avoid triggering further correspondence from the claimant. In the event Ms D did send it on 11 September but it was not addressed by Dr PP in his eventual report. It is apparent however that both Ms QQ and Ms Q had formed the view that the claimant's style of communication could well be a symptom of her medical condition.

278. Ms D replied to the claimant's email to her of 10 August on 11 August. She commented on each point raised by the claimant. In particular in respect of trade union attendance, she clarified that the right to be accompanied to a return to work meeting was in the sickness absence policy and that that policy did not apply to this meeting which concerned a return to work following a secondment. She refused the claimant's request to be accompanied by a solicitor and clarified the purpose of HR and Ms QQ being present. She confirmed that she wished to discuss mediation at the meeting. Further, she asked the claimant to stop making allegations such as having been verbally threatened which she said was 'incredibly hurtful'. She concluded by saying that she would not be responding any further to the claimant on any matter and would wait to talk to her in person on 12 September.

279. On 11 August the claimant replied to Ms Q's email of 8 August. She acknowledged Ms Q's request not to do so, but stated that:

> 'Some aspects [are] hostile, intimidating and discriminatory towards me in which I felt warranted a documented response.'

She disagreed with Ms Q's statements and asked for further detail on various points. In particular, she categorically stated that her disability, that she said was the result of workplace injuries, did not affect her ability to professionally communicate and articulate her concerns and to make such a statement was in itself disability discrimination. She asked Ms Q to provide examples of the matters she raised. In cross-examination the claimant stated that on reflection, she accepts that her communication was lengthy and emotive but said this was because she felt she was not being listened to. Further, she stated that it was her disability that led to the lengthy correspondence and that Ms Q was being dismissive and choosing to ignore her. She also accepted, with hindsight, that whether her medical

condition affected her style of communication was a fair question to put to OH.

280. The claimant emailed a letter to Ms D on 14 August. It was an aggressive and sarcastic letter including statements such as:

> 'I apologise for inconveniencing your time as my line manager in replying to my concerns so that I feel I can safely and productively attend the scheduled Return to Work meeting… I apologise for you having to engage in "time-consuming written correspondence" with me as I now feel like a nuisance… I sincerely apologise that your management of my concerns and needs as an employee with a disability has directly taken from…patient care… Once again, I apologise for asking permission if I could be in accompaniment by my trade union representative as a reasonable adjustment… Many thanks for confirming that the advice of the OH service will now be followed in comparison with last year's failure to implement the recommendations of an OH report…'

281. In addition, she asked to be provided with an agenda for the return to work meeting as a reasonable adjustment to help better manage her disability. As far as future meetings were concerned she said that she would prefer and feel safer if there was an impartial person agreeable to both parties within the meeting and asked if all future correspondence could be directed to her trade union representative, and copied to her, as she felt the communication and its tone was aggressive and upsetting which was exacerbating her anxiety and depression.

282. Ms D did not reply to that letter but she said in an email to Ms Q and Ms F:

> 'It is becoming more apparent with each email from her that she is not entering into this process with an open mind and attitude to foster a good working relationship with me and the team.'

283. Also on 14 August Ms Q emailed the claimant stating:

> 'It is most disappointing that you cannot see how your emails may be interpreted particularly given that you do not believe your health does not affect your ability to professionally communicate.… I will not be responding and you should consider any further correspondence will be unread.'

284. On 16 August Ms D had a meeting with staff support and on the following day emailed them apologising for being tearful and confirming arrangements for a mediation session on the 27th - subject to OH advice. Ms D also updated Ms Q and Ms F on 17 August explaining that she thought it best to have the session a week after the claimant's return to focus on moving forward rather than beforehand when the focus of her thoughts may have been on the past. Further, she said she would update the claimant at the return to work meeting rather than sending an additional email so as not to place additional stress.

285. On 18 August at the claimant again wrote to Mr LL chasing for a reply to her letter of 27 July (and also informing him that she felt she had been subject to discriminatory comments. She again asked him to advise whether to invoke further grievances or whether the issue could be resolved informally.

286. 25 August 2017: claimant's letter to Dr K

287. On 25 August claimant wrote to Mr K. Her letter was headed 'help to resolve employment concerns informally'.

288. She stated that she was writing under the advice of Mr LL to seek Mr K' help as senior manager to those involved, in resolving concerns she had in relation to Ms Q and Ms D. She stated that she had tried to professionally highlight and address those concerns informally with them but it had been to no avail and she was seeking his help in resolving them informally prior to invoking the grievance procedure if required.

289. She then set out her concerns in respect of Ms Q and Ms D. Specifically regarding Ms Q it was in relation to what the claimant regarded as discriminatory comments made in relation to her ability to write professional correspondence. As far as Ms D was concerned, her concern was with regard to the OH referrals of 2016 and 2017.

290. In the penultimate paragraph, the claimant stated that she would prefer if possible not to invoke a grievance:

> 'However, I would still like reassurance that this will be appropriately investigated, amended, a formal verbal and written apology given and appropriate action implemented in line with trust policy.'

291. Mr K, on 29 August, forwarded the claimant's letter to Ms F asking for advice on how best to proceed. Given that there was no reference in the claimant's letter to any dissatisfaction with Ms F this was not unreasonable. He replied to the claimant informing her of the immediate steps he would be taking (including that he would discuss it with Ms F), that he understood it was clearly a very difficult time for her and offering any additional support that she required. The claimant replied, copying Ms F, with no objection to him discussing it with her.

292. In the meantime there had been a further ongoing exchange of correspondence between the claimant and Ms D with regard to a new weekend working system that had been implemented during the claimant's absence. These emails have not otherwise been referred to in this Judgment as they do not have a direct bearing on the issues raised. However, it is noted that on 30 August Ms D emailed the claimant stating that she had nothing further to add and suggesting that they discuss the issues at the return to work meeting. She also stated in view of the volume of emails and her capacity, she would not be responding to any further emails.

293. On the following day, 31 August, Ms D emailed Ms Q and Ms W confirming that she would not be at work the following day as she was:

> '…physically and mentally exhausted with the stress of the situation with [the claimant].

I feel that I have been unable to do my job to its full potential because of this and in view of the impact of [the claimant's] impending return to work, I feel I have to take time off to protect my own well-being and prepare myself for [her] return.…

I'm sorry that I don't feel I can physically be at work.'

Ms D was then absent on sick leave due to work-related stress from 1-5 September and sent the OH referral as described above. This appears to be the tipping point at which Ms D's previous willingness to try to find a constructive way forward evaporated.

294. Also on 31 August the claimant's union representative emailed Ms D in relation to arrangements for the return to work meeting on 12 September. In that email she requested an agenda for the items to be covered stating that it would help the claimant psychologically prepare and reduce her anxiety levels and specifically stated that this was requested as a reasonable adjustment. Ms F replied simply stating that Ms D was absent and therefore a response would not be imminent but that at that stage she anticipated the meeting would proceed.

295. <u>Suspension of claimant & commission of investigation</u>

296. On 8 September Dr K met Ms Q, Ms F and the Interim Divisional Director of Operations, Mr RR. The claimant's letter was discussed. No notes were made of the meeting or the rationale for the decision that was made to suspend the claimant in response to her letter but it is clear that Dr K was briefed on the background. There was a discussion to some extent regarding possible redeployment as an alternative to suspension but Ms Q advised that there were no suitable vacancies.

297. Dr K decided, but heavily based on the advice he had received, that it was appropriate to suspend the claimant pending an investigation into the apparent breakdown in working relationships and whether it was irretrievable. He wrote to the claimant advising her of this on 8 September 2017. He stated:

'I am concerned by the correspondence between you and your managers. In particular, I note that you have stated that the trust and confidence that you once had in Ms D has been "lost" and that any future meetings should have an impartial member of staff present. Your letter to me also suggests a breakdown in working relationships between you and your managers and I understand from Ms Q that email correspondence between you and your managers suggests the same. This causes me serious concern. I am sure you are aware that teamworking and trust in colleagues is essential to achieving good patient outcomes. From what I have seen and heard, I am concerned that the ability of the team to deliver a safe and effective service could be put at risk if you return to the department and that it could impact adversely on your health and that of your managers.

… I have decided that it is necessary to suspend you from duty, on full pay, from the date of your return to work (18th September 2017), whilst an investigation takes place in relation to the apparent breakdown working relationships and whether it is irretrievable.'

298. He stated that the suspension did not constitute formal action and that whilst there was no specific policy to manage investigations of breakdown of trust and confidence, she would be afforded the full procedural

protections afforded to those suspended under the disciplinary procedure. He also informed the claimant that she should not enter the premises of the respondent without either his or another senior manager's express permission (except in the event of emergency medical attention) and that she must not have contact with any of her colleagues, other than her trade union representative, without permission. He informed the claimant that she should proceed with the planned OH assessment on 12 September but that the planned return to work meeting with Ms D on the same day would not take place.

299. That letter was received by the claimant on 11 September. The timing of this was incredibly unfortunate. It was the day that the claimant handed in her MRes thesis and she had plans to celebrate that achievement with her family who had travelled over from Ireland. Instead, the claimant suffered a severe reaction to the contents of the letter resulting in her being admitted to A&E. Dr K conceded in his evidence that it would have been far better to deliver his decision regarding the suspension face-to-face with the claimant but he had been anxious that she received it before the return to work meeting on 12 September. Given what the respondent had already been told by both the OH and her own GP about the claimant's health, which Ms F as the coordinating HR manager was fully aware of, they should have handled this much better.

300. The first request for a relaxation of the restrictions placed on the claimant during suspension came from her union representative on 14 September. Ms SS informed Ms F that the claimant required rehab at the gym for her fractured foot and that as she lived close to the hospital and was unable to mobilise long distances, she had been accessing M&S within the hospital to pick up groceries on her way back from rehab. Permission was requested that she be allowed to continue that practice.

301. Ms F's reply was that while she was sympathetic to the claimant's difficulties the terms of the suspension were that she should only attend on-site for medical purposes and that if she was on site for those purposes she would be at liberty to pop into M&S. She stated however that grocery shopping could not be a reason for attending the site in itself. She referred to a number of other convenience stores and regular, proximal bus routes to much larger supermarkets as well as online shopping. This request was later repeated and again denied. In all the circumstances this seems remarkably mean-spirited - the only possible explanation is the fear that the claimant would come into contact with and upset other members of the team. Although that might have been a valid concern it would have been reasonable to give the permission sought perhaps with some limits and only if an incident happened to retract it. Ms F was not, however, preventing or restricting her access to a healthcare appointment. Indeed, later requests to attend the site for the purposes of attending various healthcare appointments were granted.

302. <u>12 October 2017: OH report</u>

303. The claimant attended a lengthy OH review on 12 September. In Dr PP's report dated 12 October he set out in some detail the claimant's perception of events and his opinion that:
    a. she started having marked anxiety symptoms in May 2016;
    b. by mid-September 2016 she had developed mixed anxiety and depression with marked and severe anxiety symptoms induced by work stressors;
    c. at assessment she presented with marked anxiety symptoms and had severe anxiety and low mood symptoms. His conclusion was mixed moderately severe anxiety (predominant) with depression with marked exacerbations of anxiety symptoms whenever she addresses work activities; and
    d. no evidence of other serious mental health illness.

