EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss X Samson	v	London North West University Healthcare NHS Trust

Heard at: Watford **On**: 13-17 and, in private, 24 September 2021

Before: Employment Judge Hyams **Members:** Mr W Dykes, Mr D Wharton

Representation:

For the claimant: In person
For the respondent: Ms B Criddle, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimant's claim of direct disability discrimination, contrary to sections 13 and 39 of the Equality Act 2010, does not succeed and is dismissed.

2. The claimant's claims of detrimental treatment within the meaning of section 47B of the Employment Rights Act 1996 and unfair dismissal within the meaning of section 103A of that Act do not succeed and are dismissed.

REASONS

Introduction

1 By a claim form presented on 28 February 2020, the claimant claimed (1) disability discrimination which was stated in the document attached to the claim form of which there was a copy at page 16 (i.e. page 16 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle) to be "based on perceived disability", and (2) wrongful dismissal on a

number of bases, despite the fact that she had been given pay in lieu of notice in full. At a preliminary hearing conducted by Employment Judge ("EJ") KJ Palmer on 25 November 2020, the claimant was permitted to amend her claim of wrongful dismissal to a claim of detrimental treatment within the meaning of section 47B of the Employment Rights Act 1996 ("ERA 1996") and unfair dismissal within the meaning of section 103A of that Act. The claim of breach of contract was otherwise struck out. The one claimed public interest disclosure was an email dated 8 April 2019, to which we refer in detail in paragraphs 28 and 29 below. The parties had subsequently co-operated in regard to the agreement of a list of issues and by the start of the hearing before us, the claimant was claiming (1) direct disability discrimination contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010") on the basis of perceived discrimination, (2) that she had been treated detrimentally within the meaning of section 47B of the ERA 1996, and (3) that she had been dismissed because, or principally because, she had made a public interest disclosure within the meaning of section 43A of the ERA 1996.

Amendment of the claim form permitted by us

2 There was, however, one issue in the parties' agreed list of issues (to which we return below) which was not agreed: so it was there on the basis that it was agreed that it should be there, but it was the respondent's case that the claimant needed permission to amend her claim form in order to advance it as a claim before us. On the first day of the hearing, after we had read the parties' witness statements, we permitted the claimant to add that claim. The amendment was to add as a claimed public interest disclosure the letter at pages 351-353 to Mr David Jones. The letter was dated 18 April 2019 and was copied to Mr Edgar Swart and Miss Jane Porter. All of those persons were giving oral evidence to us, and in part for that reason we concluded that the prejudice to the claimant in us not permitting her to amend her claim in the manner sought (which we indicate in paragraph 16 below) considerably outweighed the prejudice to the respondent from permitting her to do so. We therefore permitted the claimant to amend her claim by relying on the letter as a disclosure within the meaning of section 43A of the ERA 1996, but without deciding whether or not it was made in time and therefore whether or not it was within the jurisdiction of the tribunal.

Application for restricted reporting order and an anonymity order

3 The claimant immediately after we had announced that decision made an application for an order under rule 50 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules"). The order sought was one anonymising the claimant and prohibiting the publication of the details of the case. We took time to consider the applicable legal principles and to hear submissions from the parties on the matter (Ms Criddle correctly recognising that it was a matter for the tribunal and not the respondent, but nevertheless making some helpful submissions), but we adjourned at 4.10pm on that day and said that we would allow the parties to address us further on the matter the following morning if they

so wished, although we would in the meantime carry out some careful research on the applicable principles and come to a provisional view on the application.

4 At the start of the next day, 14 September 2021, we heard further submissions from both parties. During the course of those submissions, we, through EJ Hyams, referred to and read out a number of passages in the relevant case law. Those passages were taken from the judgment of Simler P (as she then was) in *British Broadcasting Corporation v Roden* [2015] ICR 985; [2015] IRLR 627 and paragraphs 19-22 of the judgment of Lord Neuberger MR in *H v News Group Newspapers Ltd* [2011] 1 WLR 1645. When discussing the matter with the claimant, it became clear that she was concerned most of all about the possibility of stigma attaching to her from the fact that the respondent had thought that she might have a mental health condition, i.e. a mental illness. The claimant was, and remained throughout the hearing before us, adamant that she did not have such an illness.

5 We concluded, bearing in mind the outcome on the facts in *Roden* and that if an order under rule 50 were justified here then it would be justified in all cases where the claimant's mental health was in issue, that we could not lawfully, and in any event should not, make any order under rule 50.

<u>The evidence before us</u>

6 Having stated that conclusion, we started to hear oral evidence. We heard first from the claimant on her own behalf and then, on behalf of the respondent, from the following witnesses, who were all employed by the respondent:

6.1 Mr David Jones, Senior Human Resources Business Partner,

6.2 Miss Jane Porter, Matron of the Acute Medical Unit ("AMU") at the respondent's Ealing Hospital,

6.3 Dr Mary Kehoe, an Associate Specialist in Occupational Health ("OH"),

6.4 Mrs Tricia Mukherjee, Head of Nursing for Emergency and Ambulatory Care, and

6.5 Mr Edgar Swart, Divisional Head of Nursing at St Mark's Hospital, which is one of the respondent's four clinical sites.

7 The hearing bundle consisted of 830 pages excluding its index.

8 Having heard that oral evidence and read the parts of the bundle to which we were referred, we made the findings of fact which we set out in paragraphs 27-59 below. Those findings of fact reflect the issues in the case, to which we now turn.

The issues which required determination by us

Introduction

9 Those issues were stated by the parties in the list of issues at pages 184-189. That list included specific questions relating to time limits and a number of issues relating to the claimant's claimed losses. We, however, by agreement of the parties, considered only the liability issues, so that the issues relating to remedy would become relevant only if the claims, or any part of them, succeeded.

The factual elements of the claim of direct disability discrimination

10 The list of issues stated in paragraph 5 (on pages 185-186) a number of factual questions under the heading "Direct disability discrimination by perception under s. 13 EqA 2010" without making it clear that the question whether or not the conduct in question had occurred was not the relevant question. Rather, while it was necessary to decide whether or not the claimed conduct had in fact occurred, the key question was whether that conduct occurred to any extent "because of" the protected characteristic of disability. Since the claimant denied being disabled, answering that question was not straightforward. Before referring to the relevant statutory provisions and case law in that regard, we record here that paragraph 5 on pages 185-186 was in these terms (and that they had to be read together with the further and better particulars to which they referred, in the manner which we discuss in the final section of these reasons):

> "5. Did the Respondent subject the Claimant to the following treatment?
>
> (Paragraph references refer to paragraphs within the Claimant's FBPs commencing on page 3 under hearing 'Particulars of the 'Less Favourable Treatment')
>
> 5.1. Subjecting the Claimant to repetitive requests for a psychiatric assessment (paragraph 1);
>
> 5.2. Acting in an offensive, intimidating, and provocative manner on 02 December 2019 whilst the Claimant was being told of the outcome of the meeting regarding the medical suspension (paragraph 2);
>
> 5.3. Persistently responding in short emails to concerns the Claimant raised and not thoroughly addressing the issues the Claimant raised (paragraph 3);
>
> 5.4. The Respondent's relevant departments not sufficiently supporting the Claimant (paragraph 4);

5.5. Not supporting the Claimant by providing testimonials from management in relation to the NMC Fitness to Practice case (paragraph 5);

5.6. Not assisting the Claimant with her NMC revalidation (paragraph 6);

5.7. Sharing the Claimant's Occupational Health letters with other entities (NMC, Single Point of Access Team at West London Mental Health Trust) without the Claimant's consent (paragraph 7);

5.8. Repeatedly misquoting the Claimant in the minutes of the medical suspension review meetings (paragraph 8);

5.9. Not conducting risk assessments before the medical suspension and during the reviews (paragraph 9);

5.10. Not seriously hearing the Claimant's concerns raised regarding the environmental conditions in the clinical area such as poor thermoregulation, ventilation, and static electricity (paragraph 10);

5.11. Placing the Claimant on medical suspension for a significant length of time and then dismissing her (paragraph 11);

5.12. Failing to act on the Claimant's request to log the employment dispute as a clinical incident when the Claimant advised the Respondent that it was causing her stress (paragraph 12);

5.13. Submitting further information to the NMC which led to an interim suspension order being imposed on the Claimant (paragraph 13); and

5.14. Not giving the Claimant an opportunity to a proper final review hearing and failing to follow the sickness absence policy (paragraph 14)."

The claim of detrimental treatment within the meaning of section 43A of the ERA 1996 and the claim of unfair dismissal within the meaning of section 103A of that Act

11 A claim of detrimental treatment for the making of a protected disclosure, i.e. a claim of a breach of section 47B of the ERA 1996, is made under section 48 of that Act. Section 47B(1) 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 done on the ground that the worker has made a protected disclosure."

12 However, as a result of section 47B(2), such a claim cannot be made if the claimant is an employee and the detriment "amounts to dismissal (within the

meaning of Part X)" of that Act. Such a claim must instead be made as a claim of unfair dismissal within the meaning of section 103A of that Act, which has the effect that where an employee who satisfies an employment tribunal that he or she has made a protected disclosure within the meaning of section 43A of that Act is dismissed, the dismissal will be automatically unfair "if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure." Here, the list of issues asked these factual questions:

> "11. Did the Respondent do the following?
>
> 11.1. Place the Claimant on medical suspension on 16 April 2019; and
>
> 11.2. Dismiss the Claimant on 2 December 2019.
>
> 12. If so, by doing so did the Respondent subject the Claimant to detriments?
>
> 13. If the answers to (13) and (14) above is yes and if the Tribunal finds that the Claimant made a qualifying and protected disclosure, were any or all of these done on the grounds that the Claimant made a protected disclosure?"

13 Plainly, the reference to "the answers to (13) and (14) above" was mistaken, but that was also plainly the result of a failure to proof-read the list properly. What was more important was that issue 11.2 was not apt, because of section 47B(2). Thus, the key factual issue for determination when considering the claim of detrimental treatment within the meaning of section 47B was whether or not suspending the claimant on 16 April 2019 was done to any extent on the ground that the claimant had made a protected disclosure within the meaning of section 43A of the ERA 1996.

14 Such a disclosure is a disclosure falling within section 43B of that Act that is made in accordance with sections 43C-43H of that Act. Section 43B provides so far as relevant:

> 'In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, ...

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

15 Section 43C(1) provides:

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person."

16 The claimant apparently had not realised by the start of the trial that her only claimed public interest disclosure (the email of 8 April 2019 to which we refer in detail in paragraphs 28 and 29 below) had not been sent to her employer, so that she could not rely on it as a disclosure within the meaning of section 43A of the ERA 1996 unless she could rely on (in the circumstances) either section 43G or section 43H of that Act. As a result, the claimant sought (and we gave her, as we record in paragraph 2 above) permission in addition to rely on the email dated 18 April 2019 at pages 351-353. She did not in the end appear to rely on either section 43G or section 43F of the ERA 1996, and for the reasons stated in paragraph 64 below, we concluded that she had not made a disclosure which satisfied the requirements of section 43B. Nevertheless, for the sake of completeness we record that section 43G applies where a worker makes a disclosure which satisfies the conditions of section 43B to a person other than his or her employer and (so far as relevant)

16.1 "the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer", or

16.2 "where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer", and

16.3 "in all the circumstances of the case, it is reasonable for [the worker] to make the disclosure."

