



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Daly

**Respondent:** County Durham & Darlington NHS Foundation Trust

**Heard at:** Newcastle Upon Tyne (sitting at North Shields)

**On:** 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> December 2020

**Before:** Employment Judge Sweeney  
P Wright  
D Winter

**Representation:** For the Claimant: Richard Owen, Society Matters CIC  
For the Respondent: Laura Gould, counsel

**JUDGMENT** having been given to the parties on 4<sup>th</sup> December 2020 and a written record of the Judgment having been sent on 15<sup>th</sup> December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## REASONS

### Procedural background

1. By a Claim Form presented on 22 May 2019, the Claimant brought a complaint of unfair dismissal. Following case management preliminary hearings on 30 July 2019 and 08 October 2019, she was given leave to amend her Claim Form to add a complaint of discrimination because of something arising in consequence of disability and harassment related to disability. The Respondent did not concede that the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 and at the preliminary hearing on 08 October 2019, the Tribunal directed that she submit an impact statement. The final hearing, which had been listed to be heard over two days on 25 and 26 November 2019 was postponed. It was then listed to be heard over four days beginning on 01 June 2019. However, due to the Covid-19 global pandemic was again postponed and the first morning of the hearing was converted to a preliminary hearing by telephone.

2. Employment Judge Garnon noted that the disability on which the Claimant relied was depression with stress and anxiety and that the issue of disability remained in dispute. Judge Garnon made some further directions and directed that the hearing be listed in person at the Teesside Justice Centre on the first available date. It was in due course moved to North Shields as a result of the Covid-19 pandemic.

### **The Hearing**

3. The Claimant and her husband John Daley both gave evidence. Mr Owen also submitted written statements from their children, Christopher and Samantha Daley. The Respondent called five witnesses as follows:

3.1.1. Angela Wood, Band 6 Occupational Therapist

3.1.2. Anya Bostock-Smith, Band 8 Professional Lead for Adult Occupational Therapy

3.1.3. Debra Spedding-Clark, Band 7 Team Lead Occupational Therapist

3.1.4. Ruth Campbell, Band 7 Team Lead Occupational Therapist

3.1.5. Jennie Winnard, former Head of Therapies

4. The parties had prepared a bundle of documents consisting of **x** pages (with some additions).

### **The issues**

5. An agreed list of issues had been prepared and sent to the Tribunal on 26 November 2020. They were as follows:

#### **Disability**

- 5.1.1. Was the Claimant disabled as defined by the Equality Act 2010, as at the dates of each alleged act of discrimination?

#### **Discrimination because of something arising in consequence of disability (section 15 EqA)**

- 5.1.2. Do any or all of the following acts amount to unfavourable treatment:

- a. Instigating the capability process in respect of the Claimant's poor performance;
- b. Following a capability process which provided for various stages, meetings and levels of warnings;
- c. Monitoring and/or closely watching the Claimant's work as part of the capability process;
- d. Requiring the Claimant to be accompanied during patient assessments and the taking of notes during those assessments, as part of the capability process;
- e. Providing feedback to the Claimant in respect of her work as part of the capability process;

- f. Requiring the Claimant to wear an Assistant Occupational Therapist's uniform during periods where she was working as an Assistant Occupational Therapist;
- g. Requiring the Claimant to work across different hospitals between June and August 2018; and/or
- h. Dismissing the Claimant

5.1.3. If yes, was this treatment done because of:

- a. The Claimant's poor performance and/or a perception of the Claimant's poor performance;
- b. Alleged bullying by Angela Wood, Ruth Campbell, Anya Bostock-Smith, Deborah Spedding Clarke or any other of the Respondent's employees? [*this was abandoned by Mr Owen in submissions*]

5.1.4. If so, did any or all of the 'somethings' at 5.1.3 (a) and (b) above arise in consequence of the Claimant's alleged disability?

5.1.5. If yes, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

#### **Harassment (section 26 EqA)**

5.1.6. Did Angela Wood engage in the following alleged conduct:

- a. Telling the Claimant that colleagues thought she was incompetent; [*this was abandoned by Mr Owen in submissions*]
- b. Refusing to tell the Claimant who those colleagues were; [*this was abandoned by Mr Owen in submissions*]
- c. Denying the Claimant help with her case load; [*this was abandoned by Mr Owen in submissions*]
- d. Insisting that the Claimant take on a student occupational therapist despite the Claimant telling her that she did not want to; and /or
- e. Along with others, sat around a computer checking the Claimant's work, scrutinising and criticising it and/or looking for fault.

5.1.7. Did any of the Respondent's employees engage in the following alleged conduct:

- a. Monitoring and/or closely watching the Claimant's work as part of the capability process;
- b. Questioning the Claimant's competency as part of the capability process;
- c. Taking notes during accompanied patient assessments as part of the capability process;

- d. Requiring the Claimant to wear an Assistant Occupational Therapist's uniform during period where she was working as an Assistant Occupational Therapist; and/or
- e. Sat around a computer checking the Claimant's work, scrutinising and criticising it and/or looking for fault.

5.1.8. Was the conduct related to disability?

5.1.9. Did the conduct complained of have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

5.1.10. If so, was it reasonable for the Claimant to have perceived the conduct complained of in the way she did so that it had that effect, given all the circumstances?

### **Time limits**

5.1.11. Were each of the following individual acts brought within the relevant time limits:

- a. Those described at paragraph 5.1.2 above;
- b. Those described at paragraph 5.1.6 above;
- c. Those described at paragraph 5.1.7 above;

5.1.12. If not, do any or all of these acts amount to an ongoing course of conduct and/or a continuing act?

5.1.13. If not, is it just and equitable to extend the time limit to consider all of the Claimant's claims?

### **Unfair dismissal**

5.1.14. Was the Claimant dismissed for a potentially fair reason?

5.1.15. Did the Respondent carry out a reasonable investigation into the Claimant's capability to carry out the work of a Band 5 Occupational Therapist?

5.1.16. Did the Respondent have a reasonable belief that the Claimant was not capable of carrying out the work of a Band 5 Occupational Therapist?

5.1.17. Was the Claimant's dismissal within the range of reasonable responses of a reasonable employer?

- 5.1.18. Was the procedure adopted by the Respondent fair and reasonable in all the circumstances?
- 5.1.19. If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event?
6. Mr Owen confirmed that there was no dispute as to whether the reason for dismissal in this case related to capability.

**Findings of fact**

7. The Claimant, Mrs Daley, was employed by the Respondent within its Occupational Therapy Service as a band 5 Occupational Therapist ('OT') from 14 January 2009 based at Darlington Memorial Hospital ('DMH'). She worked four days a week, with Wednesday being a non-work day.
8. The Occupational Therapy Service consisted of four teams over six hospitals: Richardson Community Hospital, Bishop Auckland Hospital, University Hospital of North Durham ("UHND") and Darlington Memorial Hospital ('DMH'), and two smaller hospitals: Weardale and Sedgefield Community Hospitals. Robert Goddard was, at the relevant time, Head of Adult Physiotherapy & Interim Head of Adult OT.
9. Angela Wood was a member of the team. Like the Claimant, Mrs Wood had been employed as a B5 OT. However, in about 2015, she was promoted to a B6 OT. From early 2016 to about September 2017 she assumed line management and supervisory responsibility for the OT team at DMH – and continued to supervise the Claimant until about January 2018. That was not ordinarily part of the role of a B6 OT. Rather it was the responsibility of a B7 OT Team Lead. However, in about February or March 2016 the B7 Team Lead retired and was not replaced for some time. Consequently there was no B7 on site to manage the OT Team. There was a B7 Team Lead at Bishop Auckland, Ms Bostock Smith. However, she was on maternity leave from February 2016 to April 2017 (during which time her role was covered by Jeannette Mason). Debra Spedding Clark (also a B7) was based at University Hospital North Durham. In the absence of a band 7 team lead it fell to Mrs Wood to take on supervisory responsibility, albeit she was not acting up into the B7 OT Team Lead role.
10. This responsibility, we find, placed an additional pressure on Mrs Wood bearing in mind she was not an experienced manager. It was not until September 2017 that the Respondent was able to recruit a B7 OT Lead (Ruth Campbell). The reason it took so long was funding or rather the lack of it. The service (indeed the NHS more broadly) was subject to cost improvement targets. In order to fund a B7 post the service managers had to 'skill mix' other posts after the departure of a B5 OT and an OTA. Only then was the department able to go