304. As far as fitness to work was concerned he said that she was clearly unfit for work as she was very distressed having received the suspension letter and that he would be happy to assess her once the suspension was lifted. He advised that she could attend meetings to address her grievances and concerns with the following support:
    a. the chair to be advised that she is suffering from significant mixed anxiety and depression that is aggravated by work matters;
    b. reasonable time to prepare and provide information;
    c. during the meeting to allow adequate time to understand the questions and respond;
    d. if she becomes acutely distressed to give time to recover, provide a break or interruption or postponement; and
    e. to be allowed representation as per Trust policy

305. <u>Investigation</u>

306. Dr K wrote to Ms P, who had no previous knowledge of or dealings with the claimant, on 15 September appointing her to conduct an investigation into a possible breakdown of working relationships between the claimant and managers and whether that breakdown was irretrievable. The terms of reference recorded that the investigation was required to ascertain the facts in an unbiased manner and that the claimant should be afforded the full procedural protections equivalent to those under the disciplinary procedure but it was emphasised that it was not a disciplinary matter. She was asked to submit a completed report within five weeks.

307. The claimant was advised of Ms P's appointment on 18 September.

308. Ms F accurately summarised the recommendations of OH regarding adjustments for the claimant in an email to Ms P on 12 October. The claimant suggested to Ms P in cross examination that she should have seen the whole report in advance of their meeting and perhaps would have changed her questions if she had. Given her previous complaints about disclosure of personal information in her view unnecessarily, it is understandable why this was not done. In any event, the claimant's representative gave a full copy to Ms P at the meeting itself.

309. In addition to the claimant's letters of 10 and 25 August Ms P - assisted by Ms TT of HR - assembled a comprehensive pack of relevant documentation, including correspondence between the relevant parties, as was appended to her later report.

310. Ms P interviewed the following and received written statements from each (except where indicated) in advance:
    a. Ms D
    b. Ms Q
    c. Ms W (no statement)
    d. Ms E
    e. Ms QQ
    f. the claimant, and
    g. Ms HH (no statement).

311. Each was asked about the state of the relationship between the claimant and her managers and whether that relationship was, in their opinion, retrievable. Ms P's questions did seem to start from an assumption that the relationship had broken down and the issue was whether it was retrievable. Given the documents she had already read this was not an unreasonable starting point although it would have been better practice to approach that first stage with each witness in an open way though she did expressly ask some of them this as the interviews progressed. In all the circumstances however it is highly unlikely that that would have made a significant difference.

312. Ms E expressed concern to Ms P about interacting with the claimant at any hearing and they had a discussion about her perhaps giving any evidence behind a screen so that she would not have to see the claimant. (At this point in the Tribunal hearing the claimant became very distressed and I put what I thought were relevant questions on this issue to Ms P on her behalf. Having done so the claimant confirmed that I had put everything that was relevant.) It is not clear who first suggested possibly using a screen. Ms P confirmed she had not previously used one in this way but her aim was to ensure that witnesses felt safe and secure and she had not previously come across managers being so distressed.

313. It is notable that in Ms Q's interview on 6 October she said that Ms D was unwilling to mediate but Ms D herself was not asked. In evidence Ms Q said she could not remember whose decision it had been not to continue with the previously planned mediation.

314. Ms Rickets, Ms E and Ms HH all said to Ms P that they would likely leave their role if the claimant returned.

315. On 6 November Ms P produced a thorough, detailed and well organised report setting out in detail the evidence obtained from the correspondence, the views of each witness (both from their statements and interviews) and a statement of findings. Her overall conclusion was that there was an irretrievable breakdown in working relationships and that that breakdown and the difficulties in conducting supervisions had an effect on clinical care

and had the potential impact patient safety. She recommended that the case be referred to a designated officer for further consideration.

316. With regard to the notes of the claimant's interview it became apparent during the Tribunal hearing that the version of the notes in the bundle had an additional comment 'and that's the breakdown' which did not appear in the version sent with the report and that was seen by Mr M. This was puzzling but we were unable to establish how these words were added and by whom.

317. Coincidentally on the same day that the report was concluded the claimant's union representative forwarded to Ms F a letter from her GP requesting that the investigation be completed as soon as possible to help protect her health. The time taken by Ms P was not excessive. She was commissioned on 12 September and completed the report on 6 November. However, she only worked two days per week which necessarily meant that this exercise took longer than it needed to have done even though she worked on it full time. We recognise, however, the difficulties that the respondent must have faced in identifying appropriate and available individuals to carry out the investigation.

318. Ms TT forwarded the report to Dr K on 8 November. Upon consideration of it he accepted the recommendation and wrote to the claimant on 10 November informing her of Ms P's conclusion, that he would be appointing a designated officer to consider the matter at a formal hearing who, if they agreed with that conclusion, would be responsible for deciding what action should be taken which could include a range of options from informal resolution to redeployment or, potentially, termination of employment. He acknowledged the effect this decision would have upon the claimant and encouraged her to continue to use occupational health and staff counselling services as necessary.

Dismissal & Appeal

319. Mr M was appointed by Dr K as the designated officer; he had no prior knowledge of or dealings with the claimant. He wrote to her on 14 November requiring her to attend a formal hearing on 24 November. The claimant received that letter on 17 November together with, for the first time, the very lengthy investigation report and appendices. As the process being followed was from the disciplinary procedure, the terminology and timescales used by the respondent were also from that procedure. These were at times inappropriate. Mr M accepted that with hindsight perhaps the time given to the claimant was not sufficient although at the time, even though he had read the OH reports, he felt it was sufficient. We find that although it was tight it was not unreasonable.

320. Adopting that process also meant that Ms P would attend the hearing to present the outcome of her investigation and the claimant was invited to provide the names of any witnesses that she wished to call. It effectively became adversarial which, with a bit more thought, it did not have to be.

She was however quite correctly informed of her right to be accompanied by a trade union representative or work colleague.

321. An example of an overly disciplinary-type approach being taken was in respect of the claimant's requests for a postponement of the hearing. She attended her GP on 21 November and obtained a statement of fitness for work confirming that she was not fit for work and recommending adjustments as follows:
    a. neither she nor her trade union rep be in receipt of any correspondence from management or the respondent during her sick leave as it induces great stress and anxiety, and
    b. that she be given two weeks' notice prior to any formal hearing.

322. The claimant's representative emailed Mr M and HR on the same day referring to that certificate and confirming that any decision to continue with the hearing would be detrimental to the claimant but that she was prepared to attend the hearing at a later date when she was well enough. The claimant had also confirmed that she did want to know the Trust's decision about whether the hearing would go ahead and that it was crucial to be informed as soon as possible given her poor health.

323. Ms F advised Ms TT to reply advising that they:

> 'will not reschedule more than once etc. Usual arrangements.'

324. On 22 November the representative wrote again to Mr M and HR enclosing a letter from the claimant's GP reminding them that the recommendations contained within the sick note of the previous day as a suggestion had been made that the hearing may proceed in her absence which had exacerbated her symptoms.

325. Mr M's reply, drafted by HR, said it was not normal practice to reschedule a hearing more than once however one final rearrangement would be allowed and suggested some alternative dates. He confirmed that they were in receipt of the sick certificate.

326. Ultimately 9 January 2018 was agreed as the date for the hearing. Notice of that was sent to the claimant on 24 November with a statement that no further requests for postponements would be accepted. This was clearly sufficient and reasonable notice of the hearing. The claimant was reminded of the purpose of the hearing, who would be attending as witnesses and that she should provide the names of any witnesses she wished to call. She was requested to ensure that any written statement she wished to submit reached Mr M by 5 January. The claimant was reminded of the staff support service.

327. On 20 December the claimant's representative emailed Mr M and others, copying the claimant, with a series of requested adjustments for the hearing. He replied agreeing to an earlier start and that the claimant's mother could attend as support although she would not be allowed to participate but he did not agree that the hearing be audio recorded as it was not practice to

allow any recordings at any hearing across the Trust. The representative had stated that the claimant did not feel capable of taking her own notes due to her stress, anxiety and depression and that she, the representative, would not be able to take a full note.

328. The hearing proceeded as scheduled on 9 January. Ms P attended to present the investigation and witnesses in support of that case also attended: Ms D, Ms E, Ms HH, Ms QQ and Ms Q. The claimant and her representative had the opportunity to ask questions of all of them. The claimant also presented her case and submitted two written documents. It was not possible to conclude in one day and therefore it resumed on 30 January (after the claimant completed 2 weeks jury service). Mr M indicated that he would send a decision to the claimant by 9 February.

329. A full note was taken and prepared by the respondent of the meetings. The claimant's mother had also covertly recorded both meetings (including the private deliberations of Mr M with HR) and accordingly full transcripts were available to us.

330. On 20 January the claimant emailed Mr M complaining about various aspects of the hearing of 9 January and requested further adjustments for the hearing on 30 January. He replied on 24 January. Her specific complaints were:

a. The requested clear agenda with a scheduled lunch break, to help manage her symptoms of disability and taking of medication, had not been provided. Consequently she said that she had to take medication on an empty stomach causing her to vomit. In reply Mr M acknowledged that a longer break was discussed but that all parties agreed to take shorter breaks. He said he would ensure a 30-45 min break during the meeting on 30 January.

   The transcription of the covert recording shows that agreement was reached as described by Mr M but the context was the claimant asking for 'a substantial sandwich lunch break as I haven't eaten and I need to take meds' to which Mr M said 'well the challenge is time as we are limited until 2 o'clock, to finish today because I have some other commitments this afternoon.' The claimant, after becoming upset, said 'I just can't go on with this lingering over me anymore, I'll crack on without lunch.'

b. Early in the hearing on 9 January Mr M had indicated to the claimant that there was a screen in the room and that some witnesses had requested to be behind it as a special measure and therefore it would be moved across as and when required. The claimant had become very distressed and requested a break which was granted. On resumption the claimant had apologised but said she had not expected the screen, had not been told about it and found it very upsetting and humiliating. The hearing continued. In the event none of the witnesses requested use of the screen. The claimant repeated in her email of 20 January her extreme concern about this and Mr M

referred to the explanation he had given at the hearing. He said he felt it was important that she hear all the evidence directly and that was why the screen was provided. It is evident that the reason the screen was made available was in response to concerns raised by Ms E as described above and, as Mr M said, to ensure the claimant heard that evidence in person rather than it being behind closed doors.

331. The claimant also, on 23 January, raised a grievance with HR regarding inter-alia, the conduct of the hearing on 9 January. Ms UU of HR acknowledged it on the same day and it was determined, following further exchanges of correspondence with the claimant that it would be dealt with separately under the grievance policy (see below) but that the formal hearing would proceed and some of the further adjustments she requested would be agreed but not all (e.g. recording of the meeting and having both her mother and partner attend to support her).