17 Section 43H provides this:

"(1) A qualifying disclosure is made in accordance with this section if— ...

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made."

Relevant legal principles

A claim of direct disability discrimination because of the protected characteristic of disability where it is the claimant's case that he or she is not disabled

18 Direct discrimination within the meaning of section 13 of the EqA 2010 is for a number of reasons likely to be rare. That is in part because in most cases the claimant will have at the material time have been disabled and the claim will fall within section 15 of that Act. A claim of direct discrimination because of a perceived disability will usually be made only where the claimant was not, or might not have been, disabled within the meaning of section 6 of that Act. In paragraph 35 of his judgment in *Chief Constable of Norfolk Constabulary v Coffey* [2020] ICR 145, Underhill LJ (with whose judgment Davis and Bean LL agreed) said this.

> 'The starting-point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label "disability" to them. As Judge Richardson put it succinctly, at para. 51 of his judgment:
>
> > "The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation."

> That distinction between knowing the facts that constitute the disability and knowing that they amount to a disability within the meaning of the Act had already been drawn, albeit in a different context, by Lady Hale in her speech in *Malcolm* [i.e. *Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening)* [2008] UKHL 43; [2008] AC1399]: see para. 86 (p. 1430 F-G). Again, although it was common ground that this was the right approach, I should say that I agree that it is correct. In a case of perception discrimination what is perceived must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute.'

19 In *Coffey*, the Court of Appeal upheld the employment tribunal's decision in favour of the claimant, where it was found on the facts that a stereotypical assumption had been made by the decision-maker about what she perceived to be the claimant's actual or future hearing impairment, where that impairment did not on the facts amount to a disability within the meaning of section 6 of the EqA 2010. Similarly, in *Stockton-on-Tees Borough Council v Aylott* [2010] ICR 1278 (which concerned the provisions of the Disability Discrimination Act 1995, the relevant terms of which were substantially identical), the claimant employee was diagnosed with a bipolar condition. He was dismissed in the circumstances described in paragraph 45 of the judgment of Mummery LJ (with whose judgment Thomas and Toulson LJJ agreed), in the following way:

> "The employment tribunal found that the claimant's mental disability was the ground of his dismissal. The reasons for that finding included the stereotypical view of mental illness taken by the council in its reactions to the claimant's disability: the employment tribunal referred to panic, to descriptions of intimidating and scary behaviour, to fear of his return to work and to the wish to manage him out of work."

20 The Court of Appeal upheld the tribunal's finding of direct discrimination. In paragraph 48 of his judgment, Mummery LJ, said this:

> "Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics."

21 In paragraph 50 of his judgment, Mummery LJ said this:

> "The council's decision to dismiss the claimant was based in part at least on assumptions that it made about his particular mental illness rather than on the basis of up-to-date medical evidence about the effect of his illness on his ability to continue in the employment of the council."

22 In paragraph 74 of his judgment in *Coffey*, Underhill LJ said this:

> "I would emphasise that it does not follow that a claim of direct discrimination can be brought in the generality of cases where an employee suffers a detriment because they are (or are perceived to be) unable to do the work required by the employer, or do it to a sufficient standard: on the contrary, such cases will typically have to brought under section 15 (if available), and the employer will have the opportunity to seek to justify the treatment complained of."

The burden of proof in a claim of direct discrimination within the meaning of section 13 of the EqA 2010

23 In the course of determining a claim of direct discrimination within the meaning of section 13, section 136 of that Act applies. The latter provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

24 When applying that section it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence, but not its explanation for the treatment. In addition, where the person who did something which it is alleged was discriminatory does not give evidence, the tribunal, taking a common sense approach, has to decide whether "any positive signifcance should be attached to the fact that [that person] has not given evidence". Those things are clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263. The whole of that passage is material, but the most relevant parts of it for present purposes are as follows.

> "26 ... As discussed at paras 20-23 above, it had [by the time of the enactment of section 136(2) of the EqA 2010] been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into

account evidence adduced by the respondent which went to rebut or undermine the claimant's case.

...

40. ... At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that, as Mummery LJ and Sir Patrick Elias said in the passages quoted above, no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. In so far as the Court of Appeal in *Igen Ltd v Wong* at paras 21-22 can be read as suggesting otherwise, that suggestion must in my view be mistaken. It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.

41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

42. There is nothing in the reasons given by the employment tribunal for its decision in this case which suggests that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant's many job applications. The

position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy.

43. Where it is said that an adverse inference ought to have been drawn from a particular matter – here the absence of evidence from the decision-makers – the first step must be to identify the precise inference(s) which allegedly should have been drawn. In their written case on this appeal counsel for the claimant identified two such inferences: (i) that the successful applicants for the jobs for which the claimant unsuccessfully applied were of a different race or ethnic origin from the claimant; and (ii) that the recruiters who rejected the claimant's applications (in all but two cases on paper without selecting him for an interview) were aware of his race when doing so.

44. On the first point, the tribunal stated in its decision that no evidence was adduced as to the race of the successful candidates and that the tribunal could not make any findings of fact about this. The tribunal did not mention that there was evidence that seven candidates who were hired were born in the UK and one in India. But I do not think that the tribunal can reasonably be criticised for not drawing any inference about the racial profile of any of the successful applicants from the fact that the decision-makers were not called as witnesses. There can be no reasonable expectation that a respondent will call someone as a witness in case that person is able to recall information that could potentially advance the claimant's case; and I can see no reason why the tribunal should have inferred that, by not calling as witnesses any of the numerous individuals involved in making the various recruitment decisions, the respondent was seeking to withhold information about the race of successful candidates."

25 In addition, in some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

A claim of detrimental treatment within section 47B of the ERA 1996

26 In a claim of detrimental treatment within the meaning of section 47B of the ERA 1996 for making a protected disclosure within the meaning of section 43A of that Act, which is made under section 48 of that Act, it is for the employer to prove the reason for the conduct which it is claimed was detrimental. That is the effect of section 48(2), which provides that "it is for the employer to show the ground on which any act, or deliberate failure to act, was done". A claim of detrimental treatment within the meaning of section 47B is akin to a claim of

direct discrimination within the meaning of section 13 of the Equality Act 2010. It is therefore necessary to apply the principles in the case law relating to the application of section 136 of that Act, and accordingly to ask whether the claimant has proved facts from which the inference that the claimed detrimental treatment was done on the ground that the claimant had made a protected disclosure could be drawn, and, if he or she has done so, then to ask whether the respondent has proved on the balance of probabilities that the treatment was not done to any material extent because of the making of the disclosure. Here too, of course, it is possible as an alternative simply to ask what is the reason why the claimed detrimental treatment occurred.

Our findings of fact

The claimant's position with the respondent

27 The claimant was employed by the respondent as a staff nurse, on grade 5 of the scale applied nationally in the National Health Service, to work at the respondent's Ealing Hospital AMU. Her first day of employment with the respondent was 8 October 2018. As can be seen from what we say above, the claimant made no claim about the manner in which she was treated by the respondent before 16 April 2019. However, the claimant herself referred in her witness statement to the history of her employment with the respondent before then, as did Miss Porter in the circumstances to which we return in paragraph 32 below, where we refer to the relevant parts of that history.

The event which led to the claimant's suspension on 16 April 2019

28 On 8 April 2019, the claimant sent an email to a body called the Professional Standards Authority ("the PSA"). What that authority is was not explained by any witness before us, or with any precision in any document in the hearing bundle. However, we saw its origin from the content of paragraph 1 of the explanatory notes to the Health and Social Care Act 2012 (Consequential Amendments - the Professional Standards Authority for Health and Social Care) Order, SI 2012/2672, which explained the purpose of that Order as follows:

> "This Order makes amendments consequential upon the coming into force of section 222 of the Health and Social Care Act 2012 (c.7). Section 222 provides that the body corporate known as the Council for Healthcare Regulatory Excellence is to continue to exist, but is to change its name to the Professional Standards Authority for Health and Social Care."

29 The claimant's email of 8 April 2019 to the PSA asserted that a number of things were occurring at the claimant's workplace, i.e. the AMU at Ealing Hospital. The email was at pages 342-343 and was in these terms:

"I would like to report an observed pattern of likely inappropriate use of hypnosis/ideomotor phenomenon in my NHS workplace. I currently work as a Staff Nurse at Ealing Hospital - Acute Medical Unit.

In the last 3 months that I have worked in the department, I have experienced odd symptoms which I think is likely related to the above phenomenon. I am a healthy individual and does not have any past medical history but recently I have had various symptoms including headaches, breathing difficulty (a feeling of getting choked), and gastrointestinal disturbance (borborygmus, spasms, flatulence). This also includes having slurs similar to that of being possessed (as in a paranormal phenomenon). I have also noticed this in some of my patients and colleagues at work.

It becomes extremely bothersome and a distraction at work. It also involves a feeling of being attacked in various parts of the body including that of one's private part, which I feel is very inappropriate.

I understand that control is achieved in this phenomenon with an altered state of consciousness and the poorly controlled thermoregulation (heating) and inadequate ventilation (the ward is located in the basement of the hospital) in the area is set up for this purpose.

I have also noticed that I am being subjected to significant stress/anxiety, which I think makes the subject control easier in this process. This is in the form of excessive scrutiny - I am presented with excessive complaints from colleagues which are mostly trivial and made a subject of a performance management programme, which is not necessary. The frequent mention of the names of my acquaintances by my colleagues is also another way of causing anxiety (apart from this being an example of stalking behaviour) or possibly a 'suggestion'. They are also using gaslighting through the use of low frequency soundwaves. Recently, I have seen a van in the parking lot near the area where I work that carries what appears to be audio equipment.

This also extends when I am at home. I have had sleep disturbances in the last few months having waking episodes due to the above symptoms. I have recently moved to another apartment as a protective measure but I think that the people involved has followed me to the new apartment. The heating along the corridor outside my apartment is unusually warmer compared to the other parts of the building - I have raised the matter up to the property managers but they have told me that they couldn't change this. I am concerned this is an act of serial bullying and stalking with harassment. And my lack of consent to be made a subject of this practice is a form of assault.

Moreover, I am concerned that this can be a patient safety risk when done whilst I am at my workplace.

I am unable to disclose this to the management because I am concerned that this may be misinterpreted and that they may have some form of involvement in this practice unaware of its legal/ethical implications.

I hope you can assist me in identifying the people who may be involved in this and provide guidance as to how I can protect myself from this practice. I am concerned this may eventually have a negative impact on my overall health and wellbeing. I also feel more vulnerable because I currently live on my own."

