EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms FH Nolan	**v**	East of England Ambulance Service NHS Trust

Heard at: Norwich (Hybrid hearing)

On: 18, 19, 20, 21, 22 & 25 October 2021
26 & 28 October 2021 (Discussion Days – no parties present)

Before: Employment Judge M Warren

Members: Ms S Blunden and Ms S Elizabeth

Appearances
For the Claimant: Mr P Tomison (Counsel).
For the Respondent: Miss J Twomey (Counsel).

RESERVED JUDGMENT

1. The claimant's complaints of disability discrimination and constructive unfair dismissal succeed.

2. The remedy to which the claimant is entitled shall be determined at a Remedy Hearing, notice of which will follow in due course.

REASONS

Background

1. The claimant was employed by the respondent as a paramedic from 25 January 2009 until 5 August 2020, following her resignation on 8 July 2020. She brings claims of disability discrimination and constructive unfair dismissal.

2. The respondent concedes that at the material time, Ms Nolan was disabled by reason of Chronic Fatigue Syndrome (CFS), Myalgic Encephalomyelitis and spinal disc disease in her lower spine.

3. The matter came before Employment Judge A Spencer at a closed preliminary hearing by telephone on 12 February 2021, when directions were given for it to be set down for this 8 day hearing. The hearing has proceeded in person in Norwich. It has been a Hybrid hearing, in that Ms Elizabeth attended by CVP and evidence was heard from Mr Chase and in part from Mr Cason, by CVP.

4. At the case management hearing, Ms Nolan had indicated that she wished to give evidence by CVP; in the end she decided otherwise and attended to give evidence in person.

The Issues

5. An agreed list of issues was presented to Employment Judge Spencer on 12 February 2021, which he attached to his preliminary hearing summary as an Annex. At the outset of this hearing Mr Tomison, (who did not appear for the claimant at the preliminary hearing) sought to make changes to the agreed list of issues, some of which were agreed and some of which were opposed by Miss Twomey. There were two elements to the proposed changes which were controversial:

    5.1 Mr Tomison wished to change the provision, criterion or practice relied upon in respect of the reasonable adjustments claim from:

> "Requiring applicants for roles to meet all essential criteria in order to be selected for interview;
>
> Requiring applicants to apply for roles on a competitive basis;
>
> Requiring candidates for the ECAT role to work nights;
>
> Failing to pause the sickness process until 18 June 2020."

    In their place, he proposed that the PCP should be defined as, *"Requiring employees to perform their full contractual duties in order to avoid the risk of dismissal".*

    5.2 Moving certain allegations from the heading of direct disability discrimination and instead, placing them under the heading of harassment.

6. We concluded that the claimant should be permitted to amend the list of issues for the following reasons:

    6.1 A list of issues is a case management tool to help bring structure and clarity to the proceedings. The case which the tribunal must

decide is the claimant's pleaded case. The list of issues is not a pleading. See Millin v Capsticks Solicitors LLP UKEAT/0093/14, Parekh v London Borough of Brent [2012] EWCA Civ 1630 and more recently as cited by Mr Tomison, Mervyn v BW Controls Ltd [2020] EWCA Civ 393.

6.2 We have had regard to the overriding objective and the need to balance the relative prejudice to the parties.

6.3 The parties are on an equal footing, they have both been legally represented throughout.

6.4 Proportionality suggests that the amendment should be allowed because the proposed changes are logical and accord with the claimant's pleaded case. It would be wrong that a claimant might lose her case simply because the list of issues had not been prepared by a lawyer as well as it might have been.

6.5 Avoiding unnecessary formality and seeking flexibility favours allowing the proposed changes.

6.6 Allowing the changes would not cause any delay.

6.7 There is no suggestion that allowing the changes would cause any expense.

6.8 In terms of relative prejudice to the parties, if the tribunal relies on a list of issues that does not accurately reflect the claimant's case, there is the risk that she might lose. There seems to be little or no prejudice to the respondent, which is simply having to answer the claimant's, (albeit not as clear as it might have been) pleaded case.