332. Following the hearings Mr M considered that he wanted to understand better the background to the 2016 grievances and accordingly on 1 February 2018 met with Ms D, Ms E and Ms Q. Key points that arose from those meetings were:

a. Ms D and Ms E said that the claimant had refused to take her complaint against Ms S further at the time and that her separate complaint that she had been bullied by the whole team was dealt with by HR.
b. Ms D said that she did not believe the claimant was committed to the mediation process in 2016 or 2017 as she had lodged a grievance four days after it had started. She said that she did not think mediation would be successful and in fact would likely be detrimental to both parties.
c. Ms E said that there was a catalogue of issues that would have to be dealt with if the claimant returned and that she was worried about how they would or could be addressed. Both Ms E and Ms D stated they would leave the respondent if the claimant returned to work.
d. Ms Q said she was worried about the impact on the clinical practice of the claimant being unable to accept feedback from other members of the team. Also that in her opinion a number of staff would leave if the claimant returned to work. Ms Q also confirmed that Macmillan no longer no longer fund posts (the claimant had suggested in the hearing that this might be possible) and that the claimant would still have to report to Ms D and would not be able to report anywhere else, that there would be no option for the claimant to work anywhere else as she had exhibited problems with communication and behaviour in the other team she had worked him prior to the current one. The only other physiotherapy team that would have been available was muscular skeletal and it was considered that that would not have been appropriate.

333. Notes of Mr M's interviews were sent to the claimant on 8 February requesting her comments by 13 February (2 clear working days) prior to a

final decision being made. Given the claimant's extreme anxiety that the process should be completed as soon as possible, this timescale was not in itself unreasonable. It is clear however that not receiving a decision by 9 February, as well as the contents of the statements, had a serious impact on the claimant's health and she attended A&E as a result. She replied on 9 February complaining about the delay and also enclosing detailed replies to the statements.

334. Mr M sent a lengthy letter to the claimant dated 13 February but sent the following day setting out the outcome of the formal hearings (having spoken to the claimant's representative who informed him the claimant was in hospital but was still anxious to receive the decision as soon as possible). He reviewed and summarised all the evidence he had heard both from the respondent witnesses and the claimant. He then set out his conclusions and decision which in summary was that:
    a. relationships had broken down;
    b. that breakdown had a considerable impact on the working relationships within the team and that this was supported by three consistent descriptions by three managers and the documents;
    c. communication was an essential part of supervision which in turn is necessary for effective patient care and safety. Communication was paramount and he was concerned by the claimant's comments at the hearing that she had done nothing wrong which suggested she lacked insight into the effects her actions had on others and he was concerned that her behaviours were unlikely to change;
    d. the claimant and Ms D/Ms E had very different recollections of the claimant's complaints regarding Ms S in 2016;
    e. the decision to suspend was reasonable and did not amount to a breach of the implied term of trust and confidence;
    f. reasonable adjustments have been made during the course of the hearing and that he considered the claimant had had a full opportunity to put forward her case;
    g. Ms D felt mediation would be difficult and that it was difficult to see how things could move forward and that Ms E's view was that mediation would not be successful and probably detrimental to both parties. In contrast he recorded that the claimant was willing to undergo mediation in accordance with policy;
    h. consideration had been given to redeployment and that the claimant had said it would be unreasonable to consider transferring her out of her area of specialty. That Ms Q had said there have been issues with communication in a previous team and that there was no funding available for alternative posts and no other appropriate managers that the claimant could report to if she remained within the same team;
    i. he noted that Ms D's and Ms E's evidence suggested that the breakdown was irretrievable but the claimant, although she stated she was keen to come back to work and willing to receive feedback, also believed that she had done nothing wrong, again indicating a lack of insight into the impact of her behaviours on her managers making any long-term improvement in relationships unlikely. He

therefore concluded that relationships had broken down irretrievably, the impact had been incredibly difficult on the team and the claimant and therefore it was not appropriate for her to return to that work environment;

j. accordingly, and having considered the clear evidence he had heard regarding the possibility of redeployment, it was appropriate to dismiss the claimant for some other substantial reason with immediate effect and payment in lieu of her notice period and any outstanding annual leave.

335. The claimant was informed of her right to appeal which she exercised, via her solicitors, on 6 March. She stated that she believed her dismissal was both unfair and discriminatory as well as an act of harassment and victimisation. She summarised her reasons for appeal as:

a. failure to follow the grievance procedure in respect of the grievance lodged on 22 January and that the complaints of disability discrimination within that grievance were evidence of unfairness and discrimination in the dismissal;
b. failure to follow the disciplinary procedure;
c. failure to provide requested reasonable adjustments in the disciplinary process; and
d. disability discrimination, harassment, victimisation and unfairness.

with full particulars of each of those grounds set out.

336. On 23 March the claimant emailed the respondent indicating that she would not be attending any appeal hearing due to her health.

337. Ms J was appointed to chair the appeal. She had only recently joined the respondent and no previous knowledge of the claimant. The claimant was informed by letter dated 8 May that the appeal hearing would take place on 25 May and that it would be chaired by Ms J. She was informed that Mr M would present the response to the appeal (a copy of which was enclosed), that she had the opportunity to call witnesses to the hearing as well as the right to be represented. She was informed that although she had stated she would not be attending the hearing if her position had changed she should confirm her attendance.

338. In the event the claimant did not attend the hearing and it proceeded in her absence albeit that it was postponed to 29 June due to operational pressures. Mr M presented the management case and outlined the reasons for the claimant's dismissal. He also responded to each of the heads of appeal set out in the claimant's appeal letter. The appeal panel considered the information before them and concluded that the appeal was unsuccessful. Ms J approved an - in the circumstances rather short - outcome letter prepared by the secretary to the panel, Ms KK, confirming that decision. It was sent to the claimant on 10 July. The one substantive paragraph explained that the panel was satisfied Mr M had conducted the hearing properly, had considered all the evidence put forward regarding the claimant's working relationship with her managers and agreed with his assessment that the relationship had broken down irretrievably, that here

were no suitable posts to which she could be redeployed and that she had indicated in any event she did not wish to be redeployed. Taking all of that information into account the decision to dismiss was upheld.

339. Grievance 3: January - September 2018

340. The claimant's grievance letter dated 23 January stated that she had been subjected to discrimination on the grounds of disability, in particular direct discrimination, harassment, victimisation, discrimination arising from disability and failure to make reasonable adjustments. She enclosed a 29-page document setting out the timeline of the alleged acts of discrimination. It started with background information about the allegedly unprofessional behaviour exhibited by Ms S and then proceeded to set out in the summary all of the complaints that the claimant had about her treatment both as described above in this Judgment and other matters that have not been the subject of this Hearing. She set out in detail the complaints she had about her suspension and the dismissal process.

341. In the course of internal correspondence regarding the grievance Ms F acknowledged on 24 January that she could not oversee it as it was largely about her own actions.

342. Mr LL confirmed to the claimant on 30 January that only new matters that had not previously dealt with at grievance hearings would proceed.

343. Mr R was asked by Ms F to deal with the grievance. He had no prior knowledge of all dealings with the claimant.

344. On 15 February the claimant, through her solicitors, confirmed that she would not be attending any grievance hearing as she had said all she wished to say in her grievance letter and the surrounding documentation.

345. On 22 February Ms F advised Mr R by email as to the scope of the claimant's grievance and that given certain matters had already been considered by the grievance procedure, his role was to consider whether the claimant's disability had affected those processes. He also excluded from the scope of the grievance the complaints about Mr M's process as he understood she would be raising them in her appeal against dismissal. This was a reasonable approach.

346. Mr R wrote to the claimant on 5 March confirming his appointment and his understanding that she wished the grievance to be considered on the basis of her written submission. He offered her the opportunity to attend the hearing in person and advised her of the right to be accompanied stating if she did not wish to attend he would proceed and conclude by correspondence. He asked for a reply confirming if she did wish to attend by 12 March. Internal correspondence from the time shows that efforts were being made to arrange for Mr R to consider the grievance as quickly as possible but his diary commitments made that difficult.

347. Hearings were arranged for 29 March and 5 April to give various members of management the opportunity to respond to the points raised in the claimant's grievance and she was notified of this by Mr R on 21 March. The claimant replied on 23 March confirming that she would not be attending and chasing for a substantive response. She also pointed out that on 12 March she had received a letter asking for a reply by 12 March and, particularly given her disability and the advice already received about giving her time to respond, this was highly inappropriate.

348. On 29 March Mr R met Ms Q and Ms D and put questions (that had been preprepared by him in conjunction with Ms VV of HR - who reported to Ms F) to them. On 5 April he did likewise with Ms F and Mr L. The meetings were detailed and suitably probing. Signed notes were prepared and in some cases further information provided in follow up emails.

349. Mr R gave full consideration to all this information and wrote a lengthy outcome letter to the claimant on 15 May in which he went through in detail each of the matters she had raised. He set out under 43 headings the detail of her grievances, his findings and his conclusions all of which were that the grievances were not upheld. His approach was thorough, fair and reasonable. The claimant was advised of her right to appeal.

350. On 3 June the claimant appealed Mr R' decision. She set out 10 grounds of appeal with a commentary on each:
    a. failure to follow grievance procedure and policies;
    b. failure to resolve grievance prior to dismissal;
    c. failure to make reasonable adjustments or appropriately investigate denial of reasonable adjustments;
    d. failure to follow the ACAS code of practice;
    e. failure to address breaches of contract under health and safety;
    f. failure to respond to parts of the grievance in the outcome letter;
    g. failure to address the trust and confidentiality breaches;
    h. failure to appropriately and fairly investigate protected acts;
    i. failure to produce consistent and reliable evidence to support decisions; and
    j. failure to acknowledge data protection breach.

351. Ms G (who was same grade as Mr R) was asked on 4 July if she could deal with the appeal which she agreed to do and this was confirmed to the claimant on 9 July. Due to difficulties in finding a suitable member of HR to attend the hearing, it was not possible to arrange it until 5 September. The claimant was advised of this date on 30 July by Ms G and that the appeal would be limited to a review of the appropriateness of Mr R' decision. She was advised of her right to attend with representation and to call witnesses but that it was noted she had previously said she would not attend and she should advise by 22 August if that position had changed. The claimant did not reply.

352. Mr R prepared a statement of case in response to the appeal both of which were considered by Ms G together with the supporting documents.

353. On 5 September Ms G chaired the appeal. Mr R attended and presented his reasons for his decision.

354. Ms G wrote to the claimant on 13 September setting out detailed conclusions in respect of each ground of appeal. She upheld Mr R' decision.

Conclusions

355. In reaching our conclusions we recognise the very real difficulties that the situation between the claimant and her colleagues/managers presented for all parties. It is not our function to exercise a counsel of perfection aided by the benefit of hindsight but to assess our findings of fact as set out above by reference to the relevant law.

356. <u>The claimant's central argument</u>

357. It is helpful to address first the core of the claimant's case. Namely that there was a deliberate campaign of mistreatment against her culminating in a plan, directed by Ms F, to remove her from her employment. We do not find that there was such a campaign whether directed by Ms F or otherwise. Whilst we are critical of certain decisions and actions by individual managers during the course of these events, and we strongly question the wisdom of Ms F's continuing involvement once it became clear what the claimant thought of that involvement, we find that those were errors or misjudgements that arose from either a lack of experience or the pressures of the situation rather than anything more sinister. The claimant has not provided any compelling evidence to the contrary.

358. <u>Jurisdiction (time limits)</u>

359. The claim form was submitted on 16 April 2018. Taking into account the relevant dates of the early conciliation process, any act complained of that happened before 17 November 2017 is prima facie out of time.

360. It is apparent that as early as 10 November 2016 the claimant was taking legal advice regarding her work situation and had referred to the possibility of taking legal action back on 6 September 2016. It is also clear that she was still taking legal advice in August 2017 as she requested permission to bring her solicitor to the then planned return to work meeting and solicitors submitted the claim form on her behalf. In cross examination when asked if she was aware of the 3-month time limit the claimant confirmed that she was 'aware of her employment rights'.