30 That email caused concern in those who read it about the claimant's mental health. The PSA sent a copy of the email to both the respondent and the Nursing and Midwifery Council ("NMC"), which is the body which regulates the training and registration (i.e. qualification to practise) of nurses. Mr Jones described the sequence of events which followed up to and including the claimant's suspension in paragraphs 6-14 of his witness statement, which we accepted. Mrs Mukherjee was, as the respondent's Head of Nursing, the person who would normally have made a decision about what to do in the circumstances, but she was on annual leave and Mr Jones did not think that the situation could be left as it was, with the claimant continuing to attend work, until Mrs Mukherjee returned from annual leave. As a result, Mr Jones asked Mr Swart, who was at the time employed by the respondent as Head of Nursing, District Nursing and STARRS (Short term assessment, rehabilitation and reablement service) at the respondent's Northwick Park Hospital, to decide what to do. Mr Swart agreed. He described what happened next in the following passage of his witness statement, which we accepted:

"7. ... The letter was very disturbing because of the way Ms Samson explained the experiences she was having. It was difficult to understand what she was saying at some points, and she was expressing some very unusual beliefs within the correspondence, including that she was being subjected to ideomotor phenomenon on the AMU. From the letter, it was clear to me that something was not quite right, and I had concerns that Ms Samson might have been suffering with her psychological and/or physical health.

8. Given she was a nurse responsible for the care of critically ill and vulnerable patients on the AMU, there was a risk that if she was not well and was still working clinically, harm could come to the patients on the AMU, or that Ms Samson's own health could be negatively impacted.

9. While Ms Samson had indicated that these were legitimate patient safety concerns, my preliminary view was that these events she was

discussing were symptoms of ill-health. This was because of her comments about hypnosis, and that there was a sense of paranoia throughout the correspondence, and suggestions of hallucinations.

10. In discussion with Mr Jones, we considered the actions that could be taken, but noted that we had to act promptly as Ms Samson was due to work clinically the upcoming weekend (13 an 14 April). Mr Jones' advice was that we could medically suspend Ms Samson under the Sickness Absence Policy and this would give us time to obtain medical advice from Occupational Health (OH), and ensure that support was in place for Ms Samson if she needed it. This would also mitigate against any patient safety risks by ensuring Ms Samson did not work until she was confirmed fit to do so.

11. We arranged a telephone call with Ms Samson on 12 April 2019 where the above was explained to her. I confirmed that she was being medically suspended on full pay while we obtained medical advice. We discussed referring Ms Samson to OH, and it was agreed a referral would be made as soon as possible. We also arranged a meeting for 16 April 2019 where we could discuss the matter in a bit more detail and review next steps.

12. At this point, the medical suspension was always intended as a precautionary, supportive temporary measure to balance the risk of harm coming to patients if a nurse was working with unresolved health conditions and Ms Samson's own wellbeing. There was genuine concern that if it transpired that Ms Samson was suffering from ill-health, she could harm a patient or herself. We felt it was best to obtain medical advice to ascertain if Ms Samson was fit and well to work.

13. On 16 April 2019, I held a meeting with Ms Samson and Mr Jones. Ms Jane Porter (Matron of the AMU) was also present. I was present in the absence of Ms Mukherjee who was still on leave.

14. During the meeting we discussed the email that Ms Samson had written to the PSA, and why this has caused concern within the Trust. We tried to understand what Ms Samson was trying to say and clarify the contents of the email. I explained the risks that the Trust could see in relation to patient care and the clinical service if Ms Samson was allowed to work without restriction. I explained why we felt medical suspension was necessary but made clear that this was not a disciplinary sanction or punishment but a tool to ensure the necessary medical advice could be obtained to move forward. I confirmed that she would be on full pay during the suspension.

15. I recall Ms Samson was not happy about the medical suspension, but was content to be referred to OH, and was sure she would be certified as fit to work. We concluded the meeting on 16 April 2019 agreeing that she would attend the OH appointment that had been arranged for 18 April 2019, [and] that Ms Samson [would] engage with a referral that had been made to the West London Mental Health NHS Trust Single Point of Access Team (which deals with mental health emergencies).

16. It was also agreed that the medical suspension would continue until the Trust received the outcome of the OH assessment, and that a medical suspension review meeting would be arranged between Ms Samson, Ms Porter and Mr Jones in two weeks' time.

17. I wrote to Ms Samson to summarise our discussions on 12 and 16 April, and set out the agreed next steps in an outcome letter dated 16 April 2019 (p.349-350). I also directed Ms Samson to further sources of support and explained the practicalities of medical suspension.

18. Following this I had no further involvement in the matter, bar Ms Samson sending me a request for a supportive testimonial on 31 May 2019 (p.409) which I refused as I did not think it was appropriate for me to provide a letter in the terms she sought."

31 The reference in that passage to "medical suspension" was a reference to suspension under paragraph 15 of the respondent's document entitled "Sickness Absence Policy". The document was at pages 243-285 and paragraph 15 was on page 264. The paragraph was headed "Ill Health (Medical) Suspension", and the text of the paragraph was this:

> "Ill health suspension is intended to be a supportive mechanism rather than a disciplinary action. It may be appropriate where a manager has reason to believe that an employee is unfit to be on duty due to sickness, infection, notifiable diseases, intoxication or a heightened emotional state or where your continued presence is considered to adversely affect service delivery or patient care. In such circumstances, ill health suspension from duty, on full pay, may be appropriate pending the advice of the Occupational Health or Infection Control. The reasons for the suspension will be confirmed to the employee in writing by the manager, as soon as is reasonably practicable and normally within 7 calendar days."

Miss Porter's reasons for concluding that the claimant's suspension should be continued

32 In paragraphs 6-8 of her witness statement, Miss Porter said this (which we accepted).

"6. Prior to the events in question, as Matron, I was aware that there were existing performance concerns surrounding Ms Samson's conduct and capability. These related to her medicines management, failure to follow senior nurses/doctor's advice, and concerns about her documentation.

7. There were also wider concerns about her general professional behaviours whilst on the clinical floor; this included her refusal to give patients medication that had been prescribed by their treating physicians or the pharmacist and constantly challenging the decisions for treatment, despite explanations being given by the decision-makers.

8. There were also issues with her integration with the nursing team and Ms Samson would display odd behaviours. As a result of these concerns, Ms Samson was referred to Occupational Health (OH) in January 2019 because of the behaviours she was exhibiting [p.334-335] and was also asked to attend an informal meeting in February 2019 to discuss the performance concerns. Ms Samson was placed on an Improvement Action Plan and provided with a Band 6 mentor who would provide daily supervision and support [p.335-341]."

33 In paragraphs 14-19 of her witness statement, Miss Porter said this (which we also accepted):

"14. On 16 April 2019, I attended a meeting with Ms Samson, Mr Swart and Mr Jones to discuss the medical suspension and what the Trust saw as the next steps to support Ms Samson. This was the first time that we had met with Ms Samson after her telephone call with Mr Swart which commenced the medical suspension. We met with her to reiterate the reasons why the medical suspension had been imposed, and to make sure she was okay and that she had understood those reasons and the next steps.

15. Our aim at that stage, and throughout the process was to get her back to work in a safe way, and ensure she was well enough to return to work and supporting her through the suspension. Ms Samson's letter to the PSA had set out some symptoms that I had never heard of, such as ideomotor phenomenon and hypnosis, as well as the feeling of being possessed, and feeling as though she was being attacked in her "private parts" [p.342, paragraphs 1 to 3]. Due to this, we felt it was important that we receive medical input and advice and so it was agreed that Ms Samson would attend an OH appointment, but would also engage with the Single Point of Access Team at West London.

16. We agreed that Ms Samson would meet with myself and Mr Jones for a review in two weeks' time, by which time we hoped to have received

the relevant medical advice. We confirmed that the medical suspension would remain in place until this stage.

17. During the meeting, Ms Samson was clear that her view was that she was fine and not suffering any ill-health or medical condition. She expressed that she felt that she was the subject of covert hypnosis, potentially by her colleagues, which she considered was part of a pattern of bullying behaviour. I asked her to provide details of the alleged bullying so I could investigate this fully, but Ms Samson refused and stated she did not want to share this information or for me to take it forward.

...

19. As Matron, in light of what Mr Samson was recounting in relation to her symptoms, I was unsure if there was an underlying mental or physical health condition that could account for her symptoms. On reading her letter, I was concerned that there was a suggestion of people following her, and her experiencing these symptoms at home as well; it appeared that she felt there was a wider conspiracy which seemed like paranoia to me. My concern was that if she was having these types of thoughts when working on the ward with vulnerable patients, and also with their families, this posed a risk to patient care. In addition, at this stage, I was unsure if her previous refusal to give patients their clinically indicated medication was related to the symptoms she said she had experienced."

The claimant's appointments with Dr Kehoe of 18 April and 2 May 2019

34 The claimant then saw Dr Kehoe on 18 April 2019. Dr Kehoe described that meeting and what she concluded from it in paragraphs 11-23 of her witness statement, which we accepted. Dr Kehoe then prepared and sent the report dated 24 April 2019 at pages 356-357 to Miss Porter, stating Dr Kehoe's view that the claimant was not fit for work at present. The whole of the body of the letter was of particular importance, and we therefore set it out now.

> "Xandra was medically suspended on 12th April 2019. A referral was made to the Single Point of Access Service at West London Mental Health Trust. Xandra unfortunately missed both their calls and states that she did try to phone back but was unable to get through.
>
> There are ongoing concerns about Xandra's health and behavior. [Sic] She tells me that she has been having unusual experiences for the last 3 months which have caused her concern. So she contacted the Professional Standards Agency and she has also been to the Police and an Urgent Care Centre. Due to her concerns she moved home and unfortunately has not registered with a GP near her current address.

In my opinion Xandra is not fit for work. I have advised her that she does need to be assessed by the Singe Point of Access Team and I telephoned them today whilst she was with me. They provided a specific time at which they will phone her for an assessment and she is aware of this. They are also sending her a text as a reminder.

In my opinion it is important that she is properly assessed to determine whether there is an underlying medical condition affecting her health. She is convinced that there is not. She will need to be cleared by Occupational Health before she can return to work and a written report on her psychological health will be required before a return to work can occur. She was understandably unhappy about this as she does not feel there is any reason to keep her away from work.

The Singe Point of Access Team asked me if I could provide them with further information as it would be helpful before the telephone consultation next week. However Xandra refused to give consent for this although I explained to her that it would be in her interest. If she changes her mind in the future I would be happy to communicate directly with any assessing team."

35 The whole of the passage in paragraphs 11-23 of Dr Kehoe's witness statement was material, but we found the following paragraphs (16-18) to be of particular importance:

'16. Having discussed what Ms Samson was experiencing - which I identified as symptoms - Ms Samson was adamant that what she was experiencing was true, and did not accept that they potentially might be symptoms of an underlying mental health condition. I felt they could be symptomatic of psychosis, although I did not make a formal diagnosis and did not discuss this potential diagnosis with Ms Samson at the time. Ms Samson would not entertain the possibility that these experiences might not be real, and became quite irritated that I would suggest this.

