EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Miss Eileen Gleeson **The Royal British Legion**

Heard at: **Southampton**

On: **7,8,9 (In chambers parties not attending) & 10 December 2020**

Before: **Employment Judge Rayner**

Appearances
For the Claimant: In Person
For the Respondent: Miss A Smith (Counsel)

Judgment

1. The Claimants claim of Age Discrimination is Dismissed.

2. The Claimants claim of Victimisation contrary to section 27 Equality Act 2010 is dismissed.

3. The Claimants claim of less favorable treatment contrary to the Part Time Workers Regulations (Prevention of Less Favourable Treatment) Regulations 2000 is dismissed.

4. The Claimants claim that she was automatically unfairly dismissed for asserting a statutory right, contrary to section 104 Employment Rights Act 1996 is dismissed.

5. The claimants claim for holiday pay is dismissed.

REASONS

Background and Issues

1. This case was heard over 4 days on the 7,8,9 and 10 of December 2020.

2. The court heard live evidence from the Claimant and the respondent witnesses on the 7 and 8 of December with additional evidence being given by witnesses over a video link.

3. The hearing room was arranged so that the parties could attend in person or by a video link where witnesses were not able to attend in person.

4. Prior to the hearing, the parties had agreed that the hearing would be a hybrid in person and CVP hearing and had also both agreed that they were content for the case to be heard by a Judge sitting alone.

5. In advance of hearing I was provided with an agreed bundle of documents of 304 pages. This was added to in the course of the hearing.

6. The claimant provided a witness statement of her own evidence and a witness statement for Kim Badock, a Nurse practitioner at the Denmead practice, who gave evidence for the Claimant by video link.

7. For the respondent I received witness statements and heard live evidence from Ms Sharon Court, Admiral Nurse lead for Hampshire; Mrs Paula Smith, National Admiral Nurse lead, and I received a witness statement from Mrs Mandy Heal, Assistant Director of Human resources, who gave evidence by video link. Mrs Heal heard the Claimants appeal against the outcome of the Claimants grievance, determined by Mr Declan Dossett.

8. At the start of the hearing, Ms A Smith, of Counsel who represented the respondent disclosed a handwritten, two-page diary entry written by Mrs P Smith,

witness for the Respondent. I determined that the document was relevant to the issues, as the Respondent asserted that it recorded a telephone conversation Miss P Smith had with the Claimant on 8 November 2019. The Claimant did not object, and it was therefore added to the hearing bundle.

9. The Claimant was employed by the Respondent as an Admiral nurse. She started work for them having applied for full-time post, on an agreed 4-day week basis. She started work on 30 April 2018.

10. The Claimant's contract provided for a 6-month probationary period.

11. The Claimant did not complete her probationary period and her contract was terminated by the Respondent on 17 December 2019 with notice with effect from 24 December 2020.

12. The Claimant alleges that her treatment during the course of her employment and the decision to dismiss her, were the result of either

    12.1. age discrimination and/or
    12.2. less favourable treatment of her as a part-time worker and/or
    12.3. acts of victimisation contrary to the Equality Act 2010 (EqA), section 27
    12.4. or in case of dismissal, automatically unfair because the Claimant had asserted a statutory right.

13. At a case management hearing case management hearing on the 26 November 2019 before Employment Judge Gray, the issues in the case had been broadly identified and the timetable for the hearing has been set.

14. I confirmed the legal and factual issues with the parties at the start of the hearing and they are agreed as follows:

Less favourable treatment on the grounds of being a part-time worker contrary to regulation 5 PTW regs 2000

1. Was the Claimant subjected to less favorable treatment by the Respondent in that:
    a. The Claimant complains that at a 1:1 session on the 20 August 2018 her Manager (Sharon Court) was hyper critical and negative without justification.

    b. In October 2018 the Claimant complains that she was denied a training opportunity to shadow an experienced Admiral Nurse in Manchester, whereas her colleague could attend in Birmingham.

    c. At a 1:1 on the 1 November 2018, at her Manager's house, the Claimant says she was asked if she would agree to a fixed day off each week; was told that her probation would be extended and that she could hand in her notice before then if she was not enjoying the job.

    d. The Claimant received two letters dated 29 November 2018 from the Respondent (one received on the 30 November 2019) the first dealing with the changes to her hours, which had errors in it, and the second confirming the extension of her probation period to the end of January 2019. The Claimant says that the content of that letter was unsubstantiated and damming.

    e. Ending the Claimant's probationary period.

2. If so, was the reason for the treatment that the Claimant was a part-time worker?

3. The Claimant relies upon the following comparators: Robert Benham and Karen Smith.

4. If so, can the treatment be objectively justified?

Section 13: Direct discrimination on grounds of age

5. Was the Claimant subjected to less favorable treatment by the Respondent in that:

    a. The Claimant complains that at a 1:1 session on the 20 August 2018 her Manager (Sharon Court) was hyper critical and negative without justification.

    b. In October 2018 the Claimant complains that she was denied a training opportunity to shadow an experienced Admiral nurse in Manchester, whereas her colleague could attend Birmingham.

    c. At a 1:1 on the 1 November 2018 at her Manager's house the Claimant says she was asked if she would agree to a fixed day off each week, was told that her probation would be extended and that she could hand in her notice before then if she was not enjoying the job.

    d. The Claimant received two letters dated 29 November 2018 from the Respondent (one received on the 30 November 2019) the first dealing with the changes to her hours which had errors in and the second confirming the extension of her probation period to the end of January 2019. The Claimant says that the content of that letter was unsubstantiated and damming.

    e. Ending the Claimant's probationary period.

6. If so, did the respondent subject the Claimant to the less favourable treatment because of her age?

7. The Claimant relies upon the following comparators; Robert Benham and Karen Smith who are in their 40s. The Claimant is in her late 50s.

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

Section 27: Victimisation

9. Did the Claimant carry out a protected act? The Claimant relies upon her email to the Respondent dated 13th December 2018 (180).

10. Was the Claimant's employment terminated because of the protected act?

11. In addition/in the alternative, did the Respondent fail to provide enough assistance to the Claimant, in line with the Respondent's Bullying and Harassment Policy, because of the act?

Unfair dismissal - Section 104 Employment Rights Act

12. Did the Claimant assert a statutory right in her email dated 13th December 2018 (180) to be permitted a companion at her upcoming hearing?

13. Was the reason, or if more than one the principal reason, that the Claimant was dismissed due to her asserting a statutory right?