361. There is no doubt therefore that the claimant had the benefit of legal advice throughout the relevant periods, was aware of the time limits well in advance and if she had any doubt was more than capable of researching the position and acting accordingly if she had so wished.

362. Furthermore in her replies to the respondent's submissions, the claimant said that she had never been asked why she had not brought her claims within the prescribed time limits but that the 'obvious answer' was that she

wanted to stay and work at the respondent due to her personal and professional objectives.

363. In those circumstances, it is not appropriate to exercise the discretion in the claimant's favour in the event that any of her claims are out of time notwithstanding the undoubted impact upon her of not being able to pursue such claims.

364. The question then becomes whether any of the 2010 Act claims are out of time (it is clear that the other claims are in time). The claimant says none are because all of the acts complained of amount to a continuing act that ended with her dismissal.

365. We do not agree that it is as straightforward as that. On our analysis there were 4 strands of alleged continuing acts that ended at different times.

a. The processes used to deal with and decisions made in the grievances/complaints related to the bullying and harassment the claimant says she suffered from Ms S and management's response to that. This started on 6 September 2016 on submission of the first grievance and ended on 4 April 2017 when Ms Q concluded part one, (part two was concluded earlier by Ms U on 8 February 2017). Accordingly claims directly arising from these events are out of time.

b. The processes used to deal with and decisions made in the grievances/complaints related to the breach of confidence issue. This started on 14 March 2017 and concluded on 29 September 2017 when Ms N concluded the final stage of the second grievance, Ms Q and Mr H having concluded their respective stages on 26 April 2017 and 18 July 2017 respectively. Accordingly claims directly arising from these events are out of time.

   (We conclude that those two strands of grievances were not together one continuing act given the distinctly different subject matter of each and the different people involved at the various stages (Ms Q being the only point of overlap).

c. Management of the claimant's proposed return to work after her secondment. This started on 30 June 2017 (the meeting between Ms D and Ms W) and continued through to the decision that the claimant would not be returning to work i.e. dismissal Accordingly claims directly arising from these events are in time.

d. The processes used to deal with and decisions made in the consideration of whether there had been an irretrievable breakdown in relationships. This started on 8 September 2017 (the meeting at which suspension was agreed) and concluded on termination of the claimant's employment. Accordingly claims directly arising from these events are in time.

366. That being the case, the following claims as identified in the list of issues are out of time and are dismissed:

a. Para 10 (x) - except insofar as it related to the appeal against dismissal and grievance 3 - and the corresponding parts of paras 14, 17 & 18.

b. Para 20 (i), (vii), (viii), (xii) & (xiii) - except insofar as relates to the dismissal process, and (xiv) - except where after 8 September 2017 - and the corresponding parts of para 21 & 24.

367. Disability

368. The respondent has conceded the fact of disability and knowledge of the condition but not the extent of that knowledge prior to July 2017. We find that from September 2016, the respondent was aware or ought reasonably to have been aware that the claimant was disabled. Although OH advice in June 2016 was that her stress had not progressed to mental ill health though was accessing counselling, in September:

a. the OH had said that she was not fit for work and was reporting workplace stressors;
b. the claimant had referred to the disability discrimination provisions in her first grievance and requested that her psychological support worker attend hearings with her (which was agreed); and
c. the claimant's GP had diagnosed her as having severe anxiety and reactive depression.

369. Burden of Proof

370. We find that the burden of proof passes to the respondent in respect of all the remaining core allegations at para 10 of the list of issues except for:

a. (vi) - her receipt of the investigation report and the contents thereof. The decision having been made to commission the investigation, sending it to the claimant is not something that without further explanation could lead to a finding of discrimination. Indeed, not sending it to her would be of concern. Similarly, the contents of the report - although the claimant did not agree with them - were balanced and thorough with only a recommendation of further action not a decision in itself. Again, not something that without further explanation could lead to a finding of discrimination; and
b. (viii) - inviting her at short or no notice to disciplinary hearings. We have not found on the facts that they were sent at unreasonably short or no notice. The claimant's own evidence was that she received the invitation to the meeting on 24 November on 17 November which was four clear working days. She received the invitation to the meeting on 9 January on or around 25 November, several weeks' notice. These were not unreasonably short notice periods.

Accordingly, we have not considered allegations (vi) and (viii) any further.

371. The claims of indirect discrimination and reasonable adjustments are based on the same set of alleged PCPs at para 20 of the list of issues. We find that for those PCPs the burden of proof passes except with regard to (xv) (issuing report findings and instructions for submitting statements for disciplinary hearings that may result in dismissal up to two and five working days beforehand) as we have not found relevant facts that without further explanation could lead to a finding of discrimination. The corresponding claims of indirect discrimination and reasonable adjustments have also therefore not been considered further.

372. Direct, Harassment, Victimisation & Arising From

373. For the remaining core allegations we have considered each of the above claims as follows (consideration of whether there were the relevant protected acts to found victimisation claims is below):

374. Allegation 10 (i)

a. Direct - whilst there were some inaccuracies in the OH referral, these were either insignificant (e.g. the job title) or were because the relevant information had been taken from the e-roster system (e.g. numbers of days absent or reasons for absence). In the context of the reason for the referral - not under the sickness absence policy - those errors were not significant. The more general points that the claimant makes about the referral stems from the fact that she disagrees with Ms D's description of events. This reflects a genuine difference of opinion between the two as to what had happened. Ms D's description was not, however, objectively inaccurate. The allegations that the referral was written as it was to prompt a particular reaction form the claimant and to engineer her dismissal are without merit. The claimant compares this referral to the accurate referral prepared by Ms W for Ms D. The respondent's explanation for the accuracy of one and limited inaccuracy of the other is logical and was not because of the claimant's disability.

b. Harassment - clearly such inaccuracies as there were unwanted by the claimant. They did not however relate to her disability - they were simply factual errors. In any event, Ms D did not draft the OH referral with the purpose of violating the claimant's dignity or creating the intimidating etc environment. The referral clearly unfortunately had that effect on the claimant (as shown by her letter to Dr PP) but, in all the circumstances, not reasonably so. It was evident that the referral was intended to be a summary, was inevitably from Ms D's perspective and the claimant would have the opportunity to discuss it and comment on it at the subsequent appointment.

c. Victimisation - the referral predates the first protected act (see below) and therefore cannot have been because of any protected act.

d. Arising from - for the reasons stated above such inaccuracies as there were did not amount to unfavourable treatment. It is however

more likely than not that the claimant's extremely detailed and persistent style of communication - particularly in writing - did arise in consequence of her disability. The respondent was on notice of that from 18 July 2017 by Ms QQ's and Ms Q's own admission notwithstanding what the claimant was saying at the time (prior to that although they knew she was disabled they were not on notice of how it manifested itself with regard to communication).

All claims arising out of allegation 10(i) therefore fail.

375. Allegations 10 (ii) & (iii)

a. Direct - there were aspects of the correspondence to the claimant regarding her return to work and Ms Q's comments at that time that could have been better expressed or were unfortunate (in particular the 'employment processes' reference and the perfunctory reply on 28 July 2017 by Ms Q). There were also occasions when the respondent did not reply to every point raised by the claimant or always express sympathy for her condition when they could have done. However, in the context of all the circumstances and in particular the nature of the correspondence from the claimant both before and during her secondment which had been extremely lengthy and on occasion very confrontational, this was not so inappropriate as to amount to less favourable treatment. In any event, these specific examples or omissions were not written/omitted because of the claimant's disability but because of the individuals' genuine view of the situation, at times understandable exasperation and the very detailed correspondence they were receiving.

b. Harassment - the content of that correspondence and comments was undoubtedly unwanted conduct on the part of the claimant but for the same reason as above we do not find that it was related to her disability. In any event we also find that it was not with the purpose of violating the claimant's dignity or creating the intimidating etc environment. It did clearly unfortunately have that effect on the claimant but again we find not reasonably so given the context of the correspondence and the claimant's own at times confrontational approach.

c. Victimisation - (after 15.11 on 25 July 2017 only). Ms Q's comments to the claimant on 25 July regarding previous employment processes was clearly a reference to the claimant's previous grievances. Although this comment was made on 25 July it was before the first protected act was received by the respondent at 15.11 and therefore cannot found a claim for victimisation. In any event, in itself it does not amount to a detriment. Any other unfortunately expressed correspondence and comments after 25 July 2020 were not because of the claimant's protected acts. Rather, they were made for the reasons that appear above.

d. Arising from - for the same reasons we have concluded the unfortunate comments that were made and general conduct of the correspondence did not amount to unfavourable treatment. (If they had then we would have found that the reason for the comments etc was exasperation with the claimant which that did arise from her communication style which was a consequence of her disability and accordingly they would have founded a claim. As to whether in any event they could be justified as a proportionate means of achieving a legitimate aim, seems doubtful. It is undoubtedly legitimate for the respondent to properly manage the claimant and her proposed return to work, but it could not be proportionate for management to express themselves in a discriminatory way.)

All claims arising out of allegations 10(ii) & (iii) therefore fail.

376. Allegations 10 (iv) & (v)

a. Direct - the decisions to suspend and to investigate were made by Dr K. In all the circumstances these were entirely reasonable and resulted from the correspondence between the claimant and the respondent in July and August 2017 which suggested - should she attend work - similar difficulties would arise in the relationships that had existed prior to the secondment. Addressing those difficulties had been at least part of the purpose of the proposed return to work meeting anticipation of which had led to Ms D going off sick (though she had returned by 5 September). At the time of suspension, agreement had been given to the claimant's union representative attending that return to work meeting but the terms of the claimant's letter of 25 August made clear that she remained aggrieved by events that had already been the subject of completed grievances as well as more recent events. In all the circumstances it was the state of relationships between the claimant and management, and to a lesser extent her colleagues, as indicated by that letter and the need to address them in a structured way so as to maintain a safe and productive working environment, that was the reason for the suspension and the decision to investigate. This is supported by the terms of the suspension letter itself. It was not because of her disability.

b. Harassment - similarly these decisions, although undoubtedly unwanted conduct on the part of the claimant, did not relate to her disability and therefore could not amount to harassment. Furthermore they did not have the purpose of and could not reasonably have the effect of violating the claimant's dignity or creating an intimidating etc environment.

c. Victimisation - suspension and commission of the investigation were detriments. It is apparent that the claimant's letter dated 25 August 2017, which was a protected act, was the trigger for the meetings at which it was decided to do those things. It is also apparent however that the reason for them was not that she had sent the letter but that

the content of the letter showed a continuing serious problem in relationships within the team, that the claimant had not moved on from them and that needed to be addressed as described above. The fact that the claimant had previously raised many complaints and grievances (both formally and informally), which were all important context for the state of the relationships, without any such action being taken supports that.

d. Arising from - similarly, these actions amounted to unfavourable treatment and they were, at least in part, because of something arising in consequence of the claimant's disability (her communication style). However for the reasons set out above this response was a proportionate means of achieving a legitimate aim. In deciding that it was proportionate we have expressly considered the impact the suspension had on the claimant which was undoubtedly extreme and most distressing for her. As Dr K has accepted it should have been done face-to-face rather than in writing.