17. Ms Samson being so adamant that her experiences were real and not even entering into a discussion about any other possibilities was just as concerning to me clinically as the symptoms she was exhibiting as set out in her email to the PSA. I concluded that she did not have any insight; if an individual can at least consider the possibility that they have been misunderstood or something might be wrong that needs further investigation, I would conclude they had insight. Ms Samson did not display any of that. Further, she did not really give any reason as to why she was so ad [sic] adamant nothing was wrong; I recall she made reference to the fact that she was a healthcare professional and so would know if something was a symptom.

18. My recollection was that Ms Samson was very guarded in what she was saying, weighing up what she would or would not say. What she did say during the consultation only cemented my concerns:

    a. Ms Samson made reference to having suffered similar symptoms at her previous place of work, which had led to a Nursing and Midwifery Council (NMC) investigation;

    b. Ms Samson referred to experiencing these symptoms at home as well, which necessitated her moving to another apartment;

    c. Ms Samson referred to having tried to get help from the police;

    d. Ms Samson referred to 'demented patients' on the ward getting more agitated;

    e. Ms Samson thought she was electro-magnetic radiation sensitive and that she wanted to find a practitioner who she felt understood that problem;

    f. Ms Samson complained of being bullied, but said she did not know from whom;

    g. Ms Samson reported that she had stopped watching TV has she had heard "comments" from the TV and radio;

    h. Ms Samson stated that when she was last on duty, there were heating issues on the ward which she felt was due to exposure to fumes;

    i. Ms Samson said that she had suffered discomfort "scattered symptoms" on public transport, and felt as if she was being choked; and

    j. Ms Samson admitted to feeling irritable as she felt she was being monitored which affected her "disposition", although she felt she was coping well.'

36 The letter dated 18 April 2019 at pages 351-353, i.e. the claimant's second claimed public interest disclosure, in effect repeated the content of the email to the PSA at pages 342-343. In addition, it complained about the medical suspension and it contained the following paragraphs (the final two paragraphs on page 352):

36.1 "As a health and safety concern, I have also mentioned that there seems to be an issue with the thermoregulation (heating) and the ventilation in

our clinical area (Acute Medical Unit). I have raised in my email to the Professional Standards Authority that this creates an environment that makes us more vulnerable to covert hypnosis as this affects our sensorium/ state of consciousness on top of the other health concerns that this may cause. I am currently recovering from colds/upper respiratory symptoms as a result of the above environmental condition in the clinical area. I would appreciate if the management could put something in place to make the clinical area safer for everyone in terms of the above environmental aspects."

36.2 "I have attended the Occupational Health Department on 18 April 2019 at 1330H and was seen by Dr. Mary Kehoe. I am, however, concerned that the discussion we had was not very effective, which makes me feel vulnerable. I thought it would have been better to rule out/ investigate other possible causes of my experience rather than relate this to a mental health issue."

37 Dr Kehoe's witness statement described what happened at her second meeting with the claimant in the following passage (in which reference is made, in our view wrongly, to the document at pages 378-379, since it was not sent until 11 May 2019; we have set it out in paragraph 39 below; with that exception, we accepted the entirety of the following passage):

"26. The next OH appointment took place on 2 May 2019. We discussed the telephone consultation that she had had with the Single Point of Access team, and she told me she had been discharged with no further action. On discussing further, I understood that she had told them there was no need for her to be assessed as she had no mental health issues, and so the discussion she had with them was very brief [p.378-379].

27. Ms Samson told me she had been to her GP and had blood tests, and so it was decided that it would be helpful for me to have sight of those results and communicate directly with her GP to see if she could be helped by that route. Ms Samson was of the view that my corresponding with her GP would confirm she had no underlying health conditions. However, in my view, the very fact that she had gone for blood tests with her GP was symptomatic of the potential mental health condition. This is because Ms Samson had expressed that the reason she sought blood test was due to concerns about external influences on her - that was concerning to me.

28. In addition, I was not clear how far Ms Samson had disclosed to her GP about the nature of the symptoms as she had set out in her email to the PSA. Without that information, I was concerned her GP did not have the full picture, and would not be able to make a full assessment of the situation. Ms Samson always presented well-groomed, calm, and spoke clearly, although what she said and expressed was often

worrying from a medical perspective. On an initial or cursory view, you would not consider that Ms Samson was ill, however the patterns of thinking that she demonstrated, particularly regarding what she felt was influencing her, did indicate something was not quite right.

29. Again, Ms Samson expressed that she had concerns about her apartment and had contacted the police; to me this was indicative of ongoing symptoms.

30. I wanted to try and get further information from the OH department at her previous place of employment to see if they shed any light of Ms Samson's position and if they demonstrated that these experiences had been going on any longer. Ms Samson agreed to my seeking to obtain these prior OH notes, and also consented to me writing to her GP.

31. In preparing my correspondence to her GP, given my reservations about how much they knew, I wanted to make sure they were aware of the letter to the PSA, particular with regards to Ms Samson's allegations of covert hypnosis, and how this spanned both the Trust, and her home.

32. I suggested that in my correspondence to her GP, I set out my recommendation that she be reviewed by a psychiatrist, however Ms Samson refused to allow me to mention this. I did explain why I felt this would be helpful to her, particularly in facilitating a return to work, but she continued to refuse.

33. My advice remained that Ms Samson was not fit for work and that she required further assessment to make a diagnosis, and this was set out in my report to Ms Porter dated 2 May 2019 [p.364].

34. I was very concerned about Ms Samson returning to work, and in my mind until she was assessed by a psychiatrist and there was a diagnosis, or it was confirmed that there was no underlying medical condition, it was impossible for Ms Samson to return to work. I could see that it was going to be difficult to progress matters even at this stage, as Ms Samson had not changed her view at all, and would not consider the possibility that something might be amiss.

35. Ms Samson refused to agree that a referral was necessary, and did not agree to a referral to a psychiatrist. She was clear that the reasons for her refusal were that she did not accept that she was suffering from any symptoms.

36. She repeated the view that she was a healthcare professional and would have recognised symptoms if she had them, and would have

disclose them. At no point did Ms Samson express concern that a psychiatric assessment would be inappropriate because of any similarity of the word ‘psychiatric’ to a word in her first-language. If she had, I would have immediately assured her that there was no correlation to any sexual assessment; however, as a nurse within the NHS, and working in an acute medical unit who would have psychiatrists attending fairly regularly to speak with patients, I would have expected her to have a good understanding of what a psychiatrist is, and their role, considering she had also worked in the NHS for a reasonable amount of time at that stage. Ms Samson’s command of English was very good, and there was no indication that she was misunderstandings [sic] what I was suggested [sic]; to the contrary, she seemed very clear on what a psychiatric assessment would entail and simply refused to engage as she did not feel she was suffering from symptoms that would indicate it was medically or clinically necessary to undertake such an assessment.

37. The rigidity of Ms Samson’s position was also concerning to me. While I felt that an underling mental health condition was clinically indicated, at all times, I was clear that I felt a psychiatric assessment would assist one way or another - either by clearing her medically and confirming she is fit to return to work, or by providing a formal diagnosis and recommending treatment. In my experience, although individuals might be hesitant to undergo further assessment, usually, they accept that there is merit in attending, and even if they are adamant that they are entirely well, they accept the assessment as they believe they will be proved correct. The fact that Ms Samson would not even engage on the premise that the psychiatric assessment would confirm her position was to me, indicative of a lack of insight.

38. I arranged for Ms Samson to have another OH appointment with me on 3 June 2019, hopefully by which point I would have received information from her GP and the previous OH department. The letter from the GP was based on a brief mental health assessment and stated that Ms Samson was well [p.387]. The OH letter was dated from 2017 and confirmed that at that time she was well and fit for work.”

Subsequent events, including the claimant’s dismissal

38 The letter at page 387 was dated 20 May 2019. We set out its content in paragraph 40 below. The claimant had in fact before then procured the sending of a letter from her GPs’ practice to the respondent. That letter was dated 24 April 2019, was addressed “To Whom It May Concern”, was written by Dr M Maloufi and was at page 355. It was in these terms:

"This letter is to confirm that the patient named above has been registered at this GP surgery.
I met her today and we discuss her health concern. She agreed to have full blood screen.
She was also discharge from SPA as they had no mental health concern.
I do not see any reason for Miss Samson not to return to work any time soon.

Please contact the GP surgery on 0203 313 4100 for any further clarification."

39 However, on 11 May 2019 Setina Mandiveyi on behalf of the SPA completed and sent the "Outcome of Initial Triage" form at pages 378-379, which contained this text in the box headed "Summary of Triage - Outline of telephone conversation / reasons for team decision":

'Dear Dr Maloufi and the team

SPA had a brief with Xandra [sic] on the 22/04/2019 following a referral from David Jones-Human Resources Directorate Northwick Park Hospital

Xandra responded to my call promptly. I introduced myself and explained the reason from my call. Xandra reported that she had brought a concern to the management however was referred to occupational health who then send referral to SPA for assessment. Xandra told me that she had no idea why occupational health referred her for mental health assessment. She was adamant that it was to do with her concern that she raised but had nothing to do with this referral. I briefly explained some of the issues raised however told me that there was nothing wrong with her mental health. She added that she was a fit person able to carry out her duties without any problems.

She told me that she would not want to discuss what the concerns were. She then reported that she raised patient safety concern at work and the management thought she needed to be seen by occupational health. I tried to explore but she repeatedly told me that she was fine.

She said "I don't need any mental health support because my problem is not a mental health issue. I don't think I will benefit from mental health service."

Xandra reported that she will be seeing her GP tomorrow, therefore will discuss with her GP if she need any support. Have not been to work since 12th of April. She told me that it was management decision to stop her from working for now.

Following brief triage with Xandra SPA had on going follow ups to and from the referrer as he believed Xandra needed a mental health assessment before [returning] to work.

On the 24/04/2019 I had a briefly conversation with Dr Maloufi who had seen the client, however had different opinion in regards to Xandra's mental state.

On the 10/05/2019 SPA received an email from referrer David Jones advising SPA to close the referral stating that Xandra had an arrangement with her GP. Hence SPA has made the decision of discharging Xandra to the care of her GP. No role for SPA at this stage."

40 The letter from the claimant's GPs' surgery dated 20 May 2019 at page 387 was sent "To Whom It May Concern", was signed by Mr M Mohseyni and was in these terms:

"I am writing at this lady's request and with her consent to confirm based on a brief mental health assessment carried out today; there is no indication that she is suffering from any mental health illness.

I trust this is helpful."

41 In fact on the same day, 20 May 2019, Dr Kehoe's line manager, Dr Shriti Pattani, the respondent's "Clinical Director, Occupational Health Department", sent the email at page 388 to the respondent's Mr Philip Spivey, which was described in the following brief passage of Dr Kehoe's witness statement which helpfully (and, we concluded, accurately) summarised the events which occurred after 2 May 2019 and before Mrs Mukherjee became involved in the situation:

"39. I understand that as a result of my advice that Ms Samson was not fit for work, the medical suspension continued. I believe Ms Samson complained about this, and requested a review of the situation, including of my assessment. As such, my line manager, Dr Shriti Pattani (Clinical Director of the OH department) reviewed my notes of the assessment, and my reports and clinical reasoning. As set out above, I make comprehensive notes of my assessment, even more so when it becomes clear that the individual does not agree with my clinical view.