out to advert to recruit. We find that during this time, in the absence of any experienced management and leadership and with no disrespect to Mrs Wood's abilities, the staff were rudderless. Mrs Wood no doubt did her best. However, things, such as performance issues, that an experienced manager might have picked up on were not adequately addressed. The team lacked direction and motivation. When Mrs Wood, inexperienced in management as she was, tried to address them with Mrs Daley, she was unsuccessful. This, we find, was due to a combination of Mrs Wood's inexperience and Mrs Daley's perception that she was being talked about by colleagues in the team and reluctant to accept what she was being told by Mrs Wood. It is likely that there was poor communication within the team as between the OTs and OTAs and as between Mrs Wood and Mrs Daley in particular. However, we make it clear that we do not criticise Mrs Wood at all. We conclude that she did her very best in difficult circumstances. Nor, we would add, do we criticise Mrs Daley.

11. The relationship between Mrs Daley and Mrs Wood has featured largely in these proceedings. Before turning to the allegations, it is notable that each of them at different times and in different settings used the word 'friend' to describe their relationship. Mrs Wood said in oral evidence to the tribunal she considered her and Mrs Daley to be friends and that when raising work related issues with her it was not personal, it was about the work. Mrs Daley also said at her capability hearing (**page 395**) that she considered her and Mrs Wood to be friends. Also, notably, Mrs Campbell when she came to the team in September 2017 said that from her perspective it seemed that they were friends.
12. We are of no doubt that the friendly relationship was put under strain on those occasions when Mrs Wood, with good reason and with genuine concern, was compelled to raise concerns about Mrs Daley's practice directly with her. When Mrs Wood did raise her concerns with her, Mrs Daley reacted adversely in the sense that criticism of or challenge to her practice caused her distress.
13. As far as the relevant events of 2016 are concerned, they begin in May of that year. On 27 May 2016 Mrs Daley commenced a period of sickness absence from which she returned on 28 November 2016. The reason stated on each fit note was 'work related stress'.
14. What led to Mrs Daley's sickness absence was a complaint. On a Wednesday (which was a non-work day for Mrs Daley) It came to the attention of Mrs Wood that the wife of a patient on ward 51 (where the Claimant worked) had complained about Mrs Daley. Mrs Wood met with Mrs Daley on or about the Thursday to discuss the issue. It was shortly after this that Mrs Daley commenced her period of sick leave.
15. During her period of sick leave, she attended 4 counselling sessions with a therapist between 01 June and 31 October 2016. Mr Goddard managed her absence and return to work. He spoke with Mrs Daley on telephone on 11

August (**page 167**). She said that she felt there was a lack of support in the team with regard to the events leading to her absence. She said she felt anxious about returning to the team. Mr Goddard and Mrs Daley agreed that in advance of her return it would be helpful to meet with HR and staff side to highlight issues and look for solutions. Mr Goddard considered it would be helpful to arrange for a 'mediation' between Mrs Daley and Mrs Wood.

16. It was not entirely clear to us what issues were perceived to exist between Mrs Wood and Mrs Daley that required 'mediation', other than the issue which led to Mrs Daley's sickness absence. The occupational health report of 08 July 2016 [**page 159**] does not identify any issues between Mrs Daley and Mrs Wood. It suggested a phased return to work and a risk assessment. The occupational health Report of 20 October 2016 [**page 181**] identifies the complaint referred to above as the trigger for her absence and that she felt unsupported in 'its aftermath'. It also refers to some interpersonal issues within the team but nothing is directed at the supervisor Mrs Wood (save for the 'aftermath' of the complaint). The occupational health report of October 2016 described the Claimant's stress reaction coming on quite suddenly following the complaint by a relative of a patient. (**page 181**). She still had significant anxiety and low mood at the time of examination and could not see herself returning to the same team.
17. It is more likely than not, and we so infer, that Mr Goddard simply wished Mrs Daley to have reassurance prior to her return to work and gave the meeting the title 'mediation' (which is, generally, a positive step). Therefore, he arranged for Mrs Winnard to conduct this meeting. There was an issue between the parties as to whether a 'mediation' actually took place. We conclude that Mrs Daley was confused in thinking that there would be four sessions of mediation – in our experience it would be highly unusual to be so prescriptive in advance, especially where there appeared to be few issues between the individuals, and 4 mediation sessions is a lot. Mrs Daley was, we find, confusing this with the four sessions of counselling which she undertook. She had not been told there would be four mediation sessions. In any event, both Mrs Daley and Mrs Wood agree that there was a meeting on 08 November 2016. Whether it is right to give the meeting the name 'mediation' is not really to the point. The purpose of the meeting is more important and this was set out in Mr Goddard's email of 11 August 2016. More importantly, the meeting was successful. Mrs Daley returned to work on a phased return to ward 52.
18. As we will come to in a moment, Mrs Spedding-Clarke came on to the scene and made improvements which improved team working. However, we say at this juncture that we reject the claim that Mrs Wood bullied Mrs Daley during the period leading up to her absence in May 2016 (or thereafter). It may be (although on this we had little evidence other than our own observations of Mrs Wood) that Mrs Wood was not an effective communicator when it came to addressing matter of concern about the Claimant's practice but if it was

anything, it was no more than this. That is not to say that for one moment we think Mrs Daley has tried to mislead anyone. Far from it. Albeit she was inconsistent and at times confused in her evidence, she was candid and honest. She had, alas, come to regard the challenges to her practice, by someone a grade above her, whom she regarded as a friend, to be bullying behaviour.

19. We reject the allegation that Mrs Wood said to Mrs Daley 'you are incompetent'. It is more likely than not, and we so find, that Mrs Daley took what Mrs Wood was saying to her about her practices as an OT as an allegation that she was incompetent, bearing in mind references in professional terms and language to 'competencies' – much in the same way that she interpreted her colleagues' viewing a computer as them critically and unreasonably checking up on her work, whereas in fact they were simply responding to a situation that arose which required them to check the shared computer (we address this more fully later).
20. Mrs Daley did not give any evidence that could lead us to conclude that Mrs Wood had undermined her or behaved aggressively towards her or that she was unwarranted in what she did or said. In fact, the Claimant accepted in evidence that Mrs Wood genuinely believed there were issues with regards to her practice. Those issues did not, on the balance of probabilities, just arise spontaneously in May 2016 and Mrs Spedding-Clarke had heard from a distance that there were had been concerns about Mrs Daley's practice before this.
21. In about December 2016 Mr Goddard asked Debra Spedding-Clark and Jeanette Mason, both of whom were experienced B7 OT Leads to provide support to the DMH team. He did so because he was concerned that the entire team was not working in a cohesive and cooperative way. Given that the team was rudderless, this is unsurprising to us.
22. The two B7s visited DMH in December 2016 and spoke to each member of the team. Their assessment from these conversations was that everyone had their own frustrations, niggles and gripes about each of their colleagues. There were no allegations of bullying, however, and no one person was singled out as being a particular or specific source of concern. They concluded that the frustrations and niggles was due to the fact that they were a small team on a busy site, with no band 7 OT in place. Therefore, they felt the team would benefit from additional training and support, which was to be provided by Mrs Spedding-Clarke.
23. Mrs Spedding Clarke then visited the DMH team on a weekly basis. She engaged the staff in team building exercises, time together over lunch and set up training programmes among other things. She continued to visit until Ruth Campbell's appointment in September 2017. During that time, she saw an improvement in team working and collaborative working. We accept the



evidence of Mrs Spedding-Clarke, whom we found to be an impressive witness, and a manager with experience and insight. Had there been any allegation of bullying raised by anyone against Mrs Wood, we conclude that she would have addressed it.