Accordingly the claims arising from allegations 10(iv) & (v) fail.

377. Allegation 10 (vii)

a. Direct - on the facts this allegation is not made out as Dr K did not decide to proceed to consider disciplinary action against the claimant. He stated in terms that it was not disciplinary although the disciplinary process was used as a structure. In any event, reading the allegation less literally, the decision to formally proceed was not because of the claimant's disability. It was because of the contents of the investigation report on the recommendation of Ms TT.

b. Harassment - similarly this decision, although undoubtedly unwanted conduct on the part of the claimant, did not relate to her disability and therefore could not amount to harassment. Furthermore it did not have the purpose of and could not reasonably - given the contents of the report which was sent to the claimant by Mr M - have the effect of violating the claimant's dignity or creating an intimidating etc environment whilst recognising that the contents of the report would upset her.

c. Victimisation - the decision was a detriment but the reason for it was the contents of Ms P's report as to the state of relationships and their impact, not any protected act of the claimant.

d. Arising from - again this decision amounted to unfavourable treatment and was, at least in part, because of something arising in consequence of the claimant's disability (her communication style). However for the reasons set out above this response was a proportionate means of achieving a legitimate aim. In deciding that it was proportionate we have again considered the impact of the decision on the claimant and the knowledge that the respondent had of her vulnerability.

Accordingly the claims arising from allegations 10(vii) fail.

378. Allegation 10 (ix) - see below in discriminatory dismissal.

379. Allegation 10 (x) (appeal against dismissal and grievance 3 only)

a. Direct - we have not found on the facts there to have been any failure to investigate or adequately investigate these matters. They were both concluded and although not in the claimant's favour this was not because of her disability. Both managers properly took into account relevant and non-discriminatory reasons in coming to their conclusions.

b. Harassment - similarly these decisions, although undoubtedly unwanted conduct on the part of the claimant, did not relate to her disability and therefore could not amount to harassment. Furthermore they did not have the purpose of and could not reasonably - given the conduct of the processes and the contents of the outcome letters - have the effect of violating the claimant's dignity or creating an intimidating etc environment whilst recognising that those outcomes did upset her.

c. Victimisation - these outcomes were detriments but for the same reasons as above were not made because of any protected act of the claimant.

d. Arising from - again the outcomes amounted to unfavourable treatment but were not because of something arising in consequence of the claimant's disability. They were because the relevant managers had made full reasoned decisions based on all the information and evidence before them. In any event, these outcomes were proportionate means of achieving a legitimate aim.

Accordingly the claims arising from allegations 10(x) fail.

380. <u>Victimisation - Protected Acts</u>

381. The alleged protected acts relied upon by the claimant are:

a. para 16 (i) - given the claimant's confirmation in her evidence that she was not at this stage saying that the respondent had breached its duties under the 2010 Act, this cannot be a protected act.

b. para 16 (ii) & (iii) - neither documents refer to the 2010 Act and in both the claimant is clear that the alleged treatment of her by Ms S led to her stress, anxiety and reactive depression. Her allegations cannot therefore be that pre-existing bullying and harassment related to her disability (the only protected characteristic relied upon). They were therefore not protected acts.

c. para 16(iv) - similarly, this complaint does not refer to the 2010 Act. Its reference to bullying and harassment is again not related to

disability and the reference to victimisation is as a response to the previous non-2010 Act related grievance.

d. para 16(v) - the claimant did not refer to the 2010 Act either expressly or impliedly. It was not a protected act.

e. paras 16(vi)-(ix) - the respondent has accepted that these were protected acts.

382. Accordingly the date of the first protected act was 25 July 2017. Of the detriments the claimant says she suffered because of a protected act, one - the inaccurate OH referral made on 24 July (para 10(i)) - entirely predates that and therefore they can be no causal link between them. Those parts of the correspondence complained of at para 10(ii) and (iii) that predate 25 July can also not found a victimisation claim.

383. Indirect and Reasonable Adjustments claims - PCPs

384. The (in time) PCPs claimed at para 20 (and in respect of which burden of proof has passed to respondent) have been made out on the facts except:

a. (iii) - care was clearly taken to advise managers on content, tone and style of communication. Managers were not left free express themselves in the way alleged;
b. (iv) - made out only for period between Ms D saying on 7 August that no representation would be allowed and then agreeing to it on 10 August;
c. (v) - although the claimant took objection to the way the referrals were expressed, the views expressed by Ms E in June 2017 and Ms D in July 2017 cannot be properly described as 'negative'. They were both sufficiently objective accounts of the factual situation. Whilst it is correct that Ms E's expressly stated concern for the claimant's wellbeing and Ms D did not, this does not amount to a PCP of expressing negative views;
d. (vii) & (viii) - in the formal process that resulted in dismissal, Ms P, Mr M and Ms J all conducted fair and reasonable investigative processes;
e. (x) - not made out on the facts as found;
f. (xi) - disciplinary proceedings were not commenced but we read this as commencing formal proceedings which is made out; and
g. (xii) & (xiii) - in the formal process that resulted in dismissal, this is not made out on the facts. Ms P, Mr M and Ms J did not display any bias towards the statements, evidence or well-being of more senior employees. They all conducted fair and reasonable investigative processes; and
h. (xiv) - although the claimant's GP and OH had recommended avoiding delay due to the negative impact on her health, and there were occasions when the respondent could and should have made more effort to minimise delay, this did not amount to a PCP. The respondent's practice was to schedule appointments etc as soon as they could within the restrictions of diary availability, meeting other professional commitments and the difficulties in identifying suitable

people available to deal with certain matters. Having said that, there were times (e.g. between 21 and 24 November 2017) that the respondent lost sight of the circumstances of the claimant as an individual and was too process bound but this still did not amount to this PCP.

385. Indirect discrimination & reasonable adjustments - corresponding disadvantage

386. The (in time) claimed PCPs made out on the facts did cause the required disadvantage identified at para 21 except:

a. (ii) - we do not accept that this 'would inevitably' happen but have read this as 'could become…'. In any event, there was no evidence before us that disabled people were put at a particular or substantial disadvantage. A non-disabled person with relationship difficulties at work and facing possible termination of employment due to SOSR would also potentially benefit from mediation and similarly be disadvantaged by a failure to continue with it;
b. (iv) - as agreement was given on 10 August, the claimed disadvantage did not materialise;
c. (vi) - not made out on the facts;
d. (xvi) - in respect of not allowing audio recordings the claimed disadvantage cannot have arisen because the claimant's mother in fact did covertly record the hearings;
e. (xviii) - the only disadvantage for the claimant could be the prospect of this happening and being allowed to happen as no witness did in fact choose to give evidence behind the screen.

387. Indirect discrimination - justified? Reasonable adjustment?

388. Were the (in time) PCPs that resulted in the necessary disadvantage a proportionate means of achieving a legitimate aim and/or were the corresponding adjustments sought by claimant reasonable?

a. Para 20 (ix) - suspending the claimant in all the circumstances was a proportionate means of achieving the legitimate aim of investigating concerns regarding a breakdown of trust and confidence in accordance with policy and procedure and to protect all employees affected as well as maintaining the integrity of any such investigation. In considering proportionality we have taken into account the undoubted impact of the step on the claimant. It was reasonable for the respondent however to also consider the impact of the situation on other team members and continuity of service provision in not suspending other members of the team. Not suspending the claimant, therefore, was not a reasonable adjustment. These claims therefore fail.

b. Para 20 (xi) & (xix) - commencing a formal process to consider dismissal and then dismissing were proportionate means of achieving the legitimate aim of the need to investigate suspected breakdowns in trust and confidence and to take appropriate steps in

line with policy and procedure to ensure a safe and productive working environment. Again we have taken into account in assessing proportionality the impact of these steps on the claimant which was undoubtedly very significant both to her health, financial situation and career prospects. The respondent was justified however in taking these steps as they not unreasonably concluded that properly functioning working relationships were irretrievable and there was no realistic prospect of redeploying the claimant. Again it was reasonable for the respondent to consider the impact of the situation on other team members and continuity of service provision. Not commencing those proceedings and not dismissing in all the circumstances were not reasonable adjustments. These claims therefore fail.

c. Para 20 (xvi) - the failure of the respondent to provide timed agendas cannot be justified and would have been a reasonable adjustment. Whilst there is clearly a legitimate aim of conducting meetings and hearings in line with policy, in these circumstances the actions of the respondent were not proportionate. The claimant made these requests in respect of three separate meetings. The stage 3 hearing in grievance 1 by Ms Q, the return to work meeting with Ms D and the resumed dismissal meeting with Mr M. On the first occasion Ms F's response was inadequate. The second request was not answered and the response to the third was particularly inadequate. Given that the claimant expressly said that she needed a substantial break to take medicine yet Mr M's apparent only concern was to get to his other commitments. This claim therefore succeeds.

d. Para 20 (xvii) - whilst recognising how difficult this process was for the claimant and that she would have preferred one hearing, the timetable of the overall process was appropriate and a proportionate means of achieving the legitimate need to review and consider evidence gathered thoroughly and to reach a considered conclusion in line with policy and procedure. There was a very significant amount of material that had to be examined not least because of the detailed nature of the claimant's complaints about how she had been treated. Whilst it was probably unrealistic for the respondent to have thought that the hearing would be completed in one afternoon given previous experience of dealing with the claimant's concerns, it was proportionate to at least attempt to do so given the difficulties in making time available for lengthy hearings in the relevant diaries and the need to avoid unnecessary delay. Similarly it would not have been a reasonable adjustment to delay further to ensure one hearing. This claim therefore fails.

e. Para 20 (xviii) - offering witnesses the option of giving statements or answer questions from behind screens was a proportionate means of achieving the legitimate aim of the need to ensure that witnesses could be questioned as part of that hearing and to ensure that they would attend. It is recognised that the claimant found the suggestion

that witnesses may give evidence from behind a screen extremely distressing. Even so that did not take it out with proportionality given the genuine concern that had been raised by Ms E in advance of the hearing and the impact on Ms D of the relationship with the claimant. Not allowing the use of screens was not a reasonable adjustment. This claim therefore fails.

f. Para 20 (xix) - see below in discriminatory dismissal

389. Unfair Dismissal

390. The respondent has established that the reason for the claimant's dismissal was SOSR, namely an irretrievable breakdown in working relationships. Both Mr M and Ms J genuinely and reasonably held that belief. SOSR was not being used by the respondent to conceal some other reason.

391. A fair process was followed at both dismissal and appeal stages. Although, because the disciplinary procedure was used it was at times unhelpfully adversarial and the respondent was not always as flexible as it could have been in the circumstances, this did not take it out with the band of reasonableness. The claimant had the opportunity to understand the case against her and to present her reply. Further she was well represented and supported throughout. We have found of course that in one respect the disciplinary process amounted to indirect discrimination and a breach of the duty to make reasonable adjustments. Without minimising the effect of that on the claimant (which will be addressed in a remedy hearing - see below) we do not conclude that that alone makes the dismissal procedurally unfair.