Unpaid annual leave – Working Time Regulations

14. What was the Claimant's leave year?

15. How much of the leave year had elapsed at the effective date of termination?

16. In consequence, how much leave had accrued for the year under regulations 13 and 13A?

17. How much paid leave had the Claimant taken in the year?

18. How many days remain unpaid?

19. What is the relevant net daily rate of pay?

20. How much pay is outstanding to be paid to the Claimant?

Time/limitation issues

21. Are any of the claims out of time? The claim form was presented on 4 May 2019. Accordingly, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

22. Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period?

23. Is such conduct accordingly in time?

24. Was any complaint presented within such other period as the Employment Tribunal considers just and equitable?

Remedies

25. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

26. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation

Findings of Fact

27. The Claimant was employed by the Royal British Legion as an Admiral Nurse between 30 April 2018 and 24 December 2018.

28. The Royal British Legion is a charity providing financial, social and emotional support to members and veterans of the British Armed Forces, their families and dependents.

29. Initially the Claimant worked flexibly over 4 days a week, choosing which day off to take each week.

30. The Claimant's employment was subject to satisfactory completion of a six-month probation period.

31. The Claimant joined a team in which there was a full-time Admiral Nurse, Mr Robb Benham and the Claimants line manager, Sharon Court.

32. The Claimant has a professional qualification as an RGN and had previously worked as a nursing sister; a community matron and health facilitator for the Solent NHS.

33. The role of an Admiral Nurse is not the same as the role of a nurse working in the statutory sector.

34. The role of the Admiral Nurse is to work with the carers who are supporting individuals, usually their partners, with dementia. The beneficiaries of the Royal British Legion support might be either the carer themselves or the person with dementia. The role of an Admiral Nurse is to manage a clinical caseload of carers and others and to provide them with support. The support may be practical, emotional or psychological.

35. In her day-to-day role the Claimant was required to visit beneficiary's homes in order to provide that support. She would be required to make an initial assessment of their particular needs and then deliver support and services tailored to the specific needs of the individuals in a variety of ways, including home visits, telephone support and group sessions.

36. The Claimant and other team members worked from home. They were required to organise home visits to beneficiaries during the week as well as do the support work.

37. Every few weeks each nurse was required to do a duty week, which were organised on a rota basis with other members of the team. During Duty weeks the Claimant would be required to phone beneficiaries who had contacted the service, to compete triage calls and assess the urgency of calls. Nurses on duty were not required to carry out home visits during duty weeks, and the expectation was that the duty week would also be used as a chance to catch up on case load administration.

38. During the Claimant's initial 3 months, a further Admiral Nurse, Karen Smith, joined the team. Her start date was the 11 June 2018 and the Claimant relies on her and Mr Robb Benham as her comparators for the purposes of age discrimination and the purposes of less favourable treatment for the grounds of being a part-time worker.

39. Mr Benham and Ms K Smith were both younger than the Claimant and were both full-time. The Claimant is a woman in her 50s. Both comparators were in their 40s.

40. The respondent accepts that Mr Benham is a valid comparator, but does not accept that Ms K Smith was in the same material circumstances as the Claimant.

41. I find that although Ms K Smith was employed under the generic job title of Admiral Nurse, she was appointed to do a different role to the one being done by the Claimant. Ms K Smith was appointed to set up a new service and therefore, although she did carry a case load, she was not required to carry the same level of cases as other full-time workers.

42. The precise number of cases that any worker would be expected to carry varied depending on the complexity of the cases. I accept the evidence of Mrs P Smith that some cases required an intense level of input from the caseworker,

whilst others required far less input and that some cases did not require individual support at all, being managed through group attendance, perhaps at dementia clinics. There are therefore different classifications of the cases for the purposes of assessing the appropriate number of cases carried by any individual Nurse.

43. Mrs P Smith told me and I accept that her expectation was that a full-time worker would have a smaller proportion of cases which required intensive intervention and a larger proportion of cases requiring ongoing support of a less intense nature.

44. Mrs P Smith said in her Witness statement that generally a full time Admiral Nurse would expect to have between 35 and 40 cases of which 10-12 would be complex cases.

45. Mrs Smith reviewed the Claimant case load, and said that she would expect about 32 cases and 8-10 intensive clients, the Claimant had 34 cases of which only 6 were intensive. She considered that this was a reasonable level of cases for Miss Gleeson, given her 4-day week.

46. Ms Courts evidence, which I accept as true, was that the Claimant was asked to carry a caseload pro rata to a full-time case load.

47. In November 2018 at the point of her second supervision, the Claimant had a case load of about 35 cases. I accept Ms Courts evidence that this was lower than full time worker, but was about the same on a pro rata basis, taking into account the complexity of cases. In December 2019, the computer record shows that the Claimant had a total of 35 cases of which only 5 were intensive cases.

48. In contrast, Mr Benham, who was full time had a caseload of 41 cases

49. The Claimant accepted that she did not necessarily know what either Rob or Karen were doing on a day-to-day basis because all Admiral Nurses work independently.

50. During the course of her employment, I find that the Claimant's caseload was broadly pro rata to full time case workers and that her manager took steps to make sure that it was appropriate, both in terms of the number of cases, and in terms of the complexity of the cases she was allocated.

51. When Karen had been appointed her caseload was allocated at a lower level compared to the Claimant, because Karen Smith had been allocated the task of setting up the service in a new area. This difference between the Claimant's work and that of Ms Karen Smith meant that there was a difference in the number of cases that they were each allocated.

52. Whilst the Claimant said that they met weekly to discuss their caseloads, she accepted she was not aware of this aspect of Karen's work.

53. The Claimant has asserted that she was told that she must increase her caseload to nearer 40 cases, but I have seen no evidence of that ever being said to her, and nor have I seen any evidence that in fact her caseload was so increased. I find that the Claimant was not told to increase her case load to 40 cases and that it was not the expectation of her managers that she would or should do so.

Supervision of The Claimant

54. The Respondent operates a computer based file system known as WANDA. The Respondent accepts that from time to time this system would be unreliable and that on occasions it was not accessible to the nurses who needed it. This system was used by all Admiral Nurses for a number of key parts of their work. The respondnet states and I accept that there were work arounds when the computer system played up, and that there was technical support available to all staff.

55. Firstly, Admiral nurses were expected to utilise the Outlook diary by recording all their visits and appointments on a regular or daily basis. This was particularly important because the Admiral Nurses work remotely and because they often

work alone. Line managers needed to be able to check where an Admiral Nurse was and who they were visiting. The process also allowed management to manage workflow and to ensure that Admiral Nurses were using their time effectively and efficiently.

56. The computer based file system was also used to record both case notes and care plans for individuals and it was used to categorise cases.