6.9 It is clear that the claimant's pleaded case, not ideally expressed, is, (as is often typical in this scenario) that her PCP is the requirement for her to do her job. The disadvantage is that she cannot do her job. The reasonable adjustment sought is to enable her to apply for other roles, or be considered for re-deployment, in circumstances where adjustments are made to the selection process.

6.10 In respect of the movement of allegations from direct discrimination to harassment, these are all allegations which Ms Nolan made in her pleaded case. All the conduct that she has complained about in general terms are then referred to as amounting to direct discrimination and harassment, see paragraph 16 of her first particulars of claim and paragraph 27 of the second.

7. The amendment which we allowed in respect of the PCP excluded the words, *"in order to avoid the risk of dismissal"* which seemed to add an unnecessary gloss.

8. The list of issues as amended appears, is cut and pasted, below.

The Claimant's Claims

1. The Claimant is pursuing the following claims:

1.1 Direct disability discrimination;

1.2 Discrimination arising from disability;

1.3 Failure to make reasonable adjustments;

1.4 Harassment on the grounds of disability;

1.5 Constructive unfair dismissal.

Legal Issues

Constructive Unfair Dismissal

2. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of mutual trust and confidence. The breaches were as follows:

2.1 Discriminatory meetings and communications: pressure by the Respondent to attend Case review meetings in emails dated 16 March 2020, 21 May 2020 and 26 May 2020 and letters dated 10th December 2019 and 23rd March 2020.

2.2 Failure to investigate and address the Claimant's formal grievance which was submitted on 02 January 2020;

2.3 The Claimant was overlooked for three roles with the Respondent (Patient Safety Officer, Freedom to Speak Up Guardian, Specialist Clinician in Hear and Treat in the ECAT Centre) and was made to apply on a competitive basis and attend interview;

2.4 The Claimant was given less notice of interview to prepare for Freedom to Speak Up Guardian role than all other applicants (2 days as opposed to 7 days);

2.5 Continued failure to make reasonable adjustments for roles the Claimant applied for with the Respondent;

2.6 Failure to support and assist the Claimant with redeployment, in that:

2.6.1 The Claimant was not offered a guaranteed interview for the role of Patient Safety Officer despite the fact that she qualified under Disability Policy/Sickness Policy and Guaranteed Interviewed Scheme.

2.6.2 The Claimant was given only two days' notice of her interview for the role of Freedom to Speak Up Guardian (whereas other applicants were given a week's notice) and was refused additional time to prepare for the interview,

2.6.3 The Claimant should have been given the role of Freedom to Speak Up Guardian without going through a competitive process;

2.6.4 The Claimant was not offered the role of Freedom to Speak Up Guardian despite passing her assessment/interview and having considerably less time to prepare.

2.6.5 The Claimant should have been slotted into the ECAT role without a competitive process;

2.6.6 The Claimant was refused a role in ECAT after it was established that she would be unable to work night shifts due to her diagnosis of Chronic Fatigue Syndrome.

2.7 Inaccuracies in the Respondent reporting about the Claimant's work performance. The alleged inaccuracies are as follows:

2.7.1 A management referral to Occupational Health dated 17 October 2019 stated that:

2.7.1.1 The Claimant had "been unable to carry out admin role for 8 hours"; and

2.7.1.2 It "is a second return to work failure";

2.7.2 In the summary of the final formal meeting, Tom Martin stated that the Claimant "had failed a number of return to work plans".

2.8 Continued pressure for the Claimant to attend Case Review meetings, in the form of emails sent on 16 March 2020, 21 May 2020 and 26 May 2020 and letters dated 10 January 2020 and 23rd March 2020.

2.9 Failure to make reasonable adjustments for potential job opportunities;

3. Did the Claimant resign because of the breach?

4. Did the Claimant delay before resigning and affirm the contract?

5. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s.98(4) of the Act?