392. We have carefully considered the role of Ms F in the processes leading up to consideration of dismissal and the dismissal process itself. As already stated we do not find that Ms F was conducting any sort of inappropriate campaign to remove the claimant but we do find that she should have stepped back once it became clear that the claimant considered her to be biased. There were, to some extent mixed messages from the claimant on that (e.g. she complained about Ms F's involvement but continued to initiate correspondence with her) but by 25 July 2017 the claimant's concern was categorically expressed to Mr LL. Ms F herself acknowledged in August that the claimant would not like her being present yet still played a central role in managing the process. Whether this was due to a misguided sense of duty or the lack of anyone else suitable and available to take it (which her email does indicate) on is unclear. We do note however that when Mr FF did step in because of the claimant's allegations regarding Ms F, this just resulted in her also saying that Mr FF was biased. Accordingly we doubt that Ms F fully stepping back would have made any difference to the claimant's perception. In any event, overall the process was fair. Further, and most importantly, even where Ms F was heavily involved we are more than satisfied that each decisionmaker was more than capable of being, and was, independent and whilst they may have been briefed by her, that did not mean that she was making the decisions behind the scenes.

393. The conclusion that relationships had broken down irretrievably was well within that band of reasonableness. The decisionmakers had compelling evidence of that from the claimant's line management team, including from Ms Q and Ms QQ who were sufficiently removed from immediate line management to be able to present a balanced view unaffected by any particularly personal involvement, and supported by the tone of the very lengthy correspondence set out in detail above. Within that correspondence were numerous examples of the claimant herself saying that she believed her managers had behaved deliberately unlawfully and dishonestly as well as being guilty of professional malpractice. Having held and repeatedly expressed those views it is very hard to see how a close line relationship that is predicated on trust could be restored. Furthermore, although the claimant indicated during the consideration of dismissal process that she believed the relationship was retrievable she also indicated that she felt she had done nothing wrong and would go back to work 'with her head held high'. In all the circumstances it was reasonable for Mr M to conclude that this showed a lack of insight on the part of the claimant and made a successful reintegration into the workplace even more unlikely. The tone of the claimant's correspondence throughout and submissions at the formal hearings was further indication of that unlikelihood.

394. As for the support or otherwise that had been offered to the claimant (particularly in contrast to that offered to Ms D) we conclude that this was also reasonable and did not undermine the fairness of the conclusion as to breakdown in the relationship. The same efforts were made to support both. Both were referred to OH and appropriate referrals made for both. (the claimant says that referring her just before her planned return to work after the secondment was too late but we accept the respondent's argument that that was in fact the relevant time.) Mediation was on offer to both until the suspension. The claimant was regularly reminded of the availability of Staff Support which she declined. In 2016 she was also given and encouraged to complete the stress risk assessment

395. Having come to that reasonable conclusion, therefore, the remaining issue was what action should be taken. We have considered this issue with particular care. It is evident from our findings of fact that we consider the respondent at the corporate level was overall at least in part to blame for the breakdown in the relationship due to poor management in some respects of the underlying events in 2016. The claimant's complaints made on 11 May 2016 were not adequately dealt with at the time. This was compounded on the occasions when grievances/complaints identified areas where the claimant was justified to feel aggrieved yet did not uphold, even partially, her complaints and did not make any recommendations to address those issues (e.g. Ms Q's conclusion with regard to the alleged breach of confidentiality when the OH referral was saved into the public drive). This understandably led to the claimant feeling not listened to because in truth in some respects that was true. Unfortunately, a significant factor in the claimant not being listened to was the volume, detail and tone of her correspondence which initially made it difficult for the respondent to identify and manage her complaints. Further, as matters progressed, despite an

early recognition that the claimant was displaying indicators of stress, her approach led to managers becoming defensive and unwilling to fully engage her. We do not underestimate the impact of the claimant's behaviour on the respondent's management team, in particular her immediate line managers. We do consider, however, that more senior managers and those in HR in particular, could and should have taken a more proactive and constructive approach to the claimant, who after all was a good clinician, not least because of what the respondent's own disability policy says. The delays in dealing with the claimant's complaints and grievances, whilst not discriminatory and not amounting to a breach of any policy, must have also contributed to the difficulty of the claimant's position.

396. In all those circumstances, we consider that the respondent had an increased obligation to ensure that termination of employment was the last resort. Our conclusion is that, overall, the respondent did meet that obligation and neither Mr M's nor Ms J's decisions were 'faits accomplis'. They both approached this issue with an open mind and took all relevant factors into account including the claimant's ill health. The decision having reasonably been made that the relationship had broken down, it was also reasonable to conclude that reintegrating the claimant into her existing team would not be possible as neither mediation nor changing supervision lines was practicable. The only remaining possible option therefore was redeployment. Mr M addressed this specifically and in detail with the claimant. Her position clearly was that redeployment outside of her area of specialty was inappropriate and would be victimisation. This made it impracticable. In addition, even if the claimant had not taken that position, Ms Q's evidence - although admittedly we find her approach on this to be less than thorough - was that redeployment was not possible in any event.

397. In all those circumstances the decision to terminate the claimant's employment was within the band of reasonableness albeit that this is a decision that this Tribunal probably would not have made. We would have looked to see whether there were any other possible solutions e.g. a short-term secondment elsewhere in the respondent perhaps combined with an attempt at a phased return to her existing team and at least one attempt at mediation if Ms D was willing as she appeared to have been as well as what she said to Mr R at G3). To find the dismissal unfair on that basis, however, would be to substitute our own view which is not permissible. Accordingly, we find that the dismissal was fair.

398. <u>Discriminatory dismissal</u>

399. It follows from those conclusions on fairness that the claims that the dismissal was an act of direct discrimination, harassment and victimisation fail. The reason for the dismissal was a genuine and reasonable belief that the relationship had irretrievably broken down. It was not because of, nor was related to, the claimant's disability or her protected acts.

400. It is apparent that the dismissal was however because of something arising in consequence of the disability i.e. her style of communication, and the respondent was aware of that consequence at the time of dismissal.

However, for the same reasons that the dismissal was fair, the respondent has shown that that treatment was a proportionate means of achieving a legitimate aim. The legitimate aim being the need to make decisions regarding employees' employment in line with policy and procedure and to maintain a safe and productive working environment.

401. For the same reasons although the PCP of dismissing in those circumstances undoubtedly had a substantial disadvantage on the claimant, the prima facie indirect discriminatory effect of that was, for the same reasons, justified.

402. As for the reasonable adjustments claim, the adjustment sought - considering alternatives to dismissal - was done. Not dismissing the claimant would not have been a reasonable adjustment.

Remedy

403. It is hoped that the parties will be able to resolve between themselves the issue of remedy for the successful claims of indirect discrimination and reasonable adjustments. A 3-hour remedy hearing will be listed though in due course in the event that that is not possible.

_____
Employment Judge K Andrews
Date: 23 October 2020

AGREED LIST OF ISSUES

Unfair Dismissal

1. If the reason for dismissal was not a discriminatory reason (as to which see below), was the Claimant dismissed for a potentially fair reason within s98(1) and (2) ERA 1996?

The Claimant asserts that the Respondent did not have a potentially fair reason for dismissing her and that her dismissal was discriminatory in nature. The Claimant claims unfair dismissal and does not accept that there existed "some other substantial reason" that would justify her dismissal in law.

The Respondent asserts that the Claimant was dismissed for a fair reason (SOSR)

2. Was the dismissal fair in all the circumstances (including the size and administrative resources of the employer's undertaking) and did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee?

The Claimant claims that in the event the Respondent is able to show that it had a potentially fair reason, or "some other substantial reason" for dismissing her, the Claimant claims that the Respondent nonetheless acted unreasonably in treating that reason as a sufficient reason for her dismissal.

The Claimant avers that her dismissal did not fall within the band of reasonable responses in all of the circumstances for the following non-exhaustive reasons:

(i) The Claimant's health suffered as a result of her work situation and the Respondent did not comply with its duty of care towards her;

(ii) The Respondent did not deal (or did not adequately deal) with the Claimant's complaints prior to or during her secondment, which meant the issues remained unresolved when the Claimant was due to return to work;

(iii) The Respondent refused to consider further mediation with the Claimant;

(iv) The Respondent refused the Claimant's reasonable requests to be accompanied to a return to work hearing;

(v) The Respondent's managers made negative references about the Claimant's health, and gave inaccurate information to Occupational Health that only added to the Claimant's distress;

(vi) The Respondent did not investigate (or adequately investigate) the Claimant's grievances, complaints and appeals, and did not uphold them;

(vii) The Respondent made unfair accusations about the Claimant's communications and the quality of her professional and academic work;

(viii) The Respondent made the situation worse through its managers' and employees' health and safety and data protection breaches in relation to the Claimant and did not resolve these issues before the Claimant's return to work;

(ix) The investigating and dismissing officers did not give weight to the Claimant's mental health problems, as they did in relation to the ill health and distress Ms D is meant to have suffered because of the Claimant;

(x) The Respondent did not make reasonable adjustments for the Claimant or follow the Claimant's GP's or Occupational Health's recommendations;

(xi) The Respondent did not consider alternatives to dismissal, such as alternative work or a change to the Claimant's line management.

3. *If the dismissal is found to be unfair, would the Claimant have been dismissed in any event had there been no unfairness (Polkey)?*

4. *If the dismissal is found to be unfair, did the Claimant contribute to her dismissal by her own blameworthy conduct? If so, to what extent?*

Wrongful dismissal

5. Did the Respondent breach the Claimant's contract by failing to give her the requisite notice upon dismissal?

The Claimant asserts that she was paid one day short of her 8 week entitlement, having been informed of her dismissal dated and effective from 13 February 2018 via email on 14 February 2018 (page 1 and 3 'Money Claims' document)

Holiday Pay

6. What, if any, sum/s is the Claimant owed in respect of holiday pay?

The Claimant asserts that she is owed 18 hours' pay in respect of annual leave not carried over or reimbursed from 2016 (pages 1 and 3 'Money Claims' document)

Arrears of Pay

7. What, if any, sum/s is the Claimant owed in respect of her pay?

The Claimant asserts she was not paid for rostered work during her suspension period which would have included enhanced pay at weekend rates (page 1 'Money Claims' document).

Disability Discrimination

8. Was the Claimant disabled at all relevant times (section 6 of the Equality Act 2010)?

The Respondent admits that from July 2017 the Claimant was disabled within the meaning of section 6 of the Equality Act 2010 owing to her depressive illness and anxiety only. The Claimant relies on the following disabilities:

a. Mixed reactive depression with severe anxiety.

b. Reactive depression.

c. Severe or chronic anxiety.

d. Stress.

9. Was the Respondent aware, or ought reasonably to have been aware, that the Claimant was so disabled?

Direct Discrimination

10. Did the Claimant suffer direct discrimination in that she was subjected to less favourable treatment because of her disability, contrary to section 13 of the Equality Act 2010?

The Claimant claims direct discrimination and will say that the following treatment amounted to less favourable treatment on grounds of her disability:

(i) The inaccurate contents of the referral to Occupational Health in July 2017, prior to the Claimant's proposed return to work following her secondment;

(ii) The correspondence the Claimant's managers sent to the Claimant regarding her return to work in August 2017;

(iii) Ms Q's comments in relation to the Claimant's correspondence with her at that time;

(iv) The decision to suspend the Claimant in September 2017;

(v) The decision to investigate whether there had been an irretrievable breakdown of trust and confidence;

(vi) The Claimant's receipt of the investigation report and the contents of that report in November 2017;

(vii) The decision to proceed to consider disciplinary action against the Claimant;

(viii) The decision to invite the Claimant to disciplinary hearings, at short notice or at all, in November and December 2017 and in January 2018;

(ix) The Claimant's dismissal which she was made aware of upon receipt of a letter of dismissal from the Respondent on 14 February 2018;

(x) The failure to investigate (or failure to adequately investigate), conclude and uphold her grievances and appeals during the above period and ongoing.