40. I believe Dr Pattani confirmed that my notes were clear and through and she had no concerns about the assessment. Dr Pattani confirmed she agreed with my conclusion that a further assessment, ideally by a psychiatrist was required before Ms Samson could be certified as fit to return to work. Dr Pattani advised Mr Philip Spivey (Deputy Director of

HR) of this, as he was undertaking the wider review of the medical suspension and Ms Samson's complains about the process [p.388].

41. I believe that in light of Ms Samson's concerns, she was offered a third OH review with an OH department external to the Trust, and therefore 'independent'. I was not involved in that further referral and was not aware of the outcome until preparing this witness statement for the purposes of this Employment Tribunal claim. I note that Ms Samson was reviewed by Dr Janet Rees (Speciality Doctor in Occupational Medicine) of Imperial College Healthcare NHS Trust - Dr Rees is not known to me and I have never spoken to her. Dr Rees confirmed that Ms Samson was unfit for work, and would remain unfit whilst she remained untreated. It was Dr Rees' view that there was an underlying medical condition affecting Ms Samson, and that she required further medical intervention to enable Ms Samson to return to work in a timely manner [p.467-468]. I note Dr Rees also wrote to Ms Samson's GP to ask him to reassess her mental state in light of the findings she had made [p.469]."

42 Dr Pattani's email at page 388 was brief and to the point:

> "I have spoken to David [i.e., it was clear, David Jones]. This lady was seen recently 02.05.19 in OH and the notes are very clear and thorough. Based on the information I agree with the outcome that a psychiatric assessment and report is needed before a further fitness to return to work assessment is conducted."

43 The letter from Dr Rees at page 469 was dated 23 August 2019 and related to an examination of the claimant in clinic on 16 August 2019. Among other things, Dr Rees wrote:

> "In view of the effect of her health beliefs and persistent nature of her symptoms I am of the opinion that she is currently unfit for work."

44 In the meantime, we saw, on 30 May 2019 the claimant sent the letter at pages 396-398 to the Public Protection Officer of The National Hypnotherapy Society, "further to [their] recent contact via email and telephone". The latter sent the claimant the email of 5 June 2019 at page 426, in which this was said:

> "In [your letter of 30 May 2019] you have referred to our telephone conversation and I do have a concern that part of our call may have been misinterpreted. The Society's position is not that covert hypnosis is possible, but rather that some individuals may attempt to practice hypnosis outside of a commonly understood ethical framework. The cornerstone of our organisation is the practice of hypnotherapy within professional boundaries, with our members committing to work ethically and responsibly. It is not therefore possible for the Society to directly

source you an individual with expertise in the concept of covert hypnosis, we would not have that resource."

45 In addition, on 7 June 2019 Dr Maryam Akbari had sent a further letter on behalf of the claimant's GPs' surgery "To Whom It May Concern". It was at page 427 and was in the following terms:

> "This is to confirm that the [sic] Ms Xandra Samson has been registered with us since 1st September 2017, during this period there is no record of her being diagnosed or treated as any confirmed medical or mental health issues.
> There is history of work related stress and anxiety recorded on our notes on 28/12/2017, however it appears that she has recovered from this based on GAD-7 scores she did recently with my colleagues.
> She states that she has improved with her coping mechanism specially related to work stress.
>
> Please contact the GP surgery on 0203 313 4100 for any further clarification."

Mrs Mukherjee's actions, including the claimant's dismissal

46 Mrs Mukherjee became the respondent's Head of Nursing for Emergency and Ambulatory Care in September 2019. She first came to know about the claimant's situation to any material extent in August 2019. Mrs Mukherjee described how she became involved and her initial reaction to what she read about the claimant's situation in paragraphs 7-13 of her witness statement, which we accepted. The most relevant part of that passage for present purposes is paragraph 10, which was in these terms:

> "On my initial review of the correspondence, I was also concerned about the matters that Ms Samson had said she was experiencing physically and mentally while working clinically on the Acute Medical Unit (AMU). I was very troubled by her account that she was hearing things and I felt that some of the matters she was explaining in her correspondence to the PSA and what I understood from the medical suspension review letters, did not make sense."

47 The claimant refused to give the respondent until she was required to disclose it in these proceedings a copy of the report which Dr Rees had prepared of her examination of the claimant. On 7 September 2019 the claimant sent the email at page 491 to Mrs Mukherjee in the following terms.

> "Dear Tricia,
>
> I have spoken to the occupational health specialist at Imperial on Friday 6 September 2019. She has told me that I remain 'unfit for work' because

she believes I suffer from ‘psychosis’, which I am certain is an incorrect diagnosis.

Throughout our conversation, I have noticed that she was engaging me in an argument which I figured was a simulation of a conflict scenario. I have told her that I am concerned I am being experimented upon.

This has been the third occupational health opinion I had and I noticed that there appears to be a pattern.

I have told the clinician that I do not wish for this to continue because this is unethical - I have not provided consent to participate in this undertaking. I requested that she provides this feedback to the management.

I will contact Imperial Health at Work on Monday 9 September 2019 to request that a DATIX incident report is logged based on this.

I hope to hear your feedback about this as soon as possible. I remain in good health and can be functional at work and would not wish to remain on medical suspension when this is not necessary.”

48 There was then an exchange of correspondence which led to Mrs Mukherjee inviting the claimant to state a grievance about the matter. As a result the claimant sent the letter at pages 518-520 to Ms Mukherjee. While the letter spoke for itself, what was most important here was how Mrs Mukherjee received, and perceived, its content. In paragraph 17 of her witness statement, Ms Mukherjee said this.

“17…. This letter also contained allegations that I felt were disturbing, and along the lines of the previous concerning allegations she had made, including:

a. her belief/suspicion that she was being used as a subject for an experiment, as part of the Masters study being undertaken by a Matron at the previous NHS Trust she worked at;

b. that the matters were also happening outside of work, and that she felt she was being monitored 24/7 by a group of people;

c. she alleged she was being exposed to environment conditions that she felt was gas lighting activity;

d. that she was having noise nuisance at home that she attributed to this same group of people monitoring her;

e. that this group seemed to have wide influence, including over the NMC, Metropolitan Police and PSA, and so the group might have a form of overarching authority as a research privilege;

f. that the practitioners of this research were controlling her behaviour with devices/tools to simulate symptoms, which she found to be an abusive pattern;

g. that her family medical history included unconfirmed benign pituitary tumours, which she felt the 'group' were basing their case on;

h. that the practitioners were using a sound transmission device to gaslight her, and the content of their message was a form of brainwashing; and

i. that the experiment was not being performed in safe conditions."

49 The claimant after that, as indicated in paragraph 47 above, persisted in refusing to give the respondent a copy of the report of Dr Rees. On 31 October 2019 Mrs Mukherjee had a meeting with the claimant which Mrs Mukherjee described as a "medical suspension review" meeting, and at which she told the claimant in advance that she could if she wished be accompanied by a union representative or a workplace colleague. The claimant attended alone and when asked whether she was happy to proceed alone, said that she was. During the meeting, Mrs Mukherjee asked the claimant to agree to seeing a psychiatrist, since the respondent was now (as Mrs Mukherjee put it in paragraph 24 of her witness statement, which we accepted; it was part of the passage in paragraphs 21-38 of that witness statement, all of which we accepted) "in a difficult situation because there were now three OH practitioners who had felt that Ms Samson was not fit to work, and required further assessment, ideally by a mental health specialist/psychiatrist before she could be certified as fit to work." However, the claimant refused to agree to see a psychiatrist.

50 Of the rest of that passage of her Mrs Mukherjee's witness statement, we found paragraphs 30 and 31 to be of particular importance. They were in these terms.

" 30. Although I am not a specialist in mental health conditions, it seemed that this was more an issue with Ms Samson's health, rather than genuine things taking place in the AMU. I was aware that Ms Porter had undertaken a review of the AMU, interviewing staff members and had not found anything that was at all similar to what Ms Samson had described. Crucially for me was the fact that Ms Samson was adamant that there was a wider conspiracy against

her, involving other governance/public agencies and organisations, including the police, her local councillors, and the NMC. I recall at one point Ms Samson expressed the view that they were corrupt as well whenever she received written correspondence from them, or felt that their letters were being intercepted [p.541].

31. In our meeting, I could see (as far as you can) that Ms Samson appeared physically well and this was what she was relying on as a reason for the medical suspension to be lifted and for her to be allowed to return to work. However, the concerns weren't around her physical abilities, and it was about concerns about her mental health and the best way to either get Ms Samson the treatment she required or confirm that there was no underlying mental health condition, was for her to be assessed by a psychiatrist."

51 In addition, because of the complaint in paragraph 5.9 set out in paragraph 10 above, we need to record that in paragraphs 32-33 of her witness statement, Mrs Mukherjee said that the claimant had on 5 and 11 November 2019 confirmed that she did not agree to undergo a psychiatric assessment and had instead recommended that a risk assessment be carried out, and that as a result, she, Mrs Mukherjee, agreed to carry out such a risk assessment. However, she then decided not to do so as, she said, she needed the claimant to be "medically cleared" and that she did not feel that she could "undertake this risk assessment without the appropriate clearance to return to work first." We accepted that evidence of Mrs Mukherjee.

52 In the light of the claimant's continuing refusal to see a psychiatrist, Mrs Mukherjee concluded (as she stated in paragraph 34 of her witness statement) that the respondent "had no option but to proceed to a formal hearing to consider next steps". As a result, Mrs Mukherjee in the letter dated 15 November 2019 at pages 532-533 invited the claimant to a meeting on 2 December 2019. The material part of the letter was in these terms:

> "Following your suspension on medical grounds on 12th April 2019 and subsequent review meetings, to date we have been unable to receive an occupational health report and you have indicated that you would not undertake a psychiatrist assessment to determine whether you are fit to return to work.
>
> As you are aware, in order for you to return to work we require you to be cleared by Occupational Health or to be assessed by a psychiatrist to confirm that you can return to work. To date you have not consented for the latest Occupational Health report to be released. In addition, we gave you the option of being assessed by a psychiatrist and at our latest review meeting we agreed that you would confirm whether you would undertake a psychiatrist assessment by 19 November 2019. However, you have now declined this.

> You have been informed on numerous occasions that in order to be able to move forward we require these clearances. In the absence of any positive confirmation that you can return to work, or that you are willing to engage in the process, there is no reasonable prospect of you returning to work, so there appears to be no way forward to resolve this at the present time. Therefore, I am writing to inform you that you are required to attend a meeting to discuss your current suspension and determine how to take this forward. I must advise you that a potential outcome of the meeting could be dismissal."