57. Once a referral was made to TRBL, the case would be triaged. The caseworker would make a decision of the nature of action required, and the correct allocation level for the case.

58. The Claimants line manager was Sharon Court. The Claimant had a number of supervision sessions with Ms Court on a monthly basis, and some of the sessions took place at Ms Courts home. This was not unusual for the service, because Admiral nurses worked from home in order to cover a wide geographical area. I accept that the Claimant was initially happy for supervision sessions to take place at Ms Courts home.

59. The Claimant also told me that she talked to a woman called Emily Oliver, who works at Dementia UK, and that she felt she gained support from her.

60. Dementia UK is a separate organisation which works closely with the Royal British Legion. Emily Oliver was helpful to the Claimant and was supportive of her, but she was not contractually responsible at all for any management or supervision of the Claimant, and in particular, she had no knowledge of either the Claimant's particular caseload or the care plans or treatment of the individual patients. The Claimants line manager was responsible for her supervision, and was responsible for ensuring that she was doing what was required of her on order to pass her probationary period.

61. The Claimant agreed when questioned that the purpose of supervision with her line manager was to help her to develop in her role; to help her with any areas of concern , either her own or her managers; to provide the Claimant with

guidance on ways to improve; to ensure that the organisation kept track of the Claimants caseload; to keep track of the Claimant to make sure that she was safe; to allow the Claimant to raise any issues with her work and to give her feedback on her progress during her probationary period.

62. The Claimant attended one-to-one supervision meetings with Ms Court in May 2018 and on 2 July 2018 and on 16 July 2018. At these meetings issues were identified for the Claimant to consider for improvement and assistance given and suggestions made for steps that the Claimant could take to develop her practice. These included suggestions for online training.

The Claimants Birthday Card

63. In July the Claimant had a birthday and the team sent her a birthday card. The card has a picture of an older person on a motorbike and says *it's not about age, it's about attitude!* The card was signed by members of the Claimants team. The Claimant said that at the time she thought it was sweet of the team to send her a card, but that she didn't like the greeting. She felt that the comment about age was not appropriate from people she worked with professionally and who she didn't know very well. She accepted that she didn't raise this at any stage in one-to-one meetings with her manager or otherwise, and said this was because she was focused on her casework.

64. I accept the respondents' evidence that the card was purchased by member of the admin team as was usual in the team.

65. The birthday card references age and is an implicit reference to the fact that the Claimant is growing older. I have no evidence before me of any other birthday card sent to any other team member, but accept that this was a usual practice.

August supervision

66. On 20 August 2018 the Claimant attended her one-to-one probationary review with Sharon Court.

67. I have been referred to a five-page document headed *Admiral Nurse Supervision Record*. It states at the top *this supervision session forms Eileen's mid probationary review - start date, 30 April 2018*.

68. The 5 pages cover discussion of the following areas: clinical, administrative; role developments/participation in service development; training/ promotional work, personal; absence/leave issues; Evidence for values and behaviours; PDR objectives review.

69. The 5 pages finish with a 5-point action plan. The document is signed by the Claimant and by Ms Court on the 20 September 2018.

70. Ms Court explained that the document would have been emailed to the Claimant and that the Claimant would have signed it and returned it to the Respondent at the next supervision session which would have been September 2018. The Claimant accepted that it was her signature on the document but told me that she has no recollection of receiving a document; of reading it or signing it.

71. In cross examination the Claimant accepted that the notes reflected her recollection of what had been discussed at the meeting in respect of the clinical matters. She also accepted that there had been discussion about her use of the WANDA system and the fact that some of the cases had not been progressed appropriately through the system. She accepted that her manager had explained the importance of progressing cases and that she had demonstrated how the Claimant should do this.

72. The Claimant accepted that there had been the discussion about duty work, and that it was explained to her that she should not timetable visits to clients when she was timetabled to do duty work.

73. The Claimant accepted that discussion had taken place about the records she was keeping in respect of the clients and that she had been told that she needed to record information about the need for future Admiral Nurse

interventions on the file. She accepted that there had been a discussion about how she was recording matters onto her Outlook calendar and the importance of her keeping her Outlook calendar up-to-date. There was a discussion about apparent periods of inactivity and the Claimant told me that she had raised concerns about the suitability of her telephone, but that she did understand that despite the shortcomings of the IT system WANDA, there were other ways of inputting the information, and that these were discussed with her line manager.

74. At that meeting the Claimant accepts that positive comments were made, that some areas needed more work, and that she was given advice on ways of working and that her manager gave her support as to how to improve. She accepts that that there was discussion about care plans and expenses forms and that Sharon Court offered to sit in on the Claimant's calls.

75. At the end of the meeting 5 objectives were set and recorded in the action plan.

76. Despite not recalling receiving the document, the claimant accepted that it was her signature and confirmed when I asked her specifically, that she was not saying the document was a forgery. What she was saying was that it was a pity she did not have a copy of it. The Claimant said that she had never seen the document until it was in the bundle and that she did not recall being given a copy and did not know that it was an action plan.

77. I find that it is more likely than not that the claimant did receive a copy of the document, but whether the Claimant received a copy of the document later or not, on the basis of her evidence, I find that it is an accurate record of the discussion which took place and that she signed it at the time and knew of its contents.

78. I find that on each occasion when Ms Court identified an area where the Claimant needed to improve, that the Claimant was given advice and support as to how to improve and the Claimant accepts that this was the case.

79. The Claimant also accepted in evidence that there was always room for her to improvement, although she was critical of her induction. The Respondent says and I find that her induction was the same as for any other employee.

80. The Claimant suggested that the use of the phrase *remaining on the task* was a bit patronising and suggested that she was not focused on her work. She said that Ms Court was micromanaging things because many of the matters she raised were obvious to the Claimant.

81. The Claimant suggested that her managers did not take into account the fact that she was part-time, when considering her work.

82. However, it was noted in the appraisal notes that the Claimant felt that working 30 hours gave her a good work life balance and I find that this was a true reflection of her feelings about her work at that time. I find that Ms Court did take into account the fact that the Claimant was part time both when considering her work allocation and her performance in the role during her probation.

83. I find that the comments made and recorded at that meeting by the Claimants line manager were appropriate and supportive comments, and that the constructive criticism was given in order to enable the Claimant to improve her practice and pass the probationary period.

84. I have no evidence other than the Claimants assertion, that Ms Court was either hypercritical of the Claimant at this meeting or that the comments she was making amounted to micro-management of the Claimant. I accept Ms Courts evidence that because the Claimant was halfway through the probationary period, it was appropriate and necessary to identify all areas which needed improvement in order to assist the Claimant in successfully completing the probationary period. This is supported by the contemporaneous documentation.