24. During the period of time when Mrs Spedding-Clarke was visiting Darlington some specific issues were drawn to her attention regarding the Claimant's practice. – in particular, the discharge coordinator on ward 51 raised concerns via Mrs Bostock Smith. This challenge to Mrs Daley's practice did not come through Mrs Wood. Mrs Spedding-Clarke met with Mrs Daley on 21 April 2017 [page 197] to discuss these concerns. She acted with professionalism and respect towards Mrs Daley. She identified the issues with her performance and discussed them with her, giving her guidance where appropriate.
25. At that meeting, Mrs Daley referred to the hostile and undermining attitude of the discharge coordinator in ward 51 (who had raised a practice concern) towards her. Mrs Spedding-Clarke met again with Mrs Daley on 08 June 2017 to review her performance. She saw progress and did not proceed to formal capability proceedings at that stage because, of the issues raised, she saw sufficient improvement. Mrs Daley said that there was increased communication within the OT team and beyond; that she was less stressed now she was not covering ward 51 and not dealing with bullying behaviours. The reference to 'bullying behaviours' was not to Mrs Wood's supposed behaviour, but to the discharge co-ordinator who had raised the complaint. We find that, as was the case when Mrs Wood raised concerns, Mrs Daley had perceived a challenge to her practice by the discharge coordinator, and the stress that this caused her, as bullying behaviours by the coordinator.
26. From November 2016 right through to March 2018 it is notable that there is no reference to bullying (other than the discharge coordinator complaint in April 2017). In particular, Mrs Daley did not have had any sickness absence in 2017, or at least she had no significant sickness absence and there is no reference in any of the medical notes to any work-related stress in that year (although there were GP visits by Mrs Daley for other ailments). This is a tribute to the work which Mrs Spedding-Clarke had done in team-building and training within the Darlington OT team. Mrs Daley herself referred to the increased communication at the meeting on 08 June 2017.
27. In September 2017 Ruth Campbell commenced employment as a band 7 OT Team Lead. From that point in time, the OT team consisted of Ruth Campbell, Angela Wood, Mrs Daley, Lauren Goodchild (band 5 OT) and Gill Hayward (Band 3 OTA). Mrs Wood continued to supervise the Claimant until about January 2018 when this was taken over by Ms Campbell.
28. An OT has the freedom to choose their supervisor for purposes of supervision sessions. Mrs Wood asked Mrs Daley at her November 2016 appraisal (and in

supervision) whether Mrs Daley was comfortable with her continuing to supervise her and offered her the opportunity to change supervisor. Mrs Daley, however, did not choose to change. This reflects our finding that on the whole Mrs Daley was comfortable with Mrs Wood when not being challenged. Things between them were not that bad on a day-to-day basis.

29. In January 2018, a social worker contacted Mrs Wood regarding a patient. Wood believes that this patient was patient BD [BP 203]. Mrs Wood called Anya Bostock Smith and relayed the social worker's concerns. Ms Campbell was made aware of the social worker's concern, and also about some issues regarding a patient 'TC'. Ms Campbell and Mrs Daley met on 18 January 2018 at a supervision session. One of the matters discussed was the Claimant's responsibility as a student educator. Mrs Campbell also raised the matter of two patients, TC and 'BD'. She also mentioned concerns raised by the Ward Sister on ward 52. The Claimant, in turn, raised concerns that other team members were talking about her behind her back which she said made her feel nervous and stressed.
30. Mrs Campbell asked about Patient TC. Mrs Daley had seen and assessed Patient TC on his last admission but he had then been readmitted to hospital within days of his discharge due to a urinary tract infection. On his admission, the records showed that Mrs Daley had planned to carry out a follow up visit but had not done so. When Mrs Campbell asked how this had happened Mrs Daley said that she had forgotten. Mrs Daley had assessed BD in relation to his discharge from hospital and identified that he would require the provision of a perching stool for use in his upstairs bathroom. When the Social Worker considered the situation, she was concerned that BD had not been assessed on the stairs by a Physiotherapist prior to Mrs Daley's recommendation. It transpired that BD required downstairs living and the provision of a commode. The concerns raised by the Ward Sister on ward 52 was that Mrs Daley had documented an OT entry within the wrong patient notes. Mrs Daley explained that the wrong patient notes had been placed on the bed.
31. At a supervision session on 23 January 2018 Ms Campbell raised the issue of a patient 'EW' and patient 'HB'. Ms Campbell mentioned that she anticipated capability procedures may have to be implemented. At this point Mrs Daley became very upset remarking that it was 'just like last time'. Ms Campbell agreed that another OT would take over as the student's clinical educator.
32. We reject the suggestion that the student was forced upon Mrs Daley and we reject the suggestion that Mrs Daley initially said that she did not want to take on the student because of her mental health. Mrs Daley agreed to take on the student and in the end had responsibility for her for a period of 4 days before being relinquished of the responsibility. At the meeting on 23 January 2018, Mrs Daley agreed the documentation was not up to the required standards and that she was aware of the standards required.

33. One particular thing that Mrs Daley complains about is that on a date which she was unable to recall, she entered the open plan office where the team worked, and saw Mrs Wood, Lauren Goodchild, Gillian Heywood and a student 'sat around the computer checking her work, criticising and looking for fault'. This is the allegation in paragraph 6 e of the list of issues. As no date or other context was given by Mrs Daley, it was difficult for the Respondent to address this. However, Ms Campbell, doing the best she could, believed that it relates to the issue with regards patient, TC, and which was discussed with Mrs Daley at the supervision meeting on 18 January 2018.
34. Ms Campbell's belief that it was with regards to this patient was not challenged. We find on the balance of probabilities that she is right. Mrs Daley did see what her colleagues were looking for or at on the computer. It was a shared computer to which they all had equal access. As Mrs Daley said in evidence, she did not stop to ask them what they were looking at. She made an assumption.
35. We accept the evidence of Ms Campbell and find that an issue had arisen spontaneously regarding a particular patient who had been re-admitted to hospital. One of the OT team, Lauren Goodchild, recognised the patient's name, recalling that someone in the team (although she could recall who) had seen this patient. Ms Goodchild had remembered the name patient's name. Some of a patient's notes are stored on a system called 'windip' which can be accessed on the computer. Ms Goodchild then reviewed the documentation that had been scanned on to the windip system. It was only then that it came to light that there had been a plan from Mrs Daley's assessment to carry out a follow up visit to the patient, but that no documentation had been prepared in relation to that visit. Mrs Campbell quite properly discussed this with Mrs Daley in supervision on 18 January; 2018. Mrs Daley's explanation was that it had been a busy time around Christmas, that there were additional pressures and that she probably forgot. Ms Campbell discussed in a constructive way with Mrs Daley tools which she could use to help her planning.
36. We find that Mrs Daley perceived and assumed that her colleagues were looking at the computer in order to check up on her and find fault. However, there was no reasonable basis for that belief. It was a spontaneous and entirely proper and normal for them to check the system to find relevant information about a patient who had been re-admitted to hospital. The fact that upon checking, it revealed a failing in Mrs Daley's practice is no evidence that they checked in order to find something to criticise her. There was no reason suggestion as to why any of them might do this. We are confident in any event that this was not the intent. We would expect them to check the records in the circumstances.
37. There was a further supervision session on 30 January 2018. The Claimant said she was stressed. Mrs Campbell had previously discussed the use of a

case load management sheet to help her planning and organisation, However, she concluded that Mrs Daley was not using it. She gave Mrs Daley a self-audit tool to help an OT review their own documentation but it later transpired Mrs Daley was not using this either.