53 In paragraph 36 of her witness statement, Mrs Mukherjee described what happened next:

> "36. Ms Samson responded in detail to the outcome letter of the medical suspension review letter and the invite to the formal hearing to consider the medical suspension by way of her own correspondence dated 17 November 2019 [p.534-540]. In that letter, she raised a number of concerns about the content of the summary outcome letter and the decision to progress to a formal hearing/meeting. She also repeated some of her allegations that there was a conspiracy, and set out her reasons for refusing the psychiatric assessment (lack of informed consent, coercion and no indication for it - p.537). The content of that letter was also strange to me as she was highly suspicious and alleging there had been significant errors in the process which she attributed to deliberate actions."

54 The hearing of 2 December 2019 took place. Mrs Mukherjee conducted it. She described what happened at it in paragraphs 39-44 of her witness statement, which we also accepted. In paragraph 42, Mrs Mukherjee said this:

> "Ms Samson then had the opportunity to present her case. She explained that that she had been misdiagnosed by the external OH department and had made a formal complaint about that assessment. Ms Samson said that to move forward the Trust should undertake a risk assessment which would confirm that she was fit to return to work. Ms Samson repeated her reasons for refusing the psychiatric assessment, stating that she felt that the external OH and the Trust's OH department was "group think" and part of a research activity and this was the reason why they had come up with the same diagnosis. She believed that she was being tested on because she was a nurse."

55 Mrs Mukherjee's decision was that there was no alternative in the circumstances to the claimant's dismissal. Mrs Mukherjee told the claimant that outcome in person on 2 December 2019 and informed the claimant of her right to appeal against it. Mrs Mukherjee then sent the letter at pages 548-551 dated 4 December 2019 (1) stating those things and what had happened at the

hearing of 2 December 2019, and (2) asking the claimant to say in writing by 11 December 2019 whether she took issue with any part of the record in the letter of the hearing. In the letter, Mrs Mukherjee stated this as the reason for the claimant's dismissal:

> "I determined that you have been seen by 3 different Occupational Health doctors. Two of them confirmed that you are unfit to return to work. The latest Occupational Health assessment was conducted in August 2019. However, we have not received the Occupational Health report from them since you have not consented for this to be disclosed. In addition, despite repeated requests for you to undertake a psychiatric assessment to confirm whether you are fit to return to work, you have declined this.
>
> I therefore determined that you have been given ample opportunities to be assessed by a psychiatrist but you have refused this. I am satisfied you have been advised on numerous occasions that in order to be able to move forward and resolve your suspension on medical grounds we require professional advice as we are unable to determine whether you are fit to return to work. You have been suspended on medical grounds for almost 8 months, the Trust has taken reasonable steps to attempt to resolve the situation and you cannot remain on medical suspension indefinitely.
>
> Having carefully considered all the information, I concluded that there is no reasonable prospect for me to obtain the necessary evidence to enable me to make an informed decision about your suspension and you returning to work. I understand that you are not prepared to undertake a psychiatric assessment and that you have not consented for the Occupational Health report to be disclosed despite the full explanation offered for this requirement. I have considered your comments and carefully considered our position to determine how to proceed with your current suspension on medical grounds and concluded there is no way forward to resolve your suspension at the present time.
>
> Having come to these conclusions, I determined that there is no other option but to dismiss you on the grounds of some other substantial reason."

Post-dismissal events

56 Mrs Mukherjee's witness statement described in paragraphs 45-48 what happened after she had sent the letter of 4 December 2019 at pages 548-551. Those paragraphs were a succinct and in our judgment accurate statement of the material events. Given the scope of the claimant's case (as set out in paragraph 10 above), we do not need to say more than that the claimant eventually did not press an appeal, although she did (as recorded in paragraph

45 of Mrs Mukherjee's witness statement) allege that the letter of 4 December 2019

> 'was intended to cause "cognitive distortion or promote arbitrary inference/cognitive bias" [and that Mrs Mukherjee] had breached various NMC guidelines/codes of conduct as [her] letter appeared to be written by "an experienced writer as in tabloid journalism".'

Ideomotor phenomenon

57 We had no idea what "ideomotor phenomenon" (the term used in the email from the claimant to the PSA dated 8 April 2019 at pages 342-343 which we have set out in paragraph 29 above) was, and the claimant did not put before us any evidence which explained what she meant by that phenomenon. With some hesitation, but out of a desire to ensure that the claimant's case was properly understood, we carried out a search on the internet when considering the claims. We saw that there was in Wikipedia this statement:

> 'The ideomotor phenomenon is a psychological phenomenon wherein a subject makes motions unconsciously. Also called ideomotor response (or ideomotor reflex) and abbreviated to IMR, it is a concept in hypnosis and psychological research. It is derived from the terms "ideo" (idea, or mental representation) and "motor" (muscular action). The phrase is most commonly used in reference to the process whereby a thought or mental image brings about a seemingly "reflexive" or automatic muscular reaction, often of minuscule degree, and potentially outside of the awareness of the subject. As in reflexive responses to pain, the body sometimes reacts reflexively with an ideomotor effect to ideas alone without the person consciously deciding to take action. The effects of automatic writing, dowsing, facilitated communication, applied kinesiology and Ouija boards have been attributed to the phenomenon.'

Miss Porter's response to and investigation of the allegations in the claimant's claimed public interest disclosures

58 Miss Porter's witness statement contained the following passage (which we accepted) about the claimant's allegations about what was going on at the AMU as reported by the claimant in her emails at pages 342-343 and 351-353.

> "19. As Matron, in light of what Mr Samson was recounting in relation to her symptoms, I was unsure if there was an underlying mental or physical health condition that could account for her symptoms. On reading her letter [at pages 342-343], I was concerned that there was a suggestion of people following her, and her experiencing these symptoms at home as well; it appeared that she felt there was a wider conspiracy which seemed like paranoia to me. My concern was that if she was having these types of thoughts when working on

the ward with vulnerable patients, and also with their families, this posed a risk to patient care. In addition, at this stage, I was unsure if her previous refusal to give patients their clinically indicated medication was related to the symptoms she said she had experienced.

20. On 18 April 2019, Ms Samson wrote a letter [p.351-353] in response to the formal letter from Mr Swart, expressing unease about the OH appointment she had had with Dr Mary Kehoe (Associate Specialist in OH) [p.352].

21. Ms Samson's letter also expressed that she had raised these matters relating to the symptoms she was experiencing as a health and safety/patient safety concern. I therefore took steps to informally investigate what she was alleging and review the thermoregulation within the AMU and her allegations that patients and colleagues were being affected. I found absolutely no evidence of any covert hypnosis, electromagnetic frequency or radiation exposure."

The respondent's Datix system

59 At pages 697-751 there was a copy of the respondent's "Incident Reporting and Investigation Policy", which was known as the Datix system. On page 708, in paragraphs 5 and 5.1, the scope of that system was stated as follows:

"The process outlined in this policy should be used to report all accidents, incidents or near misses.

5.1 Reporting of Incidents Pathway (Appendix A)

The reporting procedure covers a wide range of situations. In general, all staff members must report:

- An event that has occurred contrary to LNWUH accepted standard of patient care.
- An incident whereby a member of staff or the public has been injured or could have been injured or put at risk out of or in connection with LNWUH work activity.
- An event that could place LNWUH in an adverse legal or media interest position.
- All pressure ulcers grade 2 or above
- All cases of MRSA and Chlostridum Difficile".

The parties' submissions

60 Both parties put detailed written submissions before us, for which we were grateful. We took them into account fully, but we refer to them below only in so far as necessary.

Our conclusions on the claimant's claims

The claim of detrimental treatment for whistleblowing

61 It is convenient to deal first with the claimant's claim of detrimental treatment within the meaning of section 47B of the ERA 1996 for the making of a protected disclosure within the meaning of section 43A of that Act. That claim was made in respect of the emails at pages 342-343 and 351-353. Given our conclusion stated in paragraph 64 below, what we say in the next two paragraphs below is said purely for the sake of completeness.

62 The claim in respect of the email to the PSA at pages 342-343 the material part of which we have set out in paragraph 29 above was not sent to the respondent, the claimant's employer. It therefore did not satisfy the condition in section 43C(1)(a) of the ERA 1996 and therefore it could be relied on in the circumstances only if the conditions in sections 43G or 43H were satisfied.

63 As far as events after 18 April 2019 were concerned, however, given that

63.1 the claimant had permission to rely on the email at pages 351-353, which was sent to the respondent, and

63.2 the email at pages 351-353 repeated the content of the email at pages 342-343,

there was no need for the claimant to rely on sections 43G and 43H in relation to the ongoing effect of the things said by the claimant in the email at pages 342-343.

64 What was fatal to the claimant's claims under sections 47B and 103A of the ERA 1996 was that we concluded that neither the email at pages 342-343 nor the email at pages 351-353 constituted a disclosure within the meaning of section 43B of the ERA 1996. That was because in neither of those emails was there in our judgment the disclosure of information which, in the reasonable belief of the claimant, was made in the public interest and tended to show either

64.1 that a criminal offence had been committed, was being committed or was likely to be committed,

64.2 that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he, she or it was subject, or

64.3 that the health or safety of any individual had been, was being or was likely to be endangered.

65 We came to that conclusion for the following reasons.

65.1 At first sight, it was impossible to believe that there had been any kind of covert hypnosis at the claimant's workplace. That initial conclusion was reinforced by the content of the email that we have set out in paragraph 44 above.

65.2 The other things described by the claimant in the email at pages 342-343, which we have set out in paragraph 29 above, could in our view not reasonably be believed to indicate a breach of any legal obligation, let alone a crime, or to tend to show that the health or safety of an individual was being endangered. That was in part because the reference to an "ideomotor phenomenon" added (see paragraph 57 above) nothing to the reference to covert hypnosis in the circumstances. It was also because it was in our view inherently unlikely that

65.2.1 the respondent would have caused or permitted "gaslighting through the use of low frequency soundwaves", or

65.2.2 the respondent would have sought to control via "an altered state of consciousness" or "poorly controlled thermoregulation (heating) and inadequate ventilation".

65.3 In addition, given the evidence of Miss Porter in paragraph 21 of her witness statement, which we have set out in paragraph 58 above, we concluded that the claimant could not reasonably have thought that the respondent had caused any "electromagnetic ... or radiation exposure". We noted that Miss Porter did not there refer to the heating and the ventilation of the AMU, but that did not affect our conclusion stated in the preceding subparagraph above.

66 However, in any event, in our view the claimant's suspension was initiated by Mr Swart and subsequently continued by Miss Porter and Mrs Mukherjee purely because they were concerned about the claimant's mental state and her ability to do her job safely, i.e. without a palpable risk to at least patients, and because they were unable to come to a conclusion that she could do her job safely. That was for the reasons stated by

66.1 Mr Swart in paragraphs 7-10 of his witness statement, which we have set out in paragraph 30 above,

66.2 Miss Porter in paragraph 19 of her witness statement, which we have set out in paragraph 33 above, which was supported by (1) the factors to which Miss Porter referred in paragraphs 6-8 of her witness statement,

which we have set out in paragraph 32 above, and (2) the documents to which those paragraphs referred, in particular those at pages 335-341, and

66.3 Miss Mukherjee in paragraphs 30 and 31 of her witness statement, which we have set out in paragraph 50 above.

67 In addition, Mrs Mukherjee's decision that the claimant should be dismissed was in our judgment based purely on the factors to which she referred in her decision letter, the material part of which we have set out in paragraph 55 above.