Direct Disability Discrimination (s.13 EqA)

6. Did the Claimant suffer the following less favourable treatment?

6.1 On 04 March 2020 the Claimant was informed she would be interviewed for the position of "Freedom to Speak Up Guardian" on 06 March 2020, whereas other candidates had at least one week's notice to prepare for the interview;

7. If the less favourable treatment did occur, was the Claimant treated this way because of her disabilities?

8. If so, was the Claimant treated less favourably than a hypothetical comparator and/or any actual workplace comparator?

The Claimant relies on comparators as follows: the 5 other non-disabled candidates who were interviewed for the role;.

Discrimination arising from disability (s.15 EqA 2010)

9. Did the following arise in consequence of the Claimant's disabilities? The something arising is the Claimant's inability to work nights; the Claimant's requirements for reasonable adjustments and her inability to work as a frontline paramedic and the Claimant's sickness absences.

10. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disabilities:

10.1 On 04 March 2020 the Claimant was informed she would be interviewed for the position of "Freedom to Speak Up Guardian" on 06 March 2020, whereas other candidates had at least one week's notice to prepare for the interview;

10.2 Unreasonable delay in investigating and addressing the Claimant's formal grievance which was submitted on 02 January 2020;

10.3 Pressuring the Claimant to attend Case Review Meetings and continuing the sickness absence procedure, which manifested itself in emails sent to the Claimant under the sickness policy requesting a Case Review meeting on 16 March 2020, 21 May 2020 and 26 May 2020 and letters dated 10 December 2019 and 23 March 2020.

11. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

12. Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Failure to make reasonable adjustments

13. Did the Respondent apply the following provision, criteria and / or practice ("the provision") generally, namely:

13.1 Requiring employees to perform their full contractual duties.

14. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant relies on her inability to perform her substantive role which had the result that she was being managed under the Respondent's Sickness Absence Management Policy, one outcome of which was dismissal.

15. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts the following were reasonable adjustments:

15.1 Permitting the Claimant to be interviewed for the position of Patient Safety officer in November 2019;

15.2 Allowing the Claimant to not take part in a competitive selection process when she applied for the Patient Safety Officer role, the Freedom to Speak Up Guardian role, and the ECAT role;

15.3 Providing training and support to the Claimant when she applied for the Patient Safety Officer role, the Freedom to Speak Up Guardian role and the ECAT role;

15.4 Recruiting the Claimant to the role in ECAT notwithstanding her inability to work nights.

16. Did the Respondent not know, or could the Respondent not reasonably be expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Harassment related to disability (s.26 EqA)

17. Did the Respondent engage in unwanted conduct as follows:

17.1 On 22 November 2019, Shaun Reddy said to the Claimant "it's about time we got rid of you";

17.2 On 06 December 2019, Nick Cason stated "he felt she would unlikely be able to return to her substantive role of Senior Paramedic in the future";

17.3 On 02 January 2020, Shaun Reddy shouting an angry comment at the Claimant whilst pointing his finger at her, aggressively saying "don't you start, I'm going to knock someone out in a moment";

17.4 Unreasonable delay in investigating and addressing the Claimant's formal grievance which was submitted on 02 January 2020;

17.5 Pressuring the Claimant to attend Case Review Meetings and continuing the sickness absence procedure, which manifested itself in emails sent to the Claimant under the sickness policy requesting a Case Review meeting on 16 March 2020, 21 May 2020 and 26 May 2020 and letters dated 10 December 2019 and 23 March 2020.

18. Was the conduct related to the Claimant's protected characteristic?

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

20. Did the Respondent take all reasonable steps to prevent the harassment complained of at ¶17 above?

Constructive discriminatory dismissal

21. Was the Claimant dismissed within the meaning of section 39(2)(c), 39(7)(b) and 40 EqA? This involves answering the following questions.