38. It was agreed that weekly supervision would continue with Mrs Campbell. At a further supervision session on 02 February 2018 Mrs Campbell spent some time going through all of Mrs Daley's patients with her. We find that Mrs Campbell gave her a lot of support. We should say that we also found Ms Campbell to be an impressive witness. Like Mrs Spedding-Clarke she had and displayed insight and empathy. She was professional and diligent and we conclude genuinely sought to provide guidance and support to Mrs Daley. However, Ms Campbell came to recognise that formal capability proceedings were, regrettably, necessary.
39. The first Formal meeting under capability procedure took place on 08 February 2018. Mrs Daley was accompanied by her trade union representative, Kim Noble. Mrs Campbell suggested an occupational health referral: see letter of 22 February 2018 (**page 229**).
40. Mrs Daley was on annual leave for a week around 19 February 2018. In her absence a number of practice issues came to light. Mrs Campbell mentioned them in supervision session on 26 February 2018 (**page 231**). Subsequently an audit of the Claimant's cases was undertaken.
41. A stress risk assessment was undertaken on 26 February 2018: **page 236**. It is comprehensive. Mrs Campbell was leading effectively on this. In the first box, it refers to a concern raised by a social worker regarding the Claimant's practice. This was drawn to Mrs Wood's attention who then drew it to Anya Bostock-Smith's attention. It is the act of Mrs Wood that the Claimant was complaining of here – i.e. in not discussing it with her before referring it on to Bostock-Smith. However, the practice concern was a real and genuine one and given Ms Campbell was now the Lead in the team, it was not unreasonable for Mrs Wood simply to refer this on. We find that she referred it to Ms Campbell as she was the right person to address it.
42. Angela Wood transferred to SCH (Sedgefield) on 28 February 2018 and had no further contact with the Claimant after this. We accept that Mrs Daley was genuinely concerned about Mrs Wood returning to DMH although we have to say that looked at objectively her concerns about Mrs Wood were not reasonable.
43. On 07 March 2018 the wife of one of the Claimant's patients telephoned the ward regarding provision of a commode for her husband who was to be discharged that day. When the notes were checked there was no mention of a commode. Ms Campbell spoke to Mrs Daley on 08 March 2018. These were

significant issues which required Ms Campbell to visit the patient's home. On this day Mrs Daley visited her GP and was prescribed medication. That she did so is in keeping with our overall findings that she reacted to life events by becoming stressed.

44. On 12 March 2018 Ms Campbell prepared a risk assessment of the Claimant's practice: **page 251-256**. It is clear from this that there were significant areas of concern with regards to her practice which the Respondent and the Claimant both needed to address. The Claimant had periods of sickness absence from 8 March 2018 to 19 April 2018 and from 18 October 2018. An occupational health report of 12 March 2018 said that she was not fit to return to work.
45. On 13 March 2018 there was a stage 1 capability meeting. The Claimant agreed to attend. Ms Campbell explained that they would move to stage 1 of the procedure when she returned to work. Mrs Daley returned to work on 30 March 2018 on a phased return with no clinical responsibilities. At a formal capability meeting on 29 May 2018 she was given first notification of unsatisfactory performance which Mrs Daley did not appeal. On 07 June 2018 Ms Campbell explained to the Claimant that she was going on leave and that the period of review may have to be extended. On 08 June 2018 she provided further guidance and support to Mrs Daley. During this time, Ms Campbell was assessing Mrs Daley's performance with professionalism and respect. On 12 June 2018 formal capability meeting at which the review period was extended.
46. As there was a problem securing a B7 to supervise the Claimant during Ms Campbell's leave, she asked her to work with the Bishop Auckland OT team as an Occupational Therapy Assistant ('OTA'). However, as it happened Mrs Claire Regan, a B7 supervisor was able to offer supervision at the Richardson Hospital in Barnard Castle. Therefore, Mrs Daley worked as a B5 OT under Ms Regan's supervision on 21, 25, 26 and 28 June 2018. Mrs Daley had the benefit of shadowing and observing other OTs and B7s in practice (not just while at Barnard Castle but when under the supervision of Ms Campbell). Ms Regan prepared a report: **page 310**. With some insight Ms Regan concluded that there were quite obvious issues with Mrs Daley's competency but also that in going through the capability process, Mrs Daley's confidence was knocked to a level where she was fearful of making an error that she could not make a decision.
47. Other than when working at the Richardson on those 4 days, Mrs Daley worked at Bishop Auckland Hospital as an OTA. In this role she was required to wear a blue uniform. Due to a combination of the levels of clinical work and lack of resource, Ms Campbell was not able to continue the capability assessment of Mrs Daley for some time. Therefore, she continued to work at Bishop Auckland as an OTA until August 2018.
48. We have no doubt this had a demoralising impact on Mrs Daley. We have equally no doubt that it was a 'necessary evil'. Mrs Daley herself accepted that

the Respondent was right to require her practice to be supervised and acknowledged that there were only so many B7s to go around. The alternative was for her not to be at work at all. Although the wearing of the blue uniform had a demoralising and embarrassing effect for Mrs Daley, there was a rational explanation for requiring her to wear it. This was discussed in advance with her and she accepted in evidence that she could understand the Respondent's position. The Respondent was trying to protect her from having to explain why she was not able to do OT tasks and to save her embarrassment in that respect. They had given it thought in advance and acted for good reason and with proper cause.

49. On 03 August 2018 Ms Campbell met with Mrs Daley and explained that the capability process would resume on 20 August 2018, and who would supervise her assessments and she agreed a reduced case load. On 20 and 24 August 2018 Mrs Spedding-Clarke supervised Mrs Daley's patient assessments. She made notes of her observations in August 2018 (**page 336-337**)
50. On 6 September 2018 the Claimant attended a capability meeting at which she was issued with a warning and told that the matter was progressing to stage 2 of the procedure. She did not appeal that warning (**p343-344**). At that meeting the Claimant's trade union representative asked if her workload could be further reduced. She asked if the Claimant could work at the Richardson. However, this was not feasible – for reasons which were given to Mrs Daley and which we accept. Mrs Daley was already working at this stage with a much reduced case load in a ward which she liked with elderly patients and where the staff she felt were friendly. Ms Campbell considered these were good conditions in which Mrs Daley would be able to demonstrate her competencies. We agree.
51. Supervision sessions with Mrs Campbell continued between 05 and 16 October 2018. Mrs Daley commenced a further period of sick leave on 18 October 2018. She attended the capability meeting on 30 October 2018 while on sick leave. She said she was able to and that she wanted to. It was explained to Mrs Daley that the process would now move to stage 3, which was to be a capability hearing.
52. The Claimant was seen by occupational health again on 20 November 2018. The report is at **pages 378 – 379**. In the second paragraph of that report, the occupational health physician refers to Mrs Daley finding scrutiny of her work to be very stressful – we find that to be a reference to the capability process. This caused disruptive sleep from about August 2018. A referral of the Claimant to HCPC was also cited as a stressor. Other than sleep not being normalised the Claimant reported being relatively well at home (when away from work). She did not see herself coming back to work in her previous role but would consider an OTA or administrative role. It was in this month that Mrs Daley applied for alternative employment with the Student Loans Company, which was indicative of the fact that she was capable of thinking ahead about her

future, and that she recognised that she could see where the capability process might end given her failures to improve.