68 For those reasons, the claims of detrimental treatment within the meaning of section 47B of the ERA 1996 for the making of a public interest disclosure within the meaning of section 43A of that Act, and of unfair dismissal within the meaning of section 103A of that Act, did not succeed.

The claimant's claim of direct disability discrimination within the meaning of section 13 of the EqA 2010

69 We concluded that at no time did any of the witnesses for the respondent who gave evidence before us act to any extent on the basis of a stereotypical view of persons who have, or might have, a mental health impairment. Rather, all of them did what they did purely because of what they perceived to be impairments to the claimant's mental health exhibited by her various statements, starting with her letter to the PSA dated 8 April 2019 at pages 342-343. We came to that conclusion after considering each and every element of the claimant's claims of disability discrimination and after considering all of the circumstances, both individually and cumulatively, in the manner stated in paragraphs 74-107 below. Thus, in all cases, whether or not we state it specifically in those paragraphs, we considered whether there were facts from which we could draw the inference that the claimant had been treated to any material extent as a result of a stereotyping of her as a disabled person by reason of a mental health condition, and concluded that were none. We also considered in each case what was the real reason for the conduct, i.e. the act(s) and/or omission(s) in question.

70 The perceived impairments to which we refer in the second sentence of the preceding paragraph above led to the perceptions of risk stated in paragraph 66 above, which caused the relevant persons (Mr Swart, Mr Porter and Mrs Mukherjee) to act as they did. We repeat: those actions were in no way influenced by any kind of stereotypical view of persons with mental health impairments.

71 Dr Kehoe's views were in our judgment arrived at entirely without any kind of stereotyping of persons who suffer, or might suffer, from a mental health impairment. Rather, Dr Kehoe's views were arrived at entirely as a result of her

view that it was "important that [the claimant was] properly assessed to determine whether there [was] an underlying medical condition affecting her health", as first stated in Dr Kehoe's letter of 24 April 2019 (see paragraph 34 above, where we have set out the material passage of that letter, from which we have taken those words) and subsequently maintained by Dr Kehoe.

72 In our judgment, none of the respondent's acts about which complaint was made by the claimant, as stated in paragraph 5 of the list of issues, which we have set out in paragraph 10 above, was to any extent the result of any stereotyping of persons who are, or may be, suffering from a mental health impairment. We came to that conclusion for the reasons to which we now turn.

Ms Criddle's written closing submissions on the claim of direct disability discrimination

73 Ms Criddle's closing submissions dealt specifically with each of the allegations stated in paragraph 5 of the list of issues. They did so in paragraphs 35-71 of the closing submissions. While Ms Criddle dealt with those issues in a more logical order than that which was in paragraph 5 of the list of issues, for the sake of clarity, we refer to the claims in paragraph 5 below in the order in which they appear there.

Paragraph 5.1 of the list of issues: "Subjecting the Claimant to repetitive requests for a psychiatric assessment"

74 Given our conclusion stated in paragraphs 66-70 above, and in any event, we found no facts from which we could draw the inference that the repeated requests of the respondent for the claimant to undergo a psychiatric assessment were made to any extent by reason of a stereotyping of the claimant as a disabled person by reason of a mental health condition. In any event, we were satisfied on the balance of probabilities that the fact that the claimant was perceived to be at least possibly disabled within the meaning of section 6 of the EqA 2010 had nothing to do with the fact that the respondent made those repeated requests.

75 That meant that the claim stated in paragraph 5.1 of the list of issues had to fail. For the sake of completeness, we need to deal with the submission, stated in paragraph 33 of Ms Criddle's written closing submissions, that the respondent did not perceive the claimant to be disabled because "It did not know whether the Claimant had an impairment which had a substantial adverse effect. It also did not know whether the impairment was long term." We rejected the first of those two propositions, which was in our view fundamentally at odds with the proposition that the claimant's mental state was such that she had to be suspended for the sake of the safety of the patients who would otherwise have been in her care. However, there was some (albeit limited) merit in the second of those propositions. That was because the fact that the claimant persistently refused to see a psychiatrist meant that the respondent did not, and could not

know, nor could it reasonably be expected to know, whether the claimant was suffering from, say, a psychosis which might cease to affect her in the near future. Having said that, the claimant's perceptions as stated in the letter at pages 342-343 did not change at all during the period that the claimant was employed by the respondent, and there was a period of 8 months between the date of that letter (8 April 2019) and the date when the claimant was dismissed (2 December 2019). Thus, we concluded that the claimant was perceived by the respondent's relevant employees to be disabled within the meaning of section 6 of the EqA 2010.

Paragraph 5.2 of the list of issues: "Acting in an offensive, intimidating, and provocative manner on 02 December 2019 whilst the Claimant was being told of the outcome of the meeting regarding the medical suspension"

76 Ms Criddle's submissions on the issue stated in paragraph 5.2 of the list of issues were these:

> "64. The Claimant put no case to Mrs Mukherjee that she had acted in this way. In cross-examination, the substance of her complaint was that Mrs Mukherjee had formed a 'rigid view' that she needed a psychiatric assessment. If that is the high water mark of the Claimant's case, it plainly does not merit the description of 'offensive, intimidating and provocative' behaviour.
>
> 65. The ET will also recall Mrs Mukherjee's unchallenged evidence that the Claimant had offered to buy her a coffee from Costa in the break in the dismissal meeting on 2 December 2019. This points away strongly from even any perception on the Claimant's part that Mrs Mukherjee was acting inappropriately."

77 We agreed with those submissions. We also concluded that Mrs Mukherjee's conduct during the hearing of 2 December 2019 was in no way offensive, intimidating or provocative. In any event, given our conclusions in paragraphs 69 and 70 above, this claim could not succeed.

Paragraph 5.3 of the list of issues: "Persistently responding in short emails to concerns the Claimant raised and not thoroughly addressing the issues the Claimant raised"

78 This third allegation in paragraph 5 of the list of issues needed to be interpreted by reference to paragraph 3 of the claimant's further and better particulars, on which the third allegation relied. The allegation was interpreted neatly (and in our view accurately) by Ms Criddle in the heading above paragraphs 58 and 59 of her closing submissions in the following manner:

> "Failure by Philip Spivey to address the issues raised by the Claimant in his letter dated 30 May 2019 and failure by Tricia Mukherjee in the dismissal letter dated 4 December 2019 to address the issues correctly".

79 We did not hear oral evidence from Mr Spivey. Ms Criddle's submissions on this issue were these:

> "58. Mr Spivey's involvement came about in May 2019 as a result of the Respondent offering an additional review of the decision to medically suspend the Claimant [382-383]. He responded to the issues raised by the Claimant as part of that review correspondence at [399-400; 405-406]. The Claimant's real complaint is that he did not agree with her, which is an entirely different matter.
>
> 59. No case was put to Mrs Mukherjee as to what she had failed to include in the dismissal letter [548-551]. The Claimant accepted that the purpose of such a letter is to summarise the discussion and the outcomes and not to provide a verbatim account of the meeting."

80 As discussed with Ms Criddle during the hearing, it was not helpful to the respondent's case that it had not adduced oral evidence from Mr Spivey to explain why he had not responded to each and every element of the claimant's letters to him to which he responded in his emails at pages 399-400 and 405-406. However, as EJ Hyams said then, it was only if there were in the circumstances any facts from which we could draw the inference that Mr Spivey's failure to respond to each and every such element was to any material extent because of a perception that the claimant was disabled that the failure by Mr Spivey to give evidence would mean that the claimant's case in paragraph 5.3 of the list of issues had to succeed.

81 Mr Spivey's emails at pages 399-400 and 405-406 responded to the claimant's letter dated 27 May 2019 at pages 390-394. In our view Mr Spivey's responses were entirely apt. Certainly, in our view they dealt in substance with the substance of the claimant's letter of 27 May 2019. There was therefore nothing whatsoever in the circumstances which suggested that Mr Spivey, in writing his responses at pages 399-400 and 405-406, had been influenced to any extent by a stereotypical view of persons who are (or may be) suffering from mental impairments. As a result, we found that the complaint stated in paragraph 5.3 of the list of issues relating to Mr Spivey's emails on those pages was not well-founded.

82 As for Mrs Mukherjee's dismissal letter of 4 December 2019 to which we refer in paragraph 55 above, it was in our view a thorough statement of her response to the relevant issues raised by the claimant. In any event, given our conclusions stated in paragraphs 69 and 70 above, the second part of the claim in paragraph 5.3 of the list of issues could not, and did not, succeed.

<u>Paragraph 5.4 of the list of issues: "The Respondent's relevant departments not sufficiently supporting the Claimant"</u>

83 In the heading to paragraphs 68 and 69 of her written closing submissions, Ms Criddle characterised the complaint in paragraph 5.4 of the list of issues in this manner:

> "Claimant not being supported by Freedom to Speak Up Guardians, Health and Safety Manager and Bullying and Harassment advisors in December 2019".

84 Again, that was in our judgment an accurate statement of the complaint (not least because it was in reality a restatement of the heading to paragraph 4 on pages 108-109). Ms Criddle's submissions in response were these:

> "This complaint is plainly ill-founded. The Claimant contacted these various people after her dismissal [581, 583, 608-609]. The proper course for the Claimant to follow, as she was advised by Mr Calderon, Head of Employee Relations, was to appeal her dismissal [584]. She chose not to pursue her appeal even though, as the accepted in evidence, she understood that this meant her dismissal would stand."

85 We agreed. We saw nothing whatsoever in the circumstances from which we could draw the inference that the fact that the claimant was not "supported by Freedom to Speak Up Guardians, Health and Safety Manager and Bullying and Harassment advisors in December 2019" after she had been dismissed was to any extent the result of the application by any of those persons of a stereotypical view of persons who are (or may be) suffering from mental impairments. As a result, we concluded that the complaint stated in paragraph 5.4 of the list of issues was not well-founded.

<u>Paragraph 5.5 of the list of issues: "Not supporting the Claimant by providing testimonials from management in relation to the NMC Fitness to Practice case"</u>

86 The NMC's Fitness to Practise case was brought because of concerns about the claimant's fitness to practise given the things that she had said in her letter dated 8 April 2019 which we have set out in paragraph 29 above. The claimant's complaint in paragraph 5.5 of the list of issues was about the failure by Miss Porter, Mr Jones and Mr Swart to provide testimonials for the claimant. Ms Criddle's response in her written closing submissions to this complaint was as follows:

> "56. It is common ground that Miss Porter, Mr Jones and Mr Swart did not provide the Claimant with testimonials in response to her request for them [407-49].