22. Did the following acts of discrimination and/or harassment occur?

22.1 The failure to make reasonable adjustments set out above;

22.2 The direct discrimination set out above;

22.3 The discrimination arising from disability set out above; and

22.4 The harassment set out above.

23. If so, did any or all of those acts entitled the Claimant to terminate her employment without giving notice?

24. If so, did the Claimant resign in response to any of those acts?

25. Did the Claimant affirm the contract notwithstanding those acts?

Remedy

26. Has the Claimant shown the extent of her injury to feelings? If so, what injury to feelings award should the Claimant receive?

27. Has the Claimant suffered financial loss as a result of the dismissal? If so, what losses are these?

Interest? Should interest be awarded and if so at what rate?

Evidence

9. We were provided with a bundle of witness statements which included witness statements from the following:

   9.1 Felicity Hope Nolan (claimant).

   9.2 Tom Martin, (HR Advisor).

9.3 Simon Chase, (Deputy Clinical Director of Quality and Safety).

9.4 Antony Brett, (Patient Safety Risk Lead).

9.5 David Smart, (Acting Assistant General Manager and Leading Operations Manager).

9.6 Nick Cason, (General Manager).

9.7 Sandra Treacher, (Senior Operations Centres Manager for Clinical Services at the time of the events in question, currently Head of Ambulance Operations Centre).

9.8 Sarah Dack, (Senior Emergency Medical Technician).

9.9 Shaun Reddy, (Leading Operations Manager).

10. During an adjournment, we read all of the witness statements and read or looked at the documents referred to therein. We also read the documents set out in a suggested prereading list from the parties.

11. Mr Martin did not appear to give evidence. We were told that he was on long term absence from work and were promised copy fit notes. After the hearing, we received a single fit not covering a 2 week period which included the dates of the hearing. The nature of the illness was redacted. We were invited to read and take into account the evidence contained in Mr Martin's witness statement, attributing to it such weight as we considered appropriate bearing in mind that he was not here to have his evidence challenged under oath. We have done so.

12. We did not hear evidence from Ms Dack either. We were expecting her to attend, but were informed on Friday 22 October that she would not be attending as she had been unwell all week. No evidence of her illness was provided. We were invited to read and take into account the evidence contained in her unsigned witness statement, attributing to it such weight as we considered appropriate bearing in mind that she was not here to have her evidence tested under oath. We have done so. We were after the hearing provided with a further copy of Ms Dack's witness statement, it contained a typed signature dated 30 October 2021, i.e. after the date of the hearing.

13. We were provided with a properly indexed and paginated bundle of documents running to page 802. We were not asked to add any further documents to the bundle during the course of the hearing.

14. Mr Tomison provided us with an opening note accompanied by a list of issues bearing his proposed amendments.

15. Miss Twomey provided us with an agreed suggested pre-reading list, cast list and chronology.

16. Both representatives provided us with excellent and detailed written closing submissions. It took some time to read those submissions and I therefore directed the representatives not to rehearse their submissions orally, nor to recap the highlights, but simply to deal with either anything they realised they may have omitted or to respond to points made by their opponent. Both counsel complied, for which we were grateful.

The Law

Disability Discrimination

17. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.

18. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting her to any other detriment.

19. "Dismissal" includes constructive dismissal, (s39(7)(b)).

20. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that she had been disadvantaged in the circumstances in which she had thereafter to work.

21. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Reasonable Adjustments

22. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which is that which might apply in this case set out at subsection (3) as follows:-

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

23. Section 21 provides that a failure to comply with that requirement is a failure to make a reasonable adjustment, which amounts to discrimination.

24. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

    24.1 The relevant provision criterion or practice applied by or on behalf of the employer;

24.2 The identity of non-disabled comparators, (where appropriate);

24.3 The nature and extent of the substantial disadvantage suffered by the disabled employee;

24.4 The steps the employer is said to have failed to take, and

24.5 Whether it was reasonable to take that step.

25. The employer will only be liable if it knew or ought to have known that the Claimant was disabled and that she was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995 that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.

26. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one-off decision.

27. The decision of Mrs Justice Simler DBE, (then President) in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from disability.

28. It is important for the claimant to identify the PCP relied upon and for the Tribunal to make its decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospere UKEAT/0412/14.

29. The duty is to make "reasonable" adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective, (Smith v Churchill Stairlifts plc [2006] ICR 524). Our focus should be not on the process followed by the employer to reach its decision but on whether there is an adjustment that should be considered reasonable.

30. On the question of comparators, the Code states at 6.16 that the purpose of comparison with people who are not disabled is to establish whether it is a PCP, physical feature or lack of auxiliary aid that places the disabled person at a disadvantage and therefore there is no need to identify a comparator whose circumstances are the same as the Claimants, (in contrast to such a requirement in claims of direct and indirect discrimination). Simler P observed in Sheikholeslami v University of

Edinburgh [2018] IRLR 1090 at [48]-[49] that it is a question of whether the PCP bites harder on the Claimant, she said:

> *"Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

Direct Discrimination

31. Direct discrimination is defined at s.13 as follows:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others…*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

32. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real or hypothetical comparator.

33. In a case of direct disability discrimination, the comparator would be a person in the same circumstances as the claimant, but who is not disabled as defined in the Equality Act 2010, see London Borough of Lewisham v Malcolm [2008] UKHL 43.

34. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

35. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the*

sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

Disability Related Discrimination

36. Disability Related discrimination is defined at s.15 as follows:

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

37. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular difficulty or disadvantaging a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.

38. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

39. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments are about preventing disadvantage, disability related discrimination is about making allowances for that person's disability.

40. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular

something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).

41. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, "wise to look into the matter more carefully before taking the unfavourable treatment".

42. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:

    42.1 The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.

    42.2 Secondly, the tribunal should determine what caused the treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant.

    42.3 Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment was the, "something arising" in consequence of the claimant's disability. There could be a range of causal links. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator.

43. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

    43.1 Whether there was a legitimate aim, unrelated to discrimination;

    43.2 Whether the treatment was capable of achieving that aim, and

    43.3 Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

44. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.

45. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective

justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

46. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.

47. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.

48. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.

49. The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

50. The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrrington & Rosedale College [2001] ICR 189).

Harassment

51. Harassment is defined at s.26:

> *"(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

disability;

…"

52. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

52.1 The perception of the Claimant;

52.2 The other circumstances of the case, and

52.3 Whether it is reasonable for the conduct to have that effect.

53. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA

54. HHJ Richardson observed in Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA at paragraph 23:

> *"The question posed by section 26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important, though they have not played any part in submissions on this appeal. The Equality Code says (paragraph 7.9):*
>
> *'7.9. Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.' …"*

55. The motivation and thought processes of those accused of harassment may be relevant to the question of whether their conduct amounted to harassment, see Unite the Union v Nailard [2018] IRLR 730 at paragraphs 108 -109.

56. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

> *"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

57. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, "intimidating, hostile, degrading, humiliating or offensive" he said that Employment Tribunals, "*should not cheapen"* the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Burden of Proof

58. In respect of the burden of proof, s.136 reads as follows:

> *"(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."*

59. The Court of Appeal gave guidance on how to apply the equivalent provision of s.136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps, that guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ 425. We have carefully observed in this case in considering the claim of indirect discrimination, on the basis that those steps assist equally well under the Equality Act 2010.

60. In the context of reasonable adjustments, Elias J explained in Project Management Institute v Latif UKEAT/0028/07CEA at paragraph 54: the Claimant must establish that a duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Once that is

established, the burden is reversed for the Respondent to show that the proposed adjustment is not reasonable.

Constructive Dismissal

61. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

62. Section 95 defines the circumstances in which a person is dismissed as including where:

> *"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

63. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating (ECC) Ltd v Sharpe 1978 ICR 221:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

64. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347)

65. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

66. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

67. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant…. If conduct objectively considered is likely to destroy or*

seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."

68. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

69. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

70. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

71. A fundamental breach by an employer has to be, "accepted" by the employee, to quote Lord Browne-Wilkinson in the EAT in W.E. Cox Toner (International) Ltd v Crook 1981 IRLR 443:-

"If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can choose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end…

But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation…

Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation…"

72. HHJ Burke QC in Hadji v St Luke's Plymouth UKEAT 0857/2012 summarised the law as follows:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these

principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44.

73. The employee must prove that an effective cause of her resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, which must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13)

74. An employee is perfectly entitled to wait for a period of time to seek alternative employment before resigning, see for example Walton & Morse v Dorrington [1997] IRLR 488.

75. There is an implied in every contract of employment, an obligation to deal with Grievances timeously and reasonably, see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516. There is also implied an obligation not to discriminate.

Findings of Fact

76. The respondent is an Ambulance NHS Trust covering Bedfordshire, Cambridgeshire, Hertfordshire, Norfolk, Suffolk and Essex. It provides an emergency ambulance service and a patient transport service. It employs approximately 4,000 people.

77. The respondent's sickness absence policy was in the bundle at page 162. Starting at page 178, paragraph 18.4 explains that managing sickness absence includes the following:

77.1 Return to work reviews after each episode of absence;

77.2 Informal meetings with management;

77.3 Formal review meetings with management;

77.4 Referral to Occupational Health at any stage;

77.5 Exploring further options such as adjustments to duties or re-deployment;

77.6 A Case Review (with the express purpose of ensuring all options have been considered);

77.7 A Final Review Meeting, and

77.8 A Capability Hearing.

78. Provisions relating to Formal Health Review Meetings are at paragraph 20. They include an expectation that informal meetings will occur first and that

the purpose of a Formal Health Review Meeting is to assess the employee's state of health, understand the treatment being undertaken and identify any barriers to a return to work. During such a meeting, it is suggested that a manager might consider the following:

78.1 Whether there is anything practicable that might be done;

78.2 Alternative duties;

78.3 The nature, likely length and effect of illness;

78.4 Whether there has been any recent improvement in attendance record;

78.5 Whether there have been any informal or formal meetings in the last 12 months;

78.6 Health and wellbeing support;

78.7 Return to work;

78.8 Re-deployment, whether temporary or permanent;

78.9 Reasonable adjustments;

78.10 Ill-health retirement, and

78.11 Dismissal on the grounds of capability.

79. Provisions in relation to a Case Review are at paragraph 23, which includes at 23.1:

> "A Case Review is required to ensure all possible options have been considered and/or actioned prior to progressing to a Final Review."

80. The Final Review Meeting is considered at paragraph 24 and includes at 24.1:

> "At any point during the above process if it is perceived that an employee is unlikely to return to their substantive role or be able to achieve an acceptable attendance record, a Final Review Meeting will be held with the employee."

81. The purpose of such a meeting is said to be to reach a final decision on the appropriate way forward, which might include a return to the substantive post, re-deployment or proceeding to a Capability Hearing, which might result in dismissal.

82. Paragraph 24.3 states:

> "Reasonable adjustments will have already been considered before this stage."

83. Paragraph 25.1 states the following with regard to re-deployment:

> "If the Occupational Health service has advised that an employee is no longer capable of carrying out their substantive duties, either during a Formal or Case Review Meeting as appropriate, the Trust has a responsibility to try and secure alternative employment. Prior consideration would be given to individuals for any potential re-deployment opportunities via a non-competitive process, ensuring the individual meets the criteria and fitness capability to perform the role of the post taking into account the Equality Act 2010 … permanent re-deployment cannot be guaranteed."