85. I find that whilst the Claimant may have subsequently formed the view that she had been micromanaged, and that her manager had been hypercritical of her, at the time of the meeting in August 2018 and at the point that she signed the notes in September 2018 the Claimant did not have that opinion. I find that the Claimant was satisfied with the meeting, and considered that the notes were a fair reflection of a supportive discussion about areas where she was doing well in her work and areas where she needed to improve.

86. The Claimant has raised the concern that the Respondent did not take sufficient account of the difficulties that she faced as an Admiral Nurse because of the problems posed by WANDA. I reject this. I find that the Respondent was fully aware that the computer system for inputting case notes and dealing with follow-up triage was less than perfect.

87. I find that this was true for all employees and that whilst it was recognised by the employer as being less than perfect, there were alternative ways of inputting information system in order to ensure records are up-to-date and I find that the Claimant was made aware of them, and did in fact use them.

88. I accept the evidence of Sharon Court that because the Claimant lived in Southampton, she could have attended at the Royal British Legion's area office to complete administrative work. The Claimant also had access to the IT department should she require any assistance on day-to-day matters, and was aware that this support was available to her.

Denial of shadowing opportunity in Manchester

89. The Claimant wanted the opportunity of shadowing a more experienced Admiral Nurse and had anticipated that she would be able to do this. As a result, she had made some enquiries about the possibility of shadowing a Nurse in the Manchester region.

90. The Claimant's colleague, Karen Smith had been able to shadow an Admiral nurse in Birmingham.

91. However, following the Claimant's August and September and October reviews, Sharon Court was becoming concerned that the Claimant was not making enough visits each week; that she needed to focus more on her clinical caseload and that she needed to ensure that carers and beneficiaries had regular contact . She was concerned that the Claimant's pro rata caseload was lower than other colleagues and was also concerned that the Claimant was still not using Outlook calendar despite being reminded that she should do so. For

these reasons, she did not consider it was the right time for the Claimant to be shadowing another Nurse.

92. Whilst the Claimant does not agree with all the criticisms made, I find that Ms Court was genuine in her concerns and that they were objectively reasonable concerns. I find that at about that time, Ms Court had become so concerned about the Claimants standard of work, that she had informed her line manager, Mrs Smith and was discussing ways of supporting the Claimant, with her.

93. It was therefore decided by Sharon Court in discussion with Paula Smith that shadowing a more experienced nurse in Manchester was not a good use of the Claimants time at that particular point. The Respondent wanted the Claimant to focus on improving her record-keeping and her client contact and wanted her to be able to do this within her probationary period. The shadowing opportunity was therefore put on hold.

94. Whilst the Claimant was unhappy about this and whilst she considered that the shadowing opportunity would have been helpful to her, I find that it was understandable and reasonable in the circumstances for the respondent to prioritise other aspects of the Claimant's work and to require her to focus on them and to postpone the shadowing opportunity.

95. The Claimant said in her evidence, when asked why she thought that putting the shadowing experience on hold was anything to do with her age or her being part-time, that she felt that during the months she had worked for the respondents, she was being told that she was not as good as the others, that she was not skilled that she was not hitting her targets, and that she was told she was slower than others. She felt that the way she worked was beneficial and that she was learning from others and that shadowing experience would be helpful to her. She told me she was passionate about her job and that she put all her energy into it.

96. I find that both Sharon Court and Paula Smith had a genuine and legitimate concerns about the Claimant's practice as an Admiral Nurse at that point in time

and in particular her abilities in dealing with clients; in identifying issues that an Admiral nurse should deal with, and in her record keeping. I find that the reasons given were the only reasons for the postponement of the opportunity, and were the real reasons for the decision and were nothing to do with her age or her being a part time employee.

97. It was not suggested that the Claimant was not working hard, or that she was not passionate or that she was not committed. The criticisms that were being made were specific to the requirements of an Admiral Nurse. The Claimant was new to the role but having been in post for nearly 6 months, the expectation was that she would be carrying a pro rata caseload easily and would be dealing appropriately with clients and managing both care plans; record-keeping triage and duty work. The respondent's concern in October and November 2018 was that the Claimant was not yet working at the required standard for the job.

98. The respondent's expectations of the Claimant were based on the Claimant managing a pro rata caseload and delivering the service at the expected level to those clients.

November 1 to 1 meeting

99. On 1 November 2018 the Claimant attended a one-to-one supervision meeting with Sharon Court at Sharon Courts house. At this meeting Ms Court raised her concerns that the Claimant was not making enough visits per week and that she needed to focus on her clinical caseload to ensure regular contact.

100. Because of her concerns Ms Court raised the possibility of extending the Claimants probationary period, so as to reassure her that if she got to the end of probationary period and had not improved sufficiently, her employment would not simply be terminated. I find that Ms Court wanted to continue to support the Claimant to help her to improve where necessary, so that she could pass the probationary period.

101. The Claimant alleges that she was also asked if she would agree to taking a fixed day off each week. Ms Court accepts that there was a discussion

of the Claimants working pattern and that she suggested a fixed day off each week rather than a variation each week.

102. I accept that the reason for making the suggestion was to ensure certain aspects of the service were covered at all times. The Claimant was not asked to increase her hours and remained employed on 4 days a week and the Claimant agreed to a variation of the contract to fix the days on which she worked.

103. The Claimant also asserts that at that meeting Ms Court said to her that, whilst her probation period could be extended, that she could hand in her notice before the end of the extended period, if she was not enjoying her job. Ms Court does not address this in the witness statement. She was not asked about it by the Claimant.

104. I have been referred to the notes of the meeting of the 1 November 2018. These notes have been amended by the Claimant in discussion with the respondents following that meeting, the amendments record the Claimants concerns with WANDA and the alternative use of Word as a work around and concerns the Claimant had that the reason her outlook, calendar was not showing as much activity as it should do, was because she spent a lot of time travelling.

105. In the action plan for improvement there is recognition that the Claimant had made some progress but also that some areas requiring continued improvement. There is no note in this meeting of any comment being made by Sharon Court, and no amendment made by the claimant about any such comment.

106. On 6 November 2018, following this meeting, the Claimant raised a grievance against Sharon Court. The Claimant complained to Paula Smith that she felt she was being bullied and micromanaged by Sharon Court.