53. By this time, Angela Wood had been at Sedgefield for about 9 months as her role had become permanent. What had been causing stress to Mrs Daley during this period was the worry of going through a capability process. Whilst on sickness absence there was a final capability meeting/hearing on 11 December 2018 (**pages 392-397**) and then again on 13 December. It was chaired by Mrs Winnard. The management case was presented by Ms Campbell (**pages 384-391**). Anya Bostock Smith was present as a professional adviser. Joanne Benzies was present as HR adviser. In the period between 11 and 13 December 2018 Mrs Winnard spoke to HR with regards to the potential for alternative employment. However, there was none available to be offered to Mrs Daley.
54. Mrs Winnard was, we find, very professional and straightforward. She concluded that Mrs Daley was failing to meet the standards required of an OT. Ms Campbell had very fairly and very thoroughly investigated and prepared a comprehensive case management case. The documentation clearly reveals significant issues of concern regarding Mrs Daley's practice. The documentation reveals the guidance and support she had been given and the period of time she had in which to demonstrate improvement. The conditions in which she was asked to demonstrate sufficient improvement were optimal. Mrs Winnard also recognised that the capability process was causing Mrs Daley stress and anxiety. As with the other managers we heard from, we found Mrs Winnard to be an impressive witness in the consideration she gave to the issues and her understanding of the effect of the process on the Claimant.
55. Mrs Daley's employment was (**page 398**). The dismissal letter is dated 19 December (**pages 399-402**). Mrs Daley did not appeal.

### **Relevant law**

#### **Disability**

56. Section 6(1) EqA 2010 provides that "*a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities*".
57. An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:
- 57.1.1. Measures are being taken to treat it or correct it; and
  - 57.1.2. But for the measures, the impairment would be likely to have that

effect.

58. The term "substantial" is defined by Section 212(1) EQA as meaning " more than minor or trivial ". It sets a fairly low threshold for a Claimant who bears the burden of proving that she is a disabled person for the purposes of the EQA (see **Kapadia v London Borough of Lambeth** [2000] IRLR 699 CA). The "likelihood" of a substantial adverse effect lasting for 12 months must be assessed at the date of the act of discrimination.
59. What a tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon her ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains she cannot do as a result of her physical or mental impairment. Once she has established that there is an effect, that it is adverse, that it is an effect upon her ability to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial, (i.e. more than minor or trivial). Unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial: **Adremi v London and South Eastern Railway Ltd** [2013] ICR 5912.
60. Guidance in the determination of the question of disability is then provided at schedule 1 of the EQA and in the Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Guidance").
61. Section B1 of the Guidance states, "*the requirement than an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people*".
62. In cases where there might be a dispute about the existence of an impairment, where identifying the nature of the impairment involved difficult medical questions, it would make sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities was adversely affected on a long-term basis, and to consider the question of impairment in the light of those findings. If it found that the claimant's ability had been adversely affected, in most cases it would follow that the claimant was suffering from an impairment. If that inference could be drawn, it would be unnecessary for the tribunal to try to resolve the difficult medical issues: **J v DLA Piper** [2010] I.C.R. 1052.

**Section 15 Equality Act 2010: discrimination because of something arising in consequence of disability**

63. Section 15 provides:



- (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.

64. The focus of section 15 is in making allowances for a person's disability: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. An employer cannot discriminate against a disabled person contrary to section 15 if, at the time of the unfavourable treatment, it did not know that the Claimant had a disability and could not reasonably have been expected to know that.

65. It is for a Respondent to show that it did not know, and could not reasonably have been expected to know, of the employee's disability. If a tribunal were to find that an employer did not have actual knowledge, it must consider whether it had constructive knowledge. That involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that she had a disability, namely that she was suffering from a mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. It is not enough to ask only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know: **A Ltd v Z** [2020] I.C.R. 199.

66. For a claim under section 15 to succeed, there must be 'something' that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. Paragraph 5.9 of the EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'.

67. In **Pnaisner v NHS England and anor** [2016] IRLR 170, the EAT summarised the proper approach to section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of the claimant's disability', this could describe a range of causal links. This stage

of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

68. There is no requirement that the employer be aware of the link between the disability and the 'something' when subjecting the employee to the unfavourable treatment complained of: **City of York Council v Grossett** [2018] I.C.R. 1492.
69. An employer will avoid liability under section 15 if it shows that the unfavourable treatment was a proportionate means of achieving a legitimate aim. In the EHRC Employment Code, paragraph 4.30 states that the means of achieving a legitimate aim must be proportionate. In deciding whether the means used to achieve the aim are proportionate the Tribunal is required to carry out a balancing exercise. To be proportionate a measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary: **Homer v Chief Constable of West Yorkshire** [2012] I.C.R. 704, SC, per Baroness Hale @ paras 24-25. Proportionality requires a balancing exercise between the impact on the employee and that of the employer: **Hardy & Hansons plc v Lax** [2005] ICR CA.

#### **Harassment related to disability: section 26**

70. Section 26 Equality Act 2010 sets out what is meant by harassment which, by virtue of section 40(1)(a) is made unlawful in the case of employees. Common to all forms of statutory harassment is that a person, 'A', must have engaged in unwanted conduct. Furthermore, A's conduct must have the purpose or the effect of violating the complainant, B's, dignity or of creating the proscribed environment referred to in section 26(1)(b)(ii).
71. It is helpful to consider cases involving harassment allegations by looking at the separate components of section 26, referring to the complainant as 'B' and the alleged harasser as 'A'; and ask:
- 71.1.1. If the Tribunal finds that A conducted him/herself as alleged, was the conduct unwanted conduct?
- 71.1.2. Did the conduct have the proscribed purpose or effect?
- 71.1.3. Did the conduct relate to disability?
72. Sometimes, it may be necessary to consider points 1 and 2 together because the question whether conduct had the proscribed effect may be best looked at when considering whether it was unwanted and vice versa.
73. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment,

paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. It does not follow that because A's conduct has been going on for some time without any apparent objection from B that B condones it or accepts it. The Tribunal must be alive to the very real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object (expressly or impliedly) to what they now say in the course of litigation was objectionable and unwanted conduct. Equally however, B is not required to expressly approve of A's conduct before a Tribunal may find that A's conduct was not unwanted. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted and in the vast majority of cases there is nothing to be gained by considering whether B objected to the conduct.

74. The unwanted conduct must be related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry. Conduct can cover verbal or non-verbal conduct including.
75. Conduct will be covered regardless of the reason for it, provided it has some connection with a protected characteristic. the words 'related to' in S.26(1)(a) have a broad meaning and conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — **Hartley v Foreign and Commonwealth Office Services** [2016] ICR D17, EAT.
76. However, the mere fact that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person will not necessarily mean that it is related to the disability.
77. Section 26 requires the Tribunal, when considering the 'effect' of the conduct to consider:
  - 1.1. The claimant's perception,
  - 1.2. The other circumstances of the caseand to ask whether it is, in light of those things, reasonable for the conduct to have that effect.
78. Therefore, the analysis has both subjective and objective features. Subjectively, (i.e. in the Claimant's perception) did the conduct have the proscribed effect on her? The Tribunal must recognise that different people have different tolerance levels: **Richmond Pharmacology v Dhaliwal** [2009] I.C.R. 724; **Pemberton v Inwood** [2008] I.C.R. 1291.
79. As regards 'the other circumstances of the case', these will clearly vary from case to case. However, the ECHR Code of Practice on Employment, paragraph 7.18 suggests that they may include the personal circumstances of the worker

experiencing such as health, mental health, mental capacity, cultural norms or previous experience of harassment and the environment in which the conduct takes place. See also: **Heafield v Times Newspapers Ltd** (EAT/1305/12).

80. The objective feature is found in section 26(4)(c). In the ECHR Code, paragraph 7.18 it states that, for example, the tribunal is unlikely to find unwanted conduct to have the proscribed effect of offending the worker if it considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

### **Burden of proof**

81. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.

82. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

### **Unfair dismissal**

83. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

84. A reason for dismissal '*is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*': **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

## Capability

85. A reason which relates to the capability of an employee for performing the work she was employed to do is a potentially fair reason for dismissal (section 98(2)(a)). 'capability' is defined in section 98(3)(a) as capability assessed by skill, aptitude, health or any other physical or mental quality.
86. The employer does not have to show that the claimant was incapable of performing every activity that she might be called upon to do — the reason for dismissal had to 'relate' to an employee's capability. Where an employer seeks to rely on incapability or lack of qualifications as the ground for dismissal, the onus is on it to show that this was the actual reason or principal reason for dismissal. But this should not be mistaken as meaning that an employer must objectively establish that a dismissed employee lacked capability. As Lord Denning MR put it in **Alidair Ltd v Taylor** 1978 ICR 445, CA: '*Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.*'

## Reasonableness – section 98(4)

87. If the employer establishes the reason, the next step is to consider section 98(4) of the Act. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. While an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions – they feed into the single question under section 98(4).
88. Part of a fair dismissal procedure will entail providing an opportunity to improve. In the absence of specific timescales set out in a formal capability procedure, the quality and length of the employee's past service, as well as the extent of the underperformance, may be relevant factors in assessing the overall fairness of any subsequent decision to dismiss.
89. From the case of **Alidair**, the test of a fair capability dismissal (aside from procedure) can be said to raise two key questions for a tribunal:
- Did the employer honestly believe the employee to be incompetent or unsuitable for the job?
  - Are the grounds for that belief reasonable?
90. What the tribunal has to decide is whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. In the absence of clear evidence of

poor performance, an employer is likely to struggle to demonstrate that it has a sufficient reason for dismissing on the ground of capability.

91. Against this background, tribunals must proceed on the basis that it is for the employer to set the standards asked of employees; tribunals cannot substitute their own view of an employee's competence for that of the employer. An employer should expect to produce evidence of poor performance and show that this was its real reason for dismissing the employee.

### **Submissions**

92. For the Respondent, Ms Gould submitted that the evidence presented by the Claimant was insufficient to satisfy the Tribunal that she qualified as a disabled person, even in light of the relatively low level of the threshold. Ms Gould submitted that stress itself is not a mental impairment, but a feature of life, although she accepted it could develop into one. She submitted that there was no evidence that any problems of forgetfulness at work were in consequence of any mental health impairment. The evidence supported an analysis of the Claimant reacting adversely to events, in particular, challenges to her competence, which the Claimant took to heart and reacted by becoming stressed and anxious. On no analysis could the effects be regarded as substantial adverse effects (on the evidence presented) and in any event there was no evidence from which a tribunal could conclude they the effects were long-term or that they were likely to last at least 12 months. Further she submitted that the Respondent did not know nor could it reasonably be expected to have known that Mrs Daley was a disabled person. It had spoken to her about her health, about her performance and had obtained occupational health updates. Nothing that it saw would reasonably lead it to conclude that the constituent elements of the definition of disability were satisfied. Ms Gould maintained that the Respondent was right not to concede disability on the facts of the case.
93. Ms Gould submitted that the Claimant has ruminated on matters looking back but in reality this is not a case of bullying or harassment but one of management of an employee with issues relating to her competence. Some of the things complained of did not happen or did not happen in the way described by the Claimant, submitted Ms Gould. The things that the Claimant complains of as harassment, were simply part and parcel of reasonable management and supervision. Even if she perceived that the effect of her treatment was as set out within section 26 Equality Act, it was unreasonable to regard the treatment of the Claimant as having that effect.
94. She submitted that she was not treated unfavourably by being subjected to capability proceedings (as they were designed to facilitate improvement) but accepted that dismissal is unfavourable treatment for the purposes of section 15 Equality Act. However, Ms Gould submitted that the 'something' (inability to perform to the required standards) did not arise in consequence of the Claimant's disability (should we conclude she was disabled). In any event, Ms Gould

submitted, the decision to initiate capability proceedings and to dismiss the Claimant were justified in that they were a proportionate means of achieving a legitimate aim.

95. For the Claimant, Mr Owen submitted that the Claimant was a disabled person within the Act from May 2016 and that the Respondent ought reasonably to have appreciated this. He relied on the Claimant's impact statement and the evidence of Mrs Daley's family members. He also relied on the occupational health reports and fit notes. As for the issue of 'knowledge' actual or constructive, he relied heavily on a submission that the mistakes which the Claimant was making at work were so basic and fundamental that it must have been obvious that they were caused by a mental impairment. He submitted that the Respondent should be fixed with knowledge from, at least, Spring 2017.
96. As far as concerns the list of issues, Mr Owen confirmed that he was abandoning issue 5.1.3b and issue 5.1.6 a, b and c.
97. As regards the section 15 complaint, Mr Owen submitted that the capability process was unfavourable treatment and that the Respondent did not really try to understand what was causing the poor performance (it being accepted that Mrs Daley was performing poorly). He said an alternative to capability was to extend the close supervision process. She could have been offered an alternative role or be placed in a location where she was comfortable.
98. Mr Owen submitted that the decision to terminate the Claimant's employment was, in the circumstances, disproportionate.
99. As regards the complaint of harassment, Mr Owen invited the tribunal to conclude that the matters set out in issues 5.1.6 d and e above happened as the Claimant suggested. He recognised that there may be some difficulty in establishing a connection between the conduct and disability but submitted that they were linked to her poor performance which flowed from her mental health. He submitted that it was reasonable to conclude that these matters would have the proscribed effect in section 26 of the Act.
100. As regards unfair dismissal, Mr Owen submitted that the decision to dismiss was outside a band of reasonable responses. He said that there was only one procedural point to be taken which was that the dismissal hearing took place at a time when the Claimant was signed as unfit for work.

## **Discussion and conclusion**

### **Disability**

101. Mrs Daley has failed to satisfy us on the evidence adduced that she met the definition of a disabled person within section 6 EqA. We have given very careful consideration to all the evidence, acknowledging that it is a low threshold.

Nevertheless, there must be a sufficient evidential basis, the burden of proof being on the Claimant (applying as we must the law in Kapadia).

102. We looked at the period from May 2016 to December 2018 in segments: 2016, 2017 and 2018 and then stepped back to look at the period as a whole. We have also considered the evidence of Mr Daley and the written statements of Lawrence and Samantha as well as Mrs Daley's impact statement. If they had provided us with some more evidence of the actual impact on Mrs Daley's ability to carry out normal day to day activities then she might very well have satisfied the burden of establishing that she had a disability (as opposed to suffering stress reactions to discrete events). It is not for the tribunal to make assumptions as to the effects on a person's ability. The burden lies on the Claimant to adduce sufficient evidence.

### **The period up to November 2016**

103. The Claimant was absent from work from May to November 2016. During that period, there was insufficient evidence as to the Claimant's ability to carry out day-to-day activities. We accept that May to November 2016 is a significant period of time to be absent from work for work related stress and we considered this. However, it must be looked at in context. There was no suggestion that Mrs Daley was suffering from stress prior to May 2016. On the contrary, she positively says she was fine.

104. Notably, there had been no challenge to her practice as an OT before then. What kept her away from work in that period was a perception that she had been unsupported by colleagues after the complaint by the wife of the patient in ward 51 and that she would return to an unsupported environment. There is little evidence, if any, as to the effects of her stress on her ability to carry out day to day activities in that period. The evidence of her family puts no dates on the things which they describe, nor does the impact statement. We recognise that the things that a person does at work may very much be part of their day to day activities. However, Mrs Daley was able to work until May 2016. She then went off suddenly and when she returned she was able to do her work. There is little, if any, evidence in respect to the difficulty she has in performing normal day to day activities when not at work or any activities while at work. We took on board that she made errors at work. However, that was insufficient, in our judgement, to enable us to conclude that that she had a mental impairment which had a substantial adverse effect (in the sense described above in the relevant law section) on her ability to carry out normal day to day activities.