84. The respondent has a Disability Policy, which is in the bundle, to which we were not taken. Within that policy at paragraph 5.4.7, (page 154) the policy states:

> "The Equality Act 2010 and case law supports the redeployment of staff who develop a disability via a non competitive process for roles at their own, or a higher banding with necessary support/training to enable them to perform that role, if needed as a reasonable adjustment. This means the staff member must be given prior consideration for vacancies that arise."

And at 5.4.8

> "Where staff with disabilities do not meet all of the essential criteria for the role, reasonable training and support can be given to allow them to fulfil the role, along with the removal of parts of the role – which could be deemed a reasonable adjustment."

85. That is of course, an accurate statement of the legal position and obligation, depending on the particular circumstances of the case.

86. Ms Nolan's employment with the respondent began on 25 January 2009. She began as a Student Paramedic and progressed to Senior Paramedic in January 2016.

87. On 21 June 2018 Ms Nolan began a period of sick leave due to a chest infection and respiratory problems, returning in November 2018. The respondent obtained Occupational Health reports on 2 August and 15 October 2018 and conducted a Formal Health Review Meeting on 4 October 2018.

88. Ms Nolan returned to work on alternative work duties in the respondent's Wellbeing Team on 1 November 2018. She met with Ms Howlett on 6 December 2018, when it was agreed that she would continue on alternative work duties for another 6 weeks.

89. There was a further Informal Review Meeting on 14 February 2019. That was followed by a referral to Occupational Health, which led to the Occupational Health report dated 28 March 2019 at page 265. This refers to Ms Nolan suffering from post-infection fatigue and recites the history of her absence. The advice was that Ms Nolan was fit for work with adjustments and that it was likely that she would be able to return to her

substantive position if a support plan could be put in place, probably in the next 4-6 weeks once a plan has been agreed. It was suggested that the return to her substantive position plan would include elements of a phased return, supervisory practice, confidence building and refresher training. It was suggested that the phased return be over at least 8 weeks, with a gradual build up. It was recommended that she refrain from night shifts and works short days to begin with.

90. Ms Nolan agreed a return to substantive duties plan with her manager at the time, Mr Chisam on 6 April 2019, (page 272). On 6 May 2019 Ms Nolan wrote an email to Mr Chisam to say that her return to work was not going to plan; she complained about the practical arrangements and that she was finding it stressful. Mr Chisam met with Ms Nolan on 8 May. He recorded the outcome of that conversation in an email of that day, (page 274/5); she was finding the hours challenging but manageable with time to recover in between shifts. They had spoken of gradually increasing her hours to 10 hour days over the following 2 weeks and they would discuss adding a third day into the plan, (at that time she was working 2 days a week).

91. On 10 June 2019, Mr Chisam emailed Ms Nolan with her proposed shifts in the coming weeks. She replied saying that she was finding things very tiring, she was exhausted and she was concerned that what was proposed may be a bit too much. Mr Chisam spoke to Ms Nolan about her concerns and wrote an email, (page 277) in which he said, *"We are so close to getting a successful RTW I do not want to jeopardise the huge progress that we have made to date … I agree to remove you from your planned shift tomorrow to allow you to recover more fully.".*

92. On 17 June 2019, Mr Chisam wrote to Ms Nolan again with details on planned shifts in the coming weeks. He commented, *"We are really close now and I am so pleased with how things have panned out for you so far. Well done. As always please get in touch if I can help with anything.".* To which Ms Nolan replied, *"That's great thank you".*

93. Unfortunately, Ms Nolan had a further period of absence through ill-health due to nervous system disorders between 20 June and 23 August 2019. Mr Chisam wrote to her on 19 July, *"I am sorry that you have suffered this setback in your RTW. I hope that you are back on your feet soon. I haven't called because I thought it might upset you. Fingers crossed you're back when I return from leave. Until then Sarah will be able to assist you with anything you need.".*

94. There was an Informal Health Review Meeting on 30 July 2019, (page 284).

95. Ms Nolan took annual leave between 24 August and 2 September 2019 in order to avoid going down to half pay. She did this with the knowledge and consent of the respondent.