107. The Claimant says that she telephoned Paula Smith on 7 November. Mrs Smith has produced a handwritten note dated 8 November 2018. Mrs Smith told me and I accept that she had two telephone calls with the Claimant and

that this note is in respect of the second call. Mrs Smith states that the first telephone call took place on the Tuesday, when the Claimant contacted her about bullying and harassment. The conclusion of the call was that Mrs Smith would call the Claimant back on the following Thursday, once she had taken advice from HR.

108. During the course of her cross examination, having been referred to this note, which was only produced by the respondent on the first day of hearing in line with the continuing duty of disclosure, the Claimant said that she had raised her concerns about less favourable treatment with Mrs Smith in this telephone call.

109. The Claimant alleges as part of her claim that she was victimised for doing a protected act, and her pleaded case and the case recorded in the list of issues is that protected act was her email of 13 December 2018.

110. The Claimant only referred to one telephone call in her evidence suggested that the note dated 8 November was a note of the first telephone call and that Mrs Smith had written the notes after the call, thus explaining the date. It was not put to the Claimant that the note was in respect of the 2nd telephone, made 2 days after the first call.

111. The Claimant refers to a note which states *controlling behavior inequitable*. She says that the use of the word *inequitable* is a reference to her telling Mrs Smith that she was being treated unfairly.

112. Mrs Smith asserts that her recollection of the two telephone calls was that the Claimant was raising an issue of bullying, but that she did not make any reference to being treated differently to others for reasons of her age or for reasons of her part-time status.

113. As a result of this telephone call and the concerns raised by the Claimant, Mrs Smith set up a three-way meeting between herself, the Claimant and Sharon Court.

114. The meeting took place on 12 November 2018. The purpose of the meeting was to seek to resolve the Claimant's concerns. Following the meeting Sharon Smith wrote to the Claimant on 19 November 2018. The letter recorded that an action plan had been agreed and set out the details of it. There were 8 numbered points. The first one set up a further three-way meeting on 17 December 2018, for a review with the Claimant and Sharon Court. The Claimant was to continue meeting Sharon Court every 2 to 3 weeks and it was noted that Sharon Court will ensure that any feedback to the positive achievements as well as highlighting areas development.

115. At point 7 it was noted that the Claimant would use her outlook diary to document work that was planned and at point 8 it is recorded, *you are contracted to 30 hours a week and you have been working flexibly with your day off changing on a weekly basis to meet the needs of the service. We have agreed that you will work full-time at Thursdays and Fridays from the 17 December with you working Friday 21st December. We will arrange for HR to put this in your contract so this is formalized.*

116. The Claimant attended a further supervision meeting with Sharon Court on the 27 November 2018. First, the meeting was to review previous accounts of supervision and to make a supervised triage call and review care plans and e-learning among other matters. The details of the exchanges between the Claimant and the client during the supervised triage call were set out with suggestions from Sharon Court in red underlined, as to what the Claimant might have done differently or in addition. The purpose of the notes in red was to help the claimant to see how she might be more effective, when making these calls and how she could improve her service to the clients Sharon Court noted that the call was more thorough than the previous one she had observed, and the note show that she made some positive comments as well as giving some constructive criticism.

117. On the 29 November 2018 the Claimant received 2 letters from her employer. The first letter was from HR and set out a variation of contract which was to take effect from the 17 December 2018. Unfortunately, the letter did not

accurately record the variation which the Claimant had agreed. The letter suggested that the Claimant would work until 5:30pm each day, whereas the Claimant finished work at 5.00pm each day. The letter also inaccurately reflected the agreement that the Claimant had made to her alternate Thursdays and Fridays as the day off each week. The Claimant wrote to HR on 5 December 2018, stating she did not agree with the amendments as set out in the letter and explaining what she considered the agreement to have been.

118. The Respondent accepts that the letter sent on 29 November was incorrect. The respondent asserts and I find as fact that this was simply due to a miscommunication with HR and that it was an administrative error.

119. In fact, the Claimant was never required to change in line with the letter of 29 November and the Respondent accepted that the Claimant was right and that a mistake being made.

120. The 2nd letter which the Claimant received also on the 29 November 2018 told her that her probationary period would be extended. It states that she had failed to meet the required standards, causing concerns for the company and raising questions about her ability to carry out duties as an Admiral Nurse practitioner.

121. The Respondent stated in the letter that it considered that her work performance and conduct needed to meet required standards and that this was still to be proven. As a consequence, the Claimants probationary period was extended by 3 months with an effective end date of 30 January 2019. The reason for the extension was stated to be to allow the Claimant time to develop her skills within Admiral Nursing in several ways and to be able to demonstrate this within the nursing record. The letter warned her that if an improvement was not seen that her probation period may not be confirmed.

122. The Claimant was very upset by both letters, and in particular by the decision to extend her probationary period.

123. On 11 December 2018 the Claimant received a copy of the grievance policy and procedure from Mr Colin Gordon, the interim head of safeguarding, who the Claimant had spoken to when she had met him at a training day. She had explained that she was having some difficulties at work and he had agreed to send her the grievance policy.

124. On 13 December 2018 the Claimant wrote to Mrs Smith. It is this letter that the Claimant relies on as being a protected act for the purposes of her victimisation claim.

125. The Claimant makes reference to her initial telephone call to Mrs Smith on 6 November 2018, when she says " I made reference to the fact I felt I was being bullied and harassed by my manager". She goes on to thank Mrs Smith for taking trouble to hear her concerns, but states that it appears there is been no change and no acknowledgement of any problems.

126. The claimant then referred to the fact that she had received two letters as follows;

> *Following on from this, I have received 2 letters from HR one informing me of the variation in my contracted hours; one informing me of an extended probation period, inferring that I have been unable to fulfil my contract with regards to meeting the objectives of the role as Admiral nurse practitioner. I was to respond within 7 days regarding my variation of contract which I did so far as I disagreed.*
>
> *While I acknowledge everyone has room for improvement, and this has been discussed in my supervision I have always been eager to learn new ways to do any job I have ever undertaken and to do so to the best of my ability. I am very puzzled and to date have no concrete evidence to suggest I am not fulfilling my contract. I have indeed had some very positive feedback from clients. I have also not been given any helpful suggestions as to where I need to improve. ……..Following an initial three-way meeting with yourself and my line manager …..which had initially felt positive and I was able to remain client focused and diligent in my work without worrying about other issues. However, in the light of the aforementioned letters dated 29 1118 there are ongoing concerns.*

I am devastated by this and under the circumstances feel the three-way meeting on Monday 17 December should be postponed until I have had time to seek guidance and reflect. It may be appropriate for me to request an independent observer as this is common practice where there are unresolved issues. I do really hope that any issues can be resolved informally at a prearranged meeting in the near future.