105. As at November 2016 we conclude that Mrs Daley was not disabled. She had not by then experienced substantial adverse effects which had lasted at least 12 months, nor could it be said that any adverse effects were, at that time, likely to last at least 12 months.

### **November 2016 – March 2018**



106. We looked at this period in two parts, the first part was up to the end of 2017. During this period, no adverse effects we can see on day to day activities are described at all. Mrs Daley was back at work – and while there were some issues with her work in April 2017 (those addressed by Mrs Spedding-Clarke) which caused her some stress that is it. We have considered the medical records but there is nothing in the GP notes regarding work related stress in 2017 and nothing at all from the Claimant about her health in this period.
107. We conclude that as of December 2017 Mrs Daley was not a disabled person.
108. We then looked at the position in the period January to March 2018. There was no evidence of any adverse effects on the Claimant in this period. The first reference to stress in 2018 is on 08 March 2018 when Mrs Daley visited her GP and commenced a further period of sick leave. She was prescribed fluoxetine, which she subsequently received on a repeat prescription. By this stage the other complaints had come to light. In light of our finding of facts, we are satisfied that Mrs Daley's stress was a reaction, once again, to proper and reasonable challenges to her practice.
109. The occupational health report of March 2018 on page **248-249** essentially says that 'if this issue which is causing her stress (i.e. the complaint) is not there she will be able to work'. We noted that it is only work that it was the issue and even then, we have found that it was the worry of being challenged about her work. Outside of work, Mrs Daley was relatively fine. This is something that Mrs Daley made clear to the occupational health physician on a subsequent assessment.
110. There was insufficient material to enable us to conclude in this period that Mrs Daley was a disabled person within the meaning of the Act.

### **The period March 2018 to December 2018**

111. We then looked at the period up to the termination of Mrs Daley's employment. Again, we conclude that there was insufficient evidence to enable us to conclude that in this period Mrs Daley had a mental impairment which had a long-term substantial adverse effect on her ability to carry out normal day to day activities. We looked carefully at the other reports on **page 261** (April 2018) and **page 378** (November 2018). What was causing stress by then was the capability process. This can be seen from **page 379** that when not at work, Mrs Daley was relatively well. She attributed her symptoms exclusively to work circumstances.
112. We looked at matters in the round. There is some reference in the Claimant's impact statement to difficulties with memory recall. However, no examples were given. Nothing was said in oral evidence either. There is no supportive medical evidence other than the GP notes which refer to Mrs Daley being under stress while at work. The occupational health reports refer to Mrs Daley's stress at work but that when at home she is relatively fine. Her husband's statement says little

about the effects on her ability to carry out day to day activities and those effects which he does refer in his statement are, in our judgement, minor effects.

113. Much as was the case back in 2016, when Mrs Daley's practice was challenged she reacted adversely (in the sense of having a stress reaction). These are, we conclude, reactions to events – and to discrete events at that. Even if there were adverse effects in this period March to December 2018 (and there was very little evidence of them other than that given by Mr Daley and their children) the effects were not long term (in that they had not lasted 12 months) nor were they likely to last 12 months (in the sense that this could well happen) because the evidence was that they were wholly by now related to the capability process which at that point was highly unlikely to last 12 months.
114. The evidence, and our conclusion from our findings above, is that absent the capability process Mrs Daley was relatively fine. We are satisfied that the work related stress was not due to overwork or bullying or anything of that sort: it was brought on by a reaction to proper and reasonable challenges to Mrs Daley's practice. It was for Mrs Daley something, sadly, which she was unable to bear. Ms Regan's comment at the bottom of **page 310** was insightful. Unlike her, we have had the benefit of seeing a whole swathe of evidence over the whole of the period. In our judgement, Ms Regan got it right – because of the scrutiny she was now under (we add, reasonable and proper scrutiny) Mrs Daley was so fearful of making an error that it was affecting her decision-making. Any prolonging of the capability process would prolong her stress.
115. As the Claimant was not a disabled person that means her claims of disability discrimination are to be dismissed.
116. Although we are confident of our conclusion, we went on to consider the position in the event that we might be wrong about the Claimant qualifying as a disabled person. Assuming for present purposes that Mrs Daley was disabled within the Act, we would also conclude that the Respondent did not know nor could it reasonably have known that she was a disabled person. Mr Owen did his best by posing the question that the errors she was making at work were so fundamental that they obviously raised mental health issues. Respectfully, we do not agree. That is a possibility. But the Respondent's managers asked Mrs Daley for an explanation for the errors and, while she referred to stress and the treatment she perceived she received at the hands of Mrs Wood, this is a far cry from it being an 'obvious case'. We would have expected to see some medical evidence of this but there was none. There is no diagnosis of depression that we have seen, and whilst not a necessity by any means, it can, we agree with Ms Gould, be informative. All that the Respondent had (through Mrs Daley and OH) was that the events of being challenged caused her stress. When someone is stressed they can, we accept, and may well make mistakes at work.

117. It is not enough to say that the Respondent was aware that the Claimant was suffering from stress. What could it reasonably have known, we asked? The Respondent managers were aware that Mrs Daley had been absent from work for six months with stress in 2016; that the stressors (as reported by her) had gone (Mrs Wood). They were aware that the issue appeared to be entirely work related in that it related to complaints about her practice. The Respondent managers were also aware that the capability process was causing her stress and that Mrs Daley was forgetting to do certain tasks. The forgetfulness is equally consistent with disorganisation and a short-term stress reaction.

118. The capability process was the immediate stressor (AW being off the scene). When the occupational health report of November 2018 was prepared Mrs Wood had been absent from the scene for some 9 months and was not returning. The capability procedure was not going to take 12 months. It is for Respondent to show it did not know and could not reasonably have known that the constituent elements of the definition of disability were satisfied: substantial effect on ability to carry out normal day to day activities and that those effects had lasted 12 months or were likely to last 12 months. The Respondent has satisfied us that it did not know and could not reasonably have known from the information it had gathered from its inquiries of the Claimant and from the medical updates it obtained that the Claimant was disabled (within the meaning of section 6 EqA) at any point up to and including the date of dismissal.

### **Harassment**

119. We considered the allegations of harassment, should we be wrong about our conclusion on disability. Although paragraphs 6 a, b and c were abandoned, we say for completeness that Mrs Wood did not tell Mrs Daley that colleagues thought she was incompetent. She did refuse, on one occasion, to identify a colleague who had come to her in confidence. However, this was solely because of the requirement for confidentiality and to avoid Mrs Daley confronting that colleague. We also reject the suggestion that Mrs Wood denied her help with her caseload. We have not set these out as findings above because they were abandoned. However, we set them out here for the sake of completeness.

120. In any event, none of this 'conduct' (even as described by the Claimant) related to disability (if Mrs Daley was disabled). As recognised by Mr Owen it preceded the date from which she maintains she became disabled. The conduct was entirely unrelated (even in the broad sense of the word 'related') to her health.

121. As to paragraph 6 d, we conclude that Mrs Wood did not insist that Mrs Daley take on the student. In any event this in no way related to disability. Mrs Daley did not tell Mrs Wood that she did not want to take on a student because of her mental health.

122. As for paragraph 7 a, b, c, d it is right that these things happened. However, they in no way related to disability or to Mrs Daley's health in the widest possible

sense. They were unconnected with her health. They may have caused her some stress but the 'conduct' was not related to her health. As for paragraph 6e/7 e, this did not happen as described and was not related to disability.