11. If so, did the Respondent treat the Claimant less favourably than it treated or would have treated someone without the Claimant's disability? The relevant comparator, in relation to 10 above, is a hypothetical non-disabled employee in the same position in all respects as the Claimant save only that they are not a member of the protected class, namely suffering with a disability.

12. If so, was the less favourable treatment because of the Claimant's disability?

13. If the Claimant is found to have been treated less favourably because of her disability, did the Respondent take all reasonable steps to prevent the acts of discrimination occurring?

Harassment

14. Did the Respondent engage in unwanted conduct related to the Claimant's disability?

The Claimant claims harassment based on disability and relies on each of the above complaints and conduct set out in paragraph 10 (i)-(x) as unwanted conduct related to her disability that had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating and or offensive environment for her.

15. If so, did that conduct have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? Alternatively did it have that effect, taking into account the perception of the Claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect?

Victimisation

16. Were the following protected acts within the meaning of section 27 of the Equality Act 2010 (paragraphs 10 and 57 Particulars of Claim):

(i) The Claimant's grievance dated 6 September 2016 against Ms D and Ms E citing alleged health and safety breaches and that the Claimant felt they had not adhered to the Occupational Health recommendations issued in June 2016, had given false reports to Human Resources and Occupational Health that alluded to the claimant being mentally unstable/bipolar and had not addressed her concerns of bullying;

(ii) The Claimant's grievance dated 14 September 2016 (originally dated 6th September 2016) against Ms S alleging bullying and harassment;

(iii) The Claimant's health and safety grievance appeal dated 19January 2017 after the Claimant was informed on 23rd December 2016 that her Health and Safety grievance would not be upheld;

(iv) A data protection complaint dated 14 March 2017 submitted to Ms Q (Head of Therapies) alleging that the Claimant's private information was accessible to colleagues on a shared computer drive within the Trust and the alleged breach by Ms E;

(v) A formal grievance dated 22 May 2017 regarding the aforementioned data protection issues referred to in subparagraph 16(iv) and the alleged breach by Ms E, as the Claimant felt it was not being dealt with fairly on an informal basis by the Respondent. This grievance was submitted to Mr LL (Director of Human Resources);

(vi) A grievance appeal dated 25 July 2017 in relation to the data protection issues referred to in subparagraph 16(iv), as the grievance was again not upheld;

(vii) A follow-up letter dated 18 August 2017 in relation to regarding further alleged data protection breaches in relation to the Claimant's records and improper references to her health made by her line manager Ms D;

(viii) A grievance dated 23 January 2018 alleging disability discrimination;

(ix) The Claimant's correspondence with the Respondent regarding her return to work or a referral to Occupational Health and referencing discrimination or harassment she claimed to have suffered (including her correspondence dated 10 and 25 August 2017).

The Claimant relies on the above alleged protected acts set out at paragraph 16 each of which the Claimant relies on as protected acts.

17. If so, did the Respondent subject the Claimant to a detriment because she did a protected act/she believed she had done a protected act?

The Claimant claims victimisation, relying on each of above paragraph 10 (i)-(x) as detriments. The Claimant asserts that she suffered these detriments because she had done any or all of the matters set out above in paragraph 16, each of which the Claimant relies on as protected acts.

Discrimination Arising

18. Was the Claimant treated unfavourably because of something arising in consequence of her disability?

The Claimant claims discrimination because of something arising from disability. The Claimant relies on the above points in paragraph 10(i)-(x) as acts of unfavourable treatment that the Claimant will say arose because of the symptoms of her disability, her style of communication, her absences due to her disability and her need to present complaints in writing and to have these investigated in a fair and organised way that is focused on resolving the issues.

The Claimant asserts that the alleged conduct set out at paragraph 10 above amounted to unfavourable treatment.

19. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

The Claimant asserts that the Respondent will not be able to demonstrate that its treatment of the Claimant was a proportionate means of achieving a legitimate aim.

The Respondent denies that it subjected the Claimant to a detriment as alleged. In the alternative, it asserts that the treatment alleged was a proportionate means of achieving a legitimate aim, being (as per the alleged treatment set out in paragraph 10 above):

(i) [The inaccurate contents of the referral to Occupational Health in July 2017, prior to the Claimant's proposed return to work following her secondment] - need to refer the Trust's employees to Occupational Health following concerns regarding their health, in line with its policies and procedures, to support its employees, to ensure they are fit to work, and to maintain a safe and productive working environment. For the avoidance of doubt, the Respondent does not admit that the referral in question was inaccurate;

(ii) [The correspondence the Claimant's managers sent to the Claimant regarding her return to work in August 2017] - the need to support and manage the Trust's employees appropriately in advance of returning to work following a period of absence in order to maintain a safe and productive working environment;

(iii) [Ms Q's comments in relation to the Claimant's correspondence with her at that time] – the need to manage the Trust's employees appropriately, in line with its policies and procedures, in order to maintain a safe and productive working environment;

(iv) [The decision to suspend the Claimant in September 2017] - the need to manage the Trust's employees appropriately, in line with its policies and procedures, in order to maintain a safe and productive working environment, and to ensure the integrity of any ongoing internal investigation is upheld;

(v) [The decision to investigate whether there had been an irretrievable breakdown of trust and confidence] – the need to manage the Trust's employees appropriately, in line with its policies and procedures, in order to maintain a safe and productive working environment;

(vi) [The Claimant's receipt of the investigation report and the contents of that report] – the need to undertake appropriate internal processes, in line with its policies and procedures, in order to maintain a safe and productive working environment;

(vii) [The decision to proceed to consider disciplinary action against the Claimant] – the need to manage the Trust's employees appropriately, in line with its policies and procedures, in order to maintain a safe and productive working environment;

(viii) [The decision to invite the Claimant to disciplinary hearings, at short notice or at all, in November and December 2017 and in January 2018] – where there is an apparent breakdown in relationships between employees, the need to follow appropriate internal processes in line with the Trust's policies and procedures in order to ensure its employees are afforded fair and proper procedural rights and in order to maintain a safe and productive working environment. For the avoidance of doubt, the Trust denies that the hearings the Claimant were invited to were disciplinary hearings;

(ix) [The Claimant's dismissal which she was made aware of upon receipt of a letter of dismissal from the Respondent on 14 February 2018] – the need to make decisions regarding employment of the Trust's employees' where appropriate, in line with its policies and procedures, in order to maintain a safe and productive working environment;

(x) [The failure to investigate (or adequately investigate), conclude and uphold her grievances and appeals during the above period and ongoing] – the need to deal with grievances and appeals raised by the Trust's employees, in line with its policies and procedures, in order to maintain a safe and productive working environment. For the avoidance of doubt the Respondent denies that it failed to investigate, or adequately investigate, or conclude the Claimant's grievances and appeals.

Indirect discrimination

20. Did the Respondent apply any of the following Provision, Criterion or Practice (PCPs) relied on by the Claimant?

The Claimant asserts that the Respondent applied the following PCPs in which the Claimant contends were discriminatory in relation to the Claimant's protected characteristic of disability.

(i) Not resolving (and/or not adequately resolving) complaints prior to or during periods of secondment;

(ii) Not continuing or engaging in further mediation after an earlier mediation session that dealt with the same or broadly similar matters;

(iii) Having managers correspond (or allowing them to correspond) with employees in whatever tone and style and using whatever language they see fit in order to allow their messages to be put across to employees in no uncertain terms;

(iv) Not agreeing to employees' reasonable requests to be accompanied to return to work hearings;

(v) Expressing negative views about individuals' health in referrals to Occupational Health, in circumstances where this is deemed appropriate by the Respondent;

(vi) Not properly checking facts and information given in referrals to Occupational Health;

(vii) Not adequately investigating grievances, complaints and expressions of dissatisfaction in accordance with its own procedures for investigating these matters;

(viii) Not adequately managing and enforcing rules in relation to health and safety and data protection breaches in relation to employees;

(ix) Suspending any employee accused of conduct that is suspected of having caused an alleged breakdown of trust and confidence between the employer and the employee;

(x) Preventing or restricting individuals' direct and timely access to healthcare appointments within the Trust during periods of suspension;

(xi) Commencing disciplinary proceedings against employees accused of conduct that it suspected of having caused an alleged breakdown of trust and confidence between the employer and the employee;

(xii) During internal investigations, giving greater weight to statements and evidence made by more senior employees;

(xiii) During investigations, having greater regard to senior employees' health and wellbeing than for more junior employees;

(xiv) Not following, or not adequately following, individuals' GP's reasonable recommendations and/or Occupational Health's reasonable recommendations in all cases without exception;

(xv) Issuing report findings and issuing instructions to submit statements for disciplinary hearings that may result in dismissal up to two working days and five working days respectively before such hearings;

(xvi) Not providing timed agendas and/ or allowing audio recordings to be made for return to work hearings and disciplinary hearings;

(xvii) During disciplinary proceedings, permitting managers to hold at least two lengthy hearings over the course of at least 4 weeks before reaching a conclusion;

(xviii) During disciplinary hearings, permitting managers to allow witnesses whom they call to give statements or to answer questions from behind screens;

(xix) Dismissing employees whose conduct is found to have allegedly caused the mutual relationship of trust and confidence to break down.

21. If so, were employees sharing the Claimant's particular disability put at a particular disadvantage compared to those who did not share it?

The Claimant asserts that she and those employees who share her disability were placed (or would have been placed) at a particular disadvantage as compared with those who do not share her particular disability because (using the same numbering as in paragraph 20 above):

(i) Complaints and concerns were left to pile up and to fester, increasing the risk that relations between employer and employee would sour and that a return to work following secondment would be made more difficult;

(ii) Relationships would inevitably become further strained, increasing the bad feeling that affected employees and making a productive working relationship between those employees less likely in the future;

(iii) Those with the Claimant's disability, including the Claimant, became (or were more likely to become) frustrated, disenfranchised and upset at the communications received from the employer;

(iv) Individuals would be required to attend these hearings without any support, making it more likely that they would be unable to attend and express themselves in a way that best protects their interests;

(v) This increased, or made it likely to increase, a bad feeling that already existed and to sour relations;

(vi) Occupational Health made, or were more likely to make, mistakes in their assessments and/or to provide an opinion more favourable to the employer than the employee;

(vii) Miscarriages of justice occurred (or were more likely to occur) resulting in incorrect or unfair outcomes and decisions being made on the basis of flawed material;

(viii) Data breaches occurred (or were more likely to occur) resulting in personal data being leaked or situations being misrepresented;

(ix) The disadvantage was the suspension and the lack of access to data, witnesses and information that came out from that, causing increased distress and an exacerbation of the existing health condition;

(x) Exacerbating the Claimant's health condition by isolating, ostracising, humiliating and limiting her normal activities of daily living, rehabilitation recovery, access to healthcare and preventing any confidentiality or dignity surrounding her private healthcare appointments which had to be disclosed to over three to four different managers;

(xi) The disadvantage was the disciplinary proceedings and the threat of sanction or dismissal causing increased distress and an exacerbation of the existing health condition;

(xii) A biased, unfair and unjust outcome occurred, or was more likely to occur, for the less senior employee;

(xiii) A biased, unfair and unjust outcome occurred, or was more likely to occur, for the less senior employee;

(xiv) This caused or contributed to a less successful working relationship than the one which would have been the case, had these recommendations been considered and implemented;

(xv) The Claimant suffered injury to feelings and ended up in A&E twice and at her GP practice on over three separate occasions on receipt of these unreasonable orders by the chair Mr M from 17 November 2017 to 22 November 2017 and subsequently had to be signed off sick by her GP;

(xvi) This caused the Claimant further distress and an inability to mentally prepare and plan her medication, which she was forced to take on an empty stomach on 9 January 2018. She also struggled to record written notes, to listen and to engage due to her impairments and the Respondent's actions;

(xvii) Delay, frustration, stress and an exacerbation of the employee's health condition;

(xviii) An intimidating, humiliating and highly stressful situation leading to an exacerbation of the employee's health condition;

(xix) The loss of employment and associated loss of career, with exacerbation of ill health.