127. The letter sets out the Claimants view that the criticism of her is unfounded and that she does not agree with the decision to extend her probationary period. The letter also asks for a postponement of the next meeting.

128. When asked in cross examination to point to the part of the letter that she considered to be a protected act, the Claimant was not able to identify what it was that she had said or done or considered she had said or done which was connected in any way at all with the Equality Act 2010.

129. What the Claimant did do was to repeat her concerns that the criticism was unfair and that she was working hard and doing her best and that she believed she was improving.

130. I find that there is nothing in this letter which could reasonably be understood as making any reference whatsoever, to any matter arising from or related to or connected to any issue of concern under the Equality Act. The Claimant does not refer to being treated differently or unfavorably or less favourably than any other person and she makes no suggestion that the cause of either any alleged bullying or of any alleged unfair criticisms of her practice or a decision to extend her probationary period is anything to do with her age or anything to do with her being a part-time worker.

131. I find that no allegation capable of being a protected act is made in this letter.

132. If Mrs Gleeson intended to make any such allegation, and she has not proved to me that she did, I find that Mrs Smith, who received the letter did not know that and did not understand that any such allegation was being made.

133. Having sent this letter, and without waiting for a reply, the Claimant assumed that the meeting on 17 December would be postponed. In fact, no postponement was agreed to, and both Ms Court and Mrs P Smith expected the meeting to proceed. Both believed that this had been made clear to the Claimant in subsequent emails.

134. On 14 December the Claimant sent a text message to Sharon Court asking if she could send apologies for a clinical meeting on that Monday, as she wanted to attend at the funeral of client. She stated in the text message that the three-way meeting with Paula had been postponed. This was in fact incorrect, as the Claimant had not received any agreement to her request for the meeting to be postponed.

135. What she did received was a response from Ms Court, who stated that she was confused, as she understood the meeting was going ahead. The Claimant replied by email that she had emailed a letter to Paula postponing the meeting. She did not say that there was an agreement to postpone the meeting. Ms Court replied, also by email, asking whether the Claimant had checked her emails. She did this because she wanted to check that the Claimant had seen the emails which she had seen, which indicated that there was no agreement to adjourn, and that therefore the meeting was expected to proceed. The Claimant replied that she had done so. In fact, the Claimant had not checked her emails.

136. What had happened, was that following receipt of the Claimants letter, Mrs Smith had taken advice from HR about what she should do regarding the meeting on 17 December. Mrs Smith wanted the meeting to go ahead, and HR had supported her in proceeding with it. She had then made several attempts to contact the Claimant by phone, so that she could discuss the meeting with her. She had left messages, but the Claimant had not returned her calls. Mrs Smith was concerned that the Claimant appeared to be ignoring her calls.

137. On 14 December at 12.55pm Mrs Smith had written an email to the Claimant telling her that the concerns she had raised in her letter would be addressed. She also noted her disappointment that the Claimant had been contacting outside agencies regarding her concerns and stated that she was disappointed that the claimant had not come to her, returned her call or her email. She states that they need to meet as planned and ends, *we will meet at 11.15am on Monday at the Southampton office*. This was a clear management instruction to the claimant to attend at a meeting with her manager during her working day as previously notified.

138. The email was sent with high importance. It should have been obvious to the Claimant that the meeting had not been adjourned, and that she was required to attend.

139. The Claimant did not attend the meeting, but did attended at the funeral. She did not have permission to attend at the funeral.

140. When she failed to attend at the meeting, Mrs Smith tried to contact her and left a voicemail. The Claimant sent her a text message at 13.27 on 17 December acknowledging the voice mail, and saying, *thank you for your voice mail Paula. I will be contacting you in Jan. once I have made a decision on the way forward. Thank you for your patience*.

141. Mrs Smith replied that she needed to speak to the Claimant that day and asked her to call her. The Claimant did not call her, and asked Mrs Smith to send any communication to her by email.

142. Following this exchange Mrs Smith again discussed the situation with HR. She then decided that in light of the Claimants non-attendance at the meeting against specific instructions, without any apology or explanation from the Claimant, and in light of the Claimants failure or refusal to respond to telephone calls from Mrs Smith, and taking into account her lack of progress during the probationary period, to terminate the claimants contract with one weeks' notice.

143. At 3.35pm, Claire Neeson of HR left a voicemail for the Claimant. She noted that the Claimant had failed to attend a meeting that day as instructed. She says that the reason they needed to meet was to terminate the Claimant's contract for a failed probation. She states that the Claimant will be paid one weeks' notice and will receive a formal letter of termination.

144. The Claimant was sent a letter dated 18 December 2018 terminating her contract of employment with one weeks' notice. The letter sets out the performance concerns that the respondent had and also set out behavioral concerns that the respondent had. The behavioral concerns included the Claimant's reluctance to positively engage with her senior managers through an internal process, the Claimant discussing internal processes with external stakeholders, such as Dementia UK; numerous occasions and failure to follow reasonable management instructions and her refusal to attend at the probationary review meeting amongst other matters.

145. The Claimant was not required to work her notice and was paid for it with her December salary. She was notified of the right to appeal.

146. The Claimant was also paid for all outstanding holiday in her final pay slip. The Claimant does not now dispute that she was paid for 55.43 hours of holiday pay on termination and also accepts that she as she was entitled to only 20 hours pay, that she has been paid in excess of the amount she was owed.

147. The Claimant took advantage of the right to appeal and also raised a formal grievance.

148. Both the Claimant's appeal and her grievance were heard after the termination of her employment and both were dismissed

149. The Claimant had full opportunity to attend at the hearings and to be accompanied and the Claimant also had every opportunity to fully set out the concerns that she had about the way she had been treated during her employment by the Respondent. At no point did she suggest that the reason for her dismissal or the reason for any criticism of her performance during

supervision or otherwise, or any other treatment was on grounds of her age or grounds of being part-time or because she had asserted a statutory right or because she had done a protected act.

Relevant Legal Principles

Dismissal for asserting statutory right

150. The Claimant alleges that she asserted her statutory right to be accompanied to a meeting. The right of accompaniment is set out in s 10 Employment Relations Act 1999. The Claimant relied in the list of issues drafted at the preliminary hearing on section 104 of the Employment Rights Act 1996. That section does not cover the right of accompaniment under the Employment Relations Act. I discussed this with the parties during the course of the hearing and the respondents counsel helpfully directed my attention and that the Claimant section 10, 11 – 12 of Employment Relations Act 1999 and indicated that she would take no point on the pleading, taking account the fact that the Claimant is a litigant in person. Insofar as it is necessary to do so, the Claimants pleaded case is therefore formally amended to a claim brought as a breach of section 10 of the 1999 Act.