123. We have concluded that none of these things was done for the purpose of violating Mrs Daley's dignity or creating the proscribed environment. While we accept that Mrs Daley genuinely perceived the conduct referred to in 7 a, b, c, d and e as creating a degrading or humiliating environment for her, we have, nevertheless, concluded that it was not reasonable for it to have that effect. Standing back and looking at matters objectively, the circumstances of the case were that the Respondent had genuine concerns (as Mrs Daley accepted) about her practice. It had a duty to ensure that OTs practised safely. From our assessment of the evidence and considering our findings of fact, the process was carried out from start to finish with professionalism and respect for Mrs Daley.

### **Discrimination because of something arising in consequence of disability**

124. We then considered the section 15 discrimination complaint in light of our findings of fact and should we be wrong in our conclusions on disability.

125. We conclude that paragraphs 2 a – e of the list of issues were all parts of the capability process. We disagreed with Ms Gould as to whether subjecting an employee to a capability process was unfavourable treatment. Putting an employee through a capability procedure is unfavourable treatment in our judgement. There is no real distinction between 'subjecting to a detriment' and subjecting to unfavourable treatment. Nothing is to be gained from eking out any distinction between the two. It was recognised by all the managers that going through a capability process is stressful. No employee looks forward to being put through a formal capability process – even though if done properly it may assist with improvement in performance. That is only one side of the coin. The other side of the coin is that it can be a precursor to dismissal or some other sanction. Ms Gould accepts that the dismissal is unfavourable treatment, but the capability process for a failing employee is a necessary precursor to that dismissal.

126. We concluded that by subjecting Mrs Daley to the formal capability process she was subjected to unfavourable treatment. We then proceeded on the assumption (for these purposes only) that the Claimant was subjected to capability proceedings (involving all those things identified in paragraph 5.1.2 a-g above) and dismissed because of her inability to attain standards of performance which inability arose in consequence of her disability. We went on to consider the justification defence to the section 15 claim. We accept the Respondent's legitimate aim as set out in its Response:

1.3. Ensuring its staff are competent and safe to provide care to its patients;

1.4. Provide a safe and effective service to its patients.

127. The legitimacy of the aim was not in dispute.

128. We conclude that the decision to terminate the Claimant's employment was proportionate to achieving that aim. As we know from the authorities, proportionality is a balancing exercise. The Respondent had tried to ensure improvement in Mrs Daley's case first through informal measures; then under the formal procedure this demonstration of support was continued. Mrs Daley was given support by Ms Campbell and when under supervision had the benefit of shadowing and observing other OTs and B7s in practice. However, by her own admission her practice was still lacking – albeit with some improvements. Mrs Campbell provided empathetic support and guidance throughout.

129. Given the pressures the department was under, the unavailability to continue the level of supervision required, the need to ensure a safe practice, in our judgement the decision to terminate was proportionate in achieving that aim. It is, as we have stated, a question of balance; part of the assessment of that balance also involves looking at the effect that the capability process was having on Mrs Daley. It is clear that the process of supervising her practice, observing her and monitoring her development was causing her stress; that stress was causing her to make mistakes; the longer that process continued (which was necessary as the Claimant agreed) the longer she would suffer from stress; she would continue to make mistakes. The respondent department would continue to be under pressure. It required Mrs Daley to be able to perform competently, yet the only way it could assess that competence was to monitor it first informally and then under the capability process. It was akin to a 'catch-22' scenario. It was to nobody's benefit to continue beyond the point of the final capability hearing.

130. Mr Owen submitted that the decision to terminate was not proportionate. He suggested a period of extended leave might have been appropriate. That had never been suggested before, either during her employment, in the pleaded case, in Mrs Daley's witness statement or by Mrs Daley in her own evidence. It was mentioned as a possibility (with a very light touch indeed) by Mr Owen to Mrs Winnard. In submissions he suggested it could have been unpaid leave. However, this would not have assisted Mrs Daley. Firstly, she would be without any income – a significant stressor in itself. Secondly, paid or unpaid she would have to return and undergo some scrutiny in order to assess her performance: the very thing that was prolonging her stress. When she returned from leave she would be under the same processes which were causing her stress. The capability process (i.e. the process of being under scrutiny) was causing her stress and she made mistakes as a result. This regrettable scenario would most likely simply continue. Mr Owen suggested extending the capability process. However, that would have the effect we have described above.

131. Mr Owen also suggested that a proportionate reaction could have been for there be no capability process. He suggested that it would have been preferable or at least an alternative to extend the close supervision process. This was not put to the witnesses. Mr Owen did not suggest that Mrs Daley's work be left unsupervised or unscrutinised. Given the nature of the work, the standards that have to be achieved and the need to ensure patient safety, there had to be some scrutiny and the capability process was not an unreasonable or disproportionate way in which to do this. Ms Campbell had given close support during supervision sessions and matters had not improved sufficiently to her satisfaction. We would add that the Respondent's managers handled that process professionally, sensitively and with empathy. In our judgement they struck an admirable balance between the needs of the department and the need for Mrs Daley to be given time and support to demonstrate her competence. As to placing Mrs Daley somewhere she was comfortable, we have found that the conditions under which she was expected to demonstrate improvement in her performance were optimal (paragraph 50 above). She had in these circumstances not improved to the standard reasonably expected by Ms Campbell.

132. In the circumstances, had we found Ms Daley to have been a disabled person and had we concluded that the Respondent knew or ought reasonably to have known this, and had her performance issues arisen in consequence of her disability, we would have dismissed the complaint of section 15 discrimination on the basis that by subjecting her to the capability process (including the things listed in paragraph 5.1.2 a-g) and by dismissing her, the Respondent had acted proportionately in achieving a legitimate aim.

### **Unfair dismissal**

133. Finally, we turn to the issues on unfair dismissal. We repeat our conclusions in paragraphs 128 to 132 above. In brief, Mrs Winnard formed a genuine belief that Mrs Daley was not performing to the required standards, that she had had a reasonable period of time in which to demonstrate sustained improvement and that she had been provided with reasonable support and guidance in that period. This assessment was based on reasonable grounds. It was not in dispute that Mrs Daley was dismissed for a potentially fair reason, namely capability. The investigation undertaken by Ms Campbell into the Claimant's capability was thorough and certainly within a band of reasonable responses. Mrs Campbell's presentation at the capability hearing was fair, reasonable and comprehensive. Mrs Winnard had available to her the occupational health report of November 2018 and had regard to its content. Mrs Daley did not appeal the decision to terminate her employment.

134. The procedure which was followed by the Respondent was a reasonable procedure. Mr Owen did not really take issue with it nor with Mrs Winnard presiding over it (which was in any event reasonable for her to do). The only observation he made (albeit not as a challenge) was that the capability hearing took place while Mrs Daley was on sick leave. However, it is clear from the occupational health

report not only that, with support, Mrs Daley was able to attend and participate in the hearing – but that she wanted it to go ahead. She knew the stress that any delay to the proceedings would cause her, and she had applied for and in all likelihood had been accepted for the job at the student loans company by this time. She wanted the process to go ahead and it was, we conclude, reasonable for it to proceed even while Mrs Daley was signed as unfit for work.

135. Finally, Mrs Winnard gave reasonable consideration to alternative employment options but conclude that there was none available. This was not the subject of any challenge.

136. In light of all of this and given the nature of the service to be provided and the need for patient safety, the Respondent acted reasonably in treating the reason for dismissal as a sufficient reason for terminating the Claimant's employment. The unfair dismissal claim must be dismissed.

137. At the conclusion of the hearing we indicated that we understood our decision would come as a disappointment for her and her family. We emphasised to her that we have no criticism of her in any way at all. She presented herself, as did Mr Daley, with dignity and honesty. We would like her to know that we have given very careful independent scrutiny to all of the events leading up to her dismissal and difficult though it may be, we could see no other option available to the Respondent to make the decision which it did, to terminate her employment. The Tribunal wished her the best for the future and that she will soon be able to put these events behind her.

**Employment Judge Sweeney**

28 January 2021