22. If so, was the Claimant put to the same particular disadvantage?

23. If the Claimant was put at a particular disadvantage, was the PCP a proportionate means of achieving that legitimate aim?

The Respondent denies that the Claimant was put at a particular disadvantage as alleged. In the alternative, it asserts that the PCP was a proportionate means of achieving a legitimate aim, being (as per the alleged PCPs set out in paragraph 20 above):

(i) [Not resolving (and/or not adequately resolving) complaints prior to or during periods of secondment] – the need to resolve complaints and issues raised by employees, in line with its policies and procedures, to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent denies that it failed to resolve or adequately resolve complaints prior to or during the Claimant's secondment;

(ii) [Not continuing or engaging in further mediation after an earlier mediation session that dealt with the same or broadly similar matters] – the need to assist employees in achieving positive working relationships by offering voluntary resources and tools to encourage this, to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent does not admit that it failed to continue or engage in further mediation after an the earlier session that dealt with the same or broadly similar matters;

(iii) [Having managers correspond (or allowing them to correspond) with employees in whatever tone and style and using whatever language they see fit in order to allow their messages to be put across to employees in no uncertain terms] – the need to ensure proper and effective management of employees, in line with its policies and procedures, to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent denies that managers corresponded in an inappropriate style or tone, or used inappropriate language;

(iv) [Not agreeing to employees' reasonable requests to be accompanied to return to work hearings] – the need to ensure that informal meetings are not unnecessarily formalised to the detriment of good working relationships and effective running of the service. For the avoidance of doubt, the Respondent denies that the Claimant was invited to a return to work hearing – this was an informal meeting to welcome her back to work;

(v) [Expressing negative views about individuals' health in referrals to Occupational Health, in circumstances where this is deemed appropriate by the Respondent] – the need to provide accurate referrals of employees to Occupational Health, for support and management, with a view to maintaining a safe and productive working environment. For the avoidance of doubt, the Respondent denies that negative views about the Claimant's health were expressed;

(vi) [Not properly checking facts and information given in referrals to Occupational Health] – the need to provide referrals to Occupational Health based on the information available to managers at the time and the concerns that they may have, in order to provide appropriate support to employees and the service as a whole. For the avoidance of doubt, it is denied that the Respondent failed to properly check facts and information;

(vii) [Not adequately investigating grievances, complaints and expressions of dissatisfaction in accordance with its own procedures for investigating these matters] – the need to investigate and conclude grievances and complaints in line with its policies and procedures, to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent denies that it failed to adequately investigate grievances, complaints and expressions of dissatisfaction, in contravention of its own procedures;

(viii) [Not adequately managing and enforcing rules in relation to health and safety and data protection breaches in relation to employees] – the need to enforce its own policies and procedures on Health and Safety and Data Protection to ensure the safe and effective working environment. For the avoidance of doubt, the Respondent denies that it failed to enforce its own policies and procedures;

(ix) [Suspending any employee accused of conduct that is suspected of having caused an alleged breakdown of trust and confidence between the employer and the employee] – the need to investigate concerns regarding a breakdown of trust and confidence, in accordance with its policies and procedures, and to protect all employees affected, as well as maintaining the integrity of any such investigation;

(x) [Preventing or restricting individuals' direct and timely access to healthcare appointments within the Trust during periods of suspension] – the need to ensure that the integrity of any investigation is maintained, and being mindful of the impact on all employees involved. For the avoidance of doubt, the Respondent denies that the Claimant was prevented or restricted from direct and timely access to healthcare appointments during the period of her suspension;

(xi) [Commencing disciplinary proceedings against employees accused of conduct that it suspected of having caused an alleged breakdown of trust and confidence between the employer and the employee] – the need to investigate suspected breakdowns in trust and confidence and take appropriate steps in line with its policies and procedures, to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent denies that the Claimant was subjected to disciplinary proceedings;

(xii) [During internal investigations, giving greater weight to statements and evidence made by more senior employees] – the need to conduct internal investigations in line with its policies and procedures to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent denies that during internal investigations the weight it gave to statements and evidence was dependent upon the seniority of the employee who provided the statement and evidence;

(xiii) [During internal investigations, having greater regard to senior employees' health and wellbeing than for more junior employees] – the need to review and consider the impact of employees behaviour on their colleagues, in line with policies and procedures, to ensure a safe and effective working environment. For the avoidance of doubt, the Respondent denies that it gives greater regard to the well-being of senior employees as opposed to more junior members of staff;

(xiv) [Not following, or not adequately following, individuals' GP's reasonable recommendations and/or Occupational Health's reasonable recommendations in all cases without exception] – the need to obtain and consider medical advice and other recommendations to ensure a safe and productive working environment. For the avoidance of doubt, the Respondent denies that it failed to follow or adequately follow such advice;

(xv) [Issuing report findings and issuing instructions to submit statements for disciplinary hearings that may result in dismissal up to two working days and five working days respectively before such hearings] – the need to gather and consider statements from employees who are subject to an internal hearing, in line with policies and procedures, to ensure a fair hearing. For the avoidance of doubt, the Respondent does not admit that it acted in breach of its own policies and procedures in this regard;

(xvi) [During disciplinary proceedings, permitting managers to hold at least two lengthy hearings over the course of at least 4 weeks before reaching a conclusion] – the need to review and consider evidence gathered as part of an internal hearing thoroughly and to reach a considered conclusion, in line with its policies and procedures. For the avoidance of doubt, the Respondent does not admit that it acted in breach of its own policies and procedures in this regard;

(xvii) [Not providing timed agendas and/ or allowing audio recordings to be made for return to work hearings and disciplinary hearings] – the need to conduct meetings and hearings in line with its policies and procedures. For the avoidance of doubt, the Respondent does not admit that it failed to provide an agenda for the return to work meeting or hearing to which the Claimant refers. The Respondent denies that any planned return to work discussion was to be in the format of a hearing and denies that the Claimant was subjected to disciplinary proceedings;

(xviii) [During disciplinary hearings, permitting managers to allow witnesses whom they call to give statements or to answer questions from behind screens] – the need to ensure that witnesses giving evidence at a hearing can be cross-examined/questioned as part of that hearing, and to implement tool to ensure that witnesses attend such hearings to give their evidence. For the avoidance of doubt, a screen was not required as part of the hearings in question;

(xix) [Dismissing employees whose conduct is found to have allegedly caused the mutual relationship of trust and confidence to break down] – the need to consider the needs of the service, patient safety and team as a whole, in line with its policies and procedures, where a breakdown of working relationships has occurred, to ensure a safe and productive working environment.

Reasonable Adjustments

24. Did the Respondent apply any of the following PCPs?

The Claimant relies on the same PCPs relied upon within paragraph 20 above which set out the Claimant's case for indirect discrimination.

25. If so, did the PCPs cause the Claimant a substantial disadvantage compared to those without her particular disability?

The Claimant relies on the matters set out at paragraph 21 above as amounting to a substantial disadvantage which set out the Claimant's case for indirect discrimination.

26. If so, did the Respondent take all steps as were reasonable in the circumstances to prevent the PCP having that disadvantageous effect?

The Claimant asserts that the Respondent should have made the following reasonable adjustments under section 20 of the Equality Act 2010:

(i) Resolved the Claimant's complaints prior to or during her secondment, which meant the issues could be resolved by the time the Claimant was due to return to work;

(ii) Considered further mediation;

(iii) Ensured managers modified the tone, style and content of written communications;

(iv) Allowed the Claimant's reasonable request to be accompanied to a return to work hearing;

(v) Not made negative references to the Claimant's health;

(vi) Properly checked facts and information given in referrals to Occupational Health;

(vii) Properly investigated her grievances, complaints and expressions of dissatisfaction in accordance with its own procedures;

(viii) Adequately managed and enforced rules in relation to health and safety data protection breaches;

(ix) Not suspended the Claimant, and instead allowed her to return to work, even if just for a trial period initially;

(x) Lifted the unreasonable restrictions imposed with the Claimant's suspension because there were circumstances in which healthcare professionals and the Claimant's trade union representative, Ms Elaine WW, identified to the Respondent that its actions would have significant adverse effects on her health on numerous occasions;

(xi) Not commenced disciplinary proceedings against the Claimant, instead allowing her to continue in her work while investigations were ongoing;

(xii) Given equal weight to statements and evidence made by employees;

(xiii) Had equal regard to employees' health and wellbeing;

(xiv) Followed GP's or Occupational Health's recommendations;

(xv) Followed the reasonable advice of the Claimant's trade union representative, Ms WW, and '*agree[d] a mutually suitable date for any hearing',* whilst also providing materials and instructions in plenty of time beforehand. As Ms WW observed '*The timing should take into account [the Claimant's] health and disability which means she will require additional time to prepare*';

(xvi) Provided the requested timed agendas and the reasonable adjustment of audio recordings for any return to work and disciplinary hearings;

(xvii) Held just one disciplinary hearing in circumstances where everyone was fully prepared, without unreasonable delay;

(xviii) Not allowed the use of screens for witnesses in disciplinary hearings, and considering the use of video conferencing facilities only if necessary;

(xix) Considered alternatives to dismissal, such as alternative work or a change to the Claimant's line management.

27. Did the Respondent know, or could have reasonably been expected to know,

that the Claimant has the disability and that she was likely to be at a substantial disadvantage compared with persons who are not disabled?

28. Would the adjustments suggested at paragraph 26 have been reasonable in the circumstances?

Jurisdiction: Time Limits

29. Were the Claimant's claims under the Equality Act 2010 presented to the Tribunal before the end of the period of three months beginning when the act complained of was done (Section 123(1) Equality Act 2010) (as extended by ACAS early conciliation)?

30. Did the matters complained of amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim (Section 123(3) Equality Act 2010) (as extended by ACAS early conciliation)?

31. To the extent that any of the Claimant's complaints are out of time, would it be just and equitable for the Tribunal to extend time for the bringing of the complaint (Section 123(1) (b) Equality Act 2010)?

The Claimant asserts that her dismissal was the final act in the series of acts as alleged that the Claimant claims amounts to discrimination based on her disability under any or all of the heads of discrimination claimed by the Claimant.