151. The right to be accompanied applies where a worker is required or invited by his employer to attend a disciplinary or grievance hearing and reasonably requests to be accompanied at the meeting. The worker has the right to choose their companion, but there are restrictions on the type of person who would be allowed. These are set out in 10 (3) ERelA 1999 and include a person employed by trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992; an official of the trade union whom the union has reasonably certified in writing, having experience of acting as a workers companion at a disciplinary or grievance hearing or another of the employer's workers.

152. A complaint may be made to an Employment Tribunal that an employer has failed or threatened to fail to comply with section 10.

153. Section 12 of that Act provides that a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer, on the grounds that he has exercised or sought to exercise his right to accompaniment.

154. Section 12 (3) provides that if the reason or if more than one, the principal reason for the dismissal is that the employee exercised their right under section 10(2), that they shall be regarded as unfairly dismissed for the purposes of part 10 of the Employment Rights Act 1996

155. An employee wishing to claim unfair dismissal must have 2 years qualifying service unless the reason they allege for the dismissal falls within section 108(3) the Employment Rights Act 1996. Section 12 4 of the Employment Relations Act 1999 specifically excludes the qualifying period under section 108 Employment Rights Act 1996.

156. The Claimant must therefore satisfy the tribunal that she asserted the right to be accompanied by either a trade union representative or another worker of the employer to a meeting which was either a disciplinary or a grievance meeting and that the reason or the principal reason for her subsequent dismissal was that she had asserted such right.

Direct discrimination

157. The Claimant has claimed direct discrimination on grounds of age contrary to section 13 of the Equality Act 2010. This section provides “a person A discriminates against another B , If because of the protected characteristic a treats B less favourably and a treats or would treat others.

158. The comparison that I was required to make under section 13 EqA is set out within s23 (1): in a comparison of cases the purposes of section 13, 14, 19. They must be no material difference between the circumstances relating to each case”.

159. I approached this question by applying the test set out in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

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

160. In order for the reverse burden of proof to be triggered, so that the respondent will be required to prove a non-discriminatory reason for any alleged adverse treatment, the Claimant needs to have proved on the evidence she presents to the tribunal that her age (in this case) was or could have been a reason for her treatment. This may be proved by direct evidence or by inferences which it would be reasonable for me to draw from the facts I have found. I reminded the parties and myself that a difference in treatment and of status and difference in protected characteristic will not be sufficient to shift the burden of proof. Unreasonable treatment by the respondent would not generally be of assistance. What the Claimant must prove is facts from which I could reasonably conclude, or infer, that any or all of the Claimant's treatment was because of her age.

161. Section 136 EqA 2010 encourages the tribunal to ignore the respondents explanation for any adverse treatment until the 2nd stage of the exercise. Whilst it is appropriate to take into account factual evidence that the first stage, evidence of motive or explanation within that should be ignored until the 2nd stage (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33). The respondent is only required to explain their treatment of the Claimant is the burden of proof moves to them at the 2nd stage. However, in *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

162. I remind myself that the legislation does not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable is an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

163. I reminded myself of Sedley LJ's judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

Victimisation

164. The test of causation under s. 27 required me to consider whether the Claimant has been victimised '*because*' she had done a protected act. The test is not the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act relied upon as a protected act has to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

165. In order to succeed under s. 27, the claimant therefore needs to show three things; That she did a protected act; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). I have applied the 'shifting' burden of proof s. 136 to that test as well.

Part Time worker Regulations

166. Regulation 5 of the PT worker regulations provides that a part time worker has the right not to be treated less favourably than a full time worker as regards the terms of his/her contract (5(1)a, or by being subject to any other detriment by an act or a failure to act of his/her employer. The right applies if the treatment is on grounds that the clamant was a part time worker and the treatment is not justified on objective grounds.

167. Regulation 7 provides that an employee who is dismissed shall be regarded as having been unfairly dismissed if the reason or the principle reason (if more than one) is that the worker has brought proceedings against an employer in respect of the regulations or done any other thing set out in the section.

Discussion and conclusions

Assertion of a statutory right

168. The Claimant's evidence was that she had asserted right to be accompanied to the meeting of December 17, 2018, in a letter which she sent to Paula Smith on the 13 December 2018 in which she asked for the meeting to be adjourned.

169. In that letter, the Claimant wrote as follows : *I am devastated by this and under the circumstances feel that the planned three-way meeting on Monday 17 December should be adjourned until I have had time to seek guidance and reflect . It may be appropriate for me to request an independent observer and this is common practice where there are unresolved issues.* She goes on to express her hopes that issues can be resolved at a prearranged meeting in the near future.

170. The respondent did not agree to the meeting being rearranged and indeed told the Claimant that the arranged meeting should continue. The Claimant did not attend.

171. The purpose of the meeting was a three-way discussion of the Claimants probationary period and her performance. The respondent had already made a decision to extend the Claimants probationary period. The meeting set for the 17 December 2018 was not a disciplinary meeting and nor was it the grievance meeting.

172. The Claimant does not assert anything. She merely makes a suggestion. The respondent has not rejected the suggestion, but rather had tried to communicate with the Claimant to ensure that the meeting went ahead.

173. I conclude that the Claimant did not assert a statutory right to be accompanied either by trade union representative or by another worker at that meeting. What the Claimant did was to suggest an independent observer at a future meeting. I conclude that the Claimant has not satisfied the requirements of the statutory provisions and that she does not therefore gain protection of the relevant section.

174. However, if I am wrong, I conclude that in any event the Claimant's comments in the letter had no effect whatsoever on Paula Smith's decision to terminate the Claimant's contract of employment.

Conclusions on direct age discrimination and part time worker status

175. The first question I have considered is whether or not the Claimant was subject to unfavourable treatment in any of the ways she has alleged.

176. The one-to-one session on 20 August 2018 was an ordinary meeting to assess the Claimant's progress midway through her probationary period.

177. I have been referred to the notes of that meeting and I conclude that they are a genuine record of the meeting that took place and that they are a reasonably accurate record of the meeting took place. I draw this conclusion from the written and oral evidence of Sharon Court about the nature of the discussion that took place, but also from the fact that the notes are signed by the Claimant.

178. I conclude that the only reason why the record of the meeting is signed by the Claimant is that the notes were indeed sent to the Claimant signed by her and returned to the respondent. I find that at the point the Claimant signed the notes, she was satisfied with them.

179. The Claimant was older than both of her comparators and part time and I conclude that Mr Benham was a valid comparator for because he was in the same material circumstances as the Claimant.