57. Equally, it is clear that the reason why they did not provide them was because they could not 'support' the Claimant in the way that she wanted them to do i.e. they were not in a position to tell the NMC that they thought that the Claimant was well. The Claimant conceded in cross-examination that it would not have helped her case with the NMC had Miss Porter, Mr Jones and Mr Swart told them that they suspected she was mentally unwell."

87 We agreed. In any event, given our conclusions stated in paragraphs 69 and 70 above, the complaint in paragraph 5.5 of the list of issues could not, and did not, succeed.

<u>Paragraph 5.6 of the list of issues: Not assisting the Claimant with her NMC revalidation</u>

88 Ms Criddle's response to this complaint was in paragraph 70 of her written closing submissions, and was this:

> "The Claimant conceded that the Respondent did not have an obligation to assist her with revalidation as she was no longer employed as at the date of her revalidation in March 2020."

89 We agreed. The complaint stated in paragraph 5.6 of the list of issues was manifestly inapt. It therefore did not succeed.

<u>Paragraph 5.7 of the list of issues: "Sharing the Claimant's Occupational Health letters with other entities (NMC, Single Point of Access Team at West London Mental Health Trust) without the Claimant's consent"</u>

90 Ms Criddle's response in her written closing submissions to this complaint was as follows:

> "50. The Claimant conceded in cross-examination that Mr Jones had not shared her OH report with the Single Point of Access team [§56 Jones w/s].
>
> 51. It is clear that Mr Jones did provide the Claimant's OH reports to the NMC and that he did not have the Claimant's consent to do so [375]. It is equally clear that this was in response to a request from the NMC for this information [376]. The NMC is empowered to require any person to supply information or produce documents relevant to the discharge of their fitness to practise functions (Art 25, Nursing and Midwifery Order 2001). The Respondent was required to comply with that request."

91 We accepted those submissions as being factually accurate. We regarded the issue here as being, however, whether what was done by Mr Jones in

responding to the NMC was done to any extent as a result of a stereotyping of the claimant as a disabled person. We concluded that there was in the circumstances nothing from which we could draw the inference that that was so. We concluded that Mr Jones sent the relevant documents to the NMC solely because he believed that it was necessary to do so. In any event, given our conclusions stated in paragraphs 69 and 70 above, this claim could not, and did not, succeed.

Paragraph 5.8 of the list of issues: "Repeatedly misquoting the Claimant in the minutes of the medical suspension review meetings"

92 Paragraph 8 of the claimant's further and better particulars (i.e. the section below the heading numbered 8) referred so far as relevant only to "the summary of the medical suspension review meeting prepared by Jane Porter". Ms Criddle's response in her written closing submissions to the claim stated in paragraph 5.8 of the list of issues was this:

> "No case was put to Miss Porter as to how she had misquoted the Claimant in the letter at [445-446]. The Respondent repeats the same point as [is stated in paragraph 59 of her written closing submissions, which we have set out in paragraph 79] above in relation to Mrs Mukherjee's correspondence with the Claimant."

93 In fact, Miss Porter's letter starting at page 445, which was dated 25 June 2019, was at pages 445-447. It was long and detailed. The claimant's complaints, stated in detail at pages 110-112, as numbered paragraph 8 of the claimant's further and better particulars, asserted nothing from which, if it was true (which we were prepared to accept for the purpose of considering this aspect of the claim), we could draw the inference that the failure by Miss Porter to include the omitted factual material was to any extent the result of a stereotyping by Miss Porter of the claimant as a disabled person.

Paragraph 5.9 of the list of issues: "Not conducting risk assessments before the medical suspension and during the reviews"

94 Ms Criddle's response in her written closing submissions to this complaint was as follows.

> "45. The Respondent's Sickness Absence Policy does not require a formal written risk assessment to be carried out prior to making a decision on medical suspension [264]. Mr Swart explained that there was an assessment of the risk to the Claimant and her patients before the decision to suspend her was made [§21 Swart w/s]. That self-evidently must be right, because the decision maker must assess whether the facts fall within the scope of the policy and whether the right response to that is carry out a medical suspension.

46. Equally, there was no requirement on the Respondent to carry out a formal written risk assessment when reviewing the suspension. In truth, nothing changed as to the nature and extent of the risk posed by the Claimant throughout the period from 12 April 2019 to 2 December 2019 because the Claimant refused consistently to put the Respondent in possession of further information on which a decision about a return to work could be based. It is not the Respondent's practice to carry out risk assessments on reviewing a medical suspension and such an assessment could not have led to the Claimant returning to work in the absence of medical evidence to inform that decision.

47. In any event, Mrs Mukherjee did commence the process of undertaking a risk assessment in November 2019 [527] in response to the Claimant's request that this be done [528]. She explained in her evidence that she had sought advice from OH about undertaking a risk assessment and had been told that it was not appropriate because there needed to be a psychiatric assessment followed by an OH assessment. Mrs Mukherjee was clear that a risk assessment would not have helped the Claimant return to work because medical clearance was needed."

95 We accepted paragraph 45 of that passage in its entirety and agreed with it. We accepted all but the final sentence of paragraph 46 of that passage. As for that final sentence, we were not able on the evidence before us to conclude that it was not the respondent's practice to carry out a risk assessment when reviewing a medical suspension, but (1) there was no good reason to think that a separate and distinct risk assessment was required when reviewing a medical suspension, as the issue of the risks both to the employee and any colleagues or patients with whom the suspended employee might come into contact arising from the employee's return to work was self-evidently paramount, and (2) we agreed that here, "such an assessment could not have led to the Claimant returning to work in the absence of medical evidence to inform that decision".

96 As for paragraph 47 of Ms Criddle's written closing submissions, that added nothing of substance to what was said in paragraphs 45 and 46, but for the avoidance of doubt, not least because of what we say in paragraph 51 above, we agreed with what Ms Criddle said in paragraph 47 of her written closing submissions. In any event, given what we say in paragraphs 69 and 70 above, this claim could not, and did not, succeed.

<u>Paragraph 5.10 of the list of issues: "Not seriously hearing the Claimant's concerns raised regarding the environmental conditions in the clinical area such as poor thermoregulation, ventilation, and static electricity"</u>

97 Ms Criddle's response to this complaint in her written closing submissions was as follows (the italics being original):

"48. The e-mail to the PSA [at pages 342-343, which we have set out in paragraph 29 above] was not a complaint about environmental conditions in the AMU as such; it was about those environmental conditions *being used to achieve control of her for the purposes of covert hypnosis*. This was an inherently implausible claim.

49. However, it was considered by the Respondent. Miss Porter took steps to informally investigate the Claimant's concerns and found nothing to support them [§21 Porter w/s]."

98 Having accepted paragraph 21 of Miss Porter's witness statement (see paragraph 58 above), we agreed with paragraph 49 of Ms Criddle's written closing submissions. As a result, we concluded that the claim in paragraph 5.10 of the list of issues was not well-founded on the facts in that the claimant's concerns about "[allegedly] poor thermoregulation [and] ventilation, and static electricity" were taken seriously by the respondent. However, we also asked ourselves whether there were facts from which we could draw the inference that the manner in which the claimant's "concerns ... regarding the environmental conditions in the clinical area such as poor thermoregulation, ventilation, and static electricity" had been dealt with to any material extent as a result of a stereotyping of her as a disabled person by reason of a mental health condition and concluded that were none.

<u>Paragraph 5.11 of the list of issues: "Placing the Claimant on medical suspension for a significant length of time and then dismissing her"</u>

99 Given our conclusions stated in paragraphs 66 and 67 above, the allegation in paragraph 5.11 of the list of issues could not, and did not, succeed.

<u>Paragraph 5.12 of the list of issues: "Failing to act on the Claimant's request to log the employment dispute as a clinical incident when the Claimant advised the Respondent that it was causing her stress"</u>

100 Ms Criddle's response to this part of the claim was in paragraph 61 of her written closing submissions, and was this:

> "It is accepted that the Claimant's ongoing medical suspension was not logged as a clinical incident on the Datix system. This is because it was not a clinical incident [708]."

101 While we agreed with the substance of that submission, our reasons for doing so differed. That is because whether or not the claimant was in fact being caused stress by the dispute that she was having with the respondent about the need for her to be assessed by a psychiatrist before any decision could be made about her fitness to work, that was not in our view the kind of incident that was intended to be reported under the Datix system. That was because we

concluded that it was not an 'accident', an 'incident' or a 'near miss' which the policy required (see paragraph 59 above) to be reported. In any event, we saw nothing in the circumstances from which we could draw the inference that the failure to report the claimant's employment dispute with the respondent as a clinical incident was to any extent a result of a stereotyping of the claimant as a disabled person by reason of a mental health condition.

102 For those reasons, the claim in paragraph 5.12 of the list of issues did not succeed.

<u>Paragraph 5.13 of the list of issues: "Submitting further information to the NMC which led to an interim suspension order being imposed on the Claimant"</u>

103 In paragraph 71 of her written closing submissions, Ms Criddle said this in response to the allegation in paragraph 5.13 of the list of issues:

> "The Claimant did not put this case. She accepted in cross-examination that her interim order had been changed from one of conditions to suspension post dismissal because she could no longer fulfill her conditions, the first of which was only to work for the Respondent [428-430]."

104 We agreed. This claim failed on the facts as it was not well-founded factually.

<u>Paragraph 5.14 of the list of issues: "Not giving the Claimant an opportunity to a proper final review hearing and failing to follow the sickness absence policy"</u>

105 In paragraphs 62 and 63 of her written closing submissions, Ms Criddle said this in response to the allegation in paragraph 5.14 of the list of issues

> "62. It is factually wrong to assert that the Claimant did not have a final review meeting. This took place on 2 December 2019 and the Claimant accepted that she had the opportunity to put her case at that meeting [548-551].
>
> 63. The sickness review procedure was inapplicable because the Claimant was not on long-term sickness absence [257-260]. It is clear however that the principles of that policy were followed in that there were reviews of the Claimant's medical suspension; advice was sought from OH; there was a final review meeting and the Claimant was afforded the right to appeal her dismissal."

106 We agreed also with those submissions. What was said in paragraph 62 was factually correct (as can be seen from what we say in paragraphs 54 and 55 above). What was said in paragraph 63 was also factually correct, given the content of the respondent's sickness absence policy (to which we refer in paragraph 31 above, where we have set out paragraph 15 of the policy,

concerning what is called in it "medical suspension"), and our above findings of fact about the procedure followed.

107 In addition, and in any event, there was in the circumstances as we found them to be nothing from which we could draw the inference that the claimant had in this regard been treated by any person acting on behalf of the respondent in any way less favourably by reason of a perception that the claimant was, or might be, disabled by reason of a mental health impairment, than she would have been if there had not been such a perception on the part of that person.

In conclusion

108 For all of the above reasons, the claimant's claims did not succeed and were dismissed.

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Employment Judge Hyams

Date: 27 September 2021

SENT TO THE PARTIES ON

........29 September 2021......................................

T Henry-Yeo
....

FOR THE TRIBUNAL OFFICE