180. I conclude that Karen was not in the same material circumstances as the Claimant because she was doing a different job, albeit that she was employed as an Admiral Nurse. I accept the respondents evidence about the work that she was doing and the reason why she had a different caseload to the Claimant.

181. The Claimant gave evidence of how she felt about her treatment by the respondents during the course of supervision meetings and day-to-day management. Her evidence was that she felt that she was being told she was a burden to the organisation that she was being carried and that she felt that given her experience, she was being micromanaged in an inappropriate way. The Claimant made reference to a birthday card, which had a comment about age. This card was purchased by member of the admin team and signed by a number of people.

182. The Claimants work and further progress in developing the necessary skills to do the work was criticised by Sharon Court, and the Claimant was required to show improvement across a number of areas of her work. Sharon Court attempted to manage aspects of the Claimants work as recorded in the notes of supervision meetings.

183. The Claimant was denied the opportunity of shadowing a more senior practitioner in the autumn of 2018. Her colleague Karen was allowed to shadow a more senior colleague. However, I conclude that Karen was not in the same material circumstances. Alternatively, the reason why Karen was treated differently was because there were no concerns about her work and her probationary period.

184. The Claimant was asked whether or not she would agree to fixing her days of work rather than varying them each week. She agreed to this.

185. The Claimant did receive a letter on 29 November 2018 which erroneously set out a proposed variation of the contract. The variation was in respect of her part-time hours.

186. The Claimant did receive a 2nd letter on 29 November, telling her that her probationary period would be extended.

187. On the basis of the evidence I find it probable that Sharon Court did make comment to the Claimant to the effect that she could speak to Sharon Court if she decided she did not wish to work out a probationary period.

188. The Claimant did work part-time and she was older than her comparators.

189. The Claimant was dismissed by the respondent.

190. I find that the sending of a birthday card making reference to age is not in this context capable of amounting to a detriment or of unfavourable treatment of the Claimant and I find that the Claimant herself did not in fact consider it to be so at the time.

191. I find that the agreement to fix her hours of work is not capable of being unfavourable treatment or a detriment. The claimant agreed to a suggestion made by her employer. In any event the reason for the suggestion was to ensure cover of the service and was nothing to do with age.

192. I find that the remaining matters *could* be capable of amounting to unfavourable treatment of the Claimant or of being a detriment.

193. I have therefore considered whether any of the treatment is less favourable treatment than other actual or hypothetical comparators in the same or not materially different circumstances as the Claimant.

194. The material factors are that the Claimant was within her probationary period; that she was subject to supervision and that she was required to improve in order to pass probationary period.

195. The Claimant worked part-time and I find that her whole caseload was pro rata to reflect her four-day working week. There is no evidence that she was ever asked to increase the caseload to that of a full-time worker or that she was expected to do so. The caseload was proportionate to the days she worked and the evidence I have seen suggests that this was not simply a matter of numbers, but that it was also proportionate in terms of the complexity and intensity and variety of cases allocated to her. There was no unfavourable treatment of her. She was treated the same as others in the same circumstances as she was, would have been treated.

196. I conclude that the Claimant's induction and supervision within her probationary period was fair and appropriate and that the concerns and criticisms made of the Claimant were based on genuine beliefs formed by Sharon Court that the Claimants practice needed to improve across the range of duties and skills.

197. I conclude that in respect of the supervision the Claimant cannot compare herself with Karen or with Mr Robert Benham, because their circumstances were different to those of the Claimant. I heard no evidence to suggest that there were any concerns about Karen's work or her skills in her probationary period.

198. Similarly, I have heard no evidence of any concerns about Mr Benham's work, and in any event, he was not in his probationary period.

199. It is implicit in the Claimant's case that she considers the criticisms made of her to be unjustified and unnecessary.

200. On the evidence before me, both from the supervision notes themselves the evidence of the respondents witnesses and the Claimant's own evidence and cross-examination, I conclude that Sharon Court had a genuine and reasonable belief that the criticisms which she made were justified, and that she would have made the same criticisms of any employee who she considered was not performing at the required standard or who needed to improve.

201. In respect of the letter, I conclude that this was the result of genuine error, and although it upset the claimant, it was not less favorable treatment. The HR department could have made a mistake in any letters sent. Whilst this may be different treatment, it is entirely explicable as an error, and was nothing to do with the claimant being part time, or of a certain age.

202. Whilst Sharon Court made a remark that the claimant could resign, this was a reasonable observation to make to a person failing their probation. Whilst the claimant may have been upset, I conclude that Ms Court would have made the same remark to any one in that situation and it was not less favourable treatment.

203. I therefore conclude that the claimant has not been treated less favourably than any actual comparator, or a hypothetical other person in any respect.

204. Even if I had found any less favorable treatment, I could not have drawn any inference from the primary facts I have found, that the Claimant's age, or her part time status played any part whatsoever in the way the Claimant was treated by the respondents.

205. The burden of proof would not therefore pass to the respondents to provide a non-discriminatory reason for the treatment of the Claimant.

206. However, and in any event, I conclude that the respondents had a fully non-discriminatory reason for all of their treatment of the Claimant. The Claimant was allocated pro rata cases and was managed as were all other employees.

207. The claimant was not, in the professional opinion of Sharon Court, performing to the standard required of an Admiral Nurse at the later stage of her probation and the Claimant's behavior towards her employers when they tried to manage and support the Claimant so that she could develop and succeed was such that the respondent considered it appropriate to terminate the Claimant's employment.

208. I conclude that the real reason for the termination of the Claimants employment was as set out in the termination letter and was nothing to do with the claimants age or her being a part time worker.

209. The reasons given by the respondents are the only reasons for the claimants' dismissal, and are nothing to do with her age, the fact that she worked part time or that she had asserted a right to be accompanied to any meeting.

Victimisation

210. I conclude that the Claimant did not do a protected act, but in any event, I find that the letters written by the Claimant and the complaints raised by the Claimant about her manager were handled sensitively and effectively by Paula Smith and indeed by Sharon Court. The respondents worked proactively with the Claimant to resolve the concerns she had, and their actions were taken because they wanted to resolve her issues and support her to do better in her work, so that she would pass her probationary period.

211. It was the Claimant's lack of cooperation and her refusal to communicate with her managers which caused the ongoing difficulties and ultimately led to the termination of the contract, and not a protected act done by the claimant. . The Claimant was not victimised.

212. The claimant claims are therefore dismissed.

Employment Judge Rayner
Date: 01 March 2021

Judgment sent to the parties: 05 March 2021

FOR THE TRIBUNAL OFFICE