96. A further Occupational Health report was provided on 29 August 2019. This referred to ongoing symptoms of fatigue and joint pain. It described Ms Nolan's attitude towards managing her health and wellbeing as proactive. A diagnosis was awaited. A timeframe for a return to her substantive role was said therefore to be difficult to predict. It was thought likely that her role would exacerbate her symptoms. Medical re-deployment at that time was thought not to be an appropriate option, as it may well be that in due course, Ms Nolan may be able to manage her symptoms, allowing her to return to her substantive post. She was said to be likely to meet the definition of disability in the Equality Act 2010 and it was suggested that arrangements should be made to enable her to return to work on alternative duties either in administration or HALO, (which stands for Hospital Ambulance Liaison Officer). A phased return to work was suggested.

97. There followed a Return to Work Review Meeting with Ms Howlett on 9 September, (page 294). Ms Nolan was to return to work as a Hospital Ambulance Liaison Officer.

98. Mr Chisam met with Ms Nolan on 13 September 2019 to discuss the Occupational Health report and the return to work plan. In an email of that date, he set out the proposed shifts that she should work.

99. On 20 September Ms Nolan emailed Ms Howlett and Mr Chisam to say that the HALO work had, *"completely wiped me out for days".* Ms Howlett replied, *"It was always a concern for us that the physicality of the role may be too much for you.".* She proposed Ms Nolan fulfil a new function within HALO which involved completing certain reports.

100. On 4 October 2019, Ms Nolan saw her rheumatologist.

101. On 8 October 2019 Mr Nolan wrote again to Mr Chisam to explain that she was finding it very difficult in the HALO role. She wrote, *"Unfortunately I am sorry to say that I am still struggling with the HALO role. Frustratingly today I am feeling really fatigued and weak so have asked Paul Collins that I do Flu Vaccinations today instead … I think this might be a bit too much a bit too early after being ill for several months.".* Ms Nolan took a days leave on 11 October.

102. On 17 October 2019, Mr Chisam referred Ms Nolan to Occupational Health again. The referral is at page 310. Ms Nolan takes exception to the terms of the referral which read as follows:

> "Hope has not been able to meet the plan set out in her last consultation. Unable to carryout AWD admin role for 8 hours on alternate days (Mon-Wed-Fri) due to fatigue. Seen by consultant rheumatologist and although further tests to be carried out rheumatoid arthritis deemed unlikely as I understand. Given this is a second failure to RTW on the plans provided we would ask the following questions again:

1. Is Hope going to be able to return to her substantive role in the near/foreseeable future and be able to sustain a regular attendance given her ongoing condition?

2. Are there any adjustments that management should consider, if operationally feasible to support the above?

3. Will remaining in her substantive role exacerbate her condition?

4. Should re-deployment be explored?

5. Is Hope likely to be classed as disabled under the EA10?

6. Is Hope condition "mainly" or "wholly" attributable to her/his NHS employment?"

103. Ms Nolan's objection is that it was not her second failure to return to work, because she was doing the administrative role at HALO. The respondent says it was her second failure to return to work, because she had not been able to return to her substantive role.

104. On 20 October 2019, Ms Nolan met Ms Howlett and they agreed a rota for her to return on ambulances as a paramedic, to start on 1 January 2020. The proposed rota is at page 315.

105. The Occupational Health report resulting from the earlier referral by Mr Chisam was provided on 30 October 2019, see page 316. The Occupational Health Advisor is a Mr Varley, as it had been with all the earlier Occupational Health reports. Mr Varley's report here states that Ms Nolan had been undertaking alternative work duties due to her persisting symptoms of fatigue, muscle and joint pain. He explained that there was no formal diagnosis, but that auto-immune diseases had at this time been ruled out. He said that Ms Nolan was currently awaiting further investigation. He said she had described to him that she had attempted to return to work on alternative work duties in the HALO role, but found this too physically demanding and that instead, she had been undertaking administrative roles on non-consecutive days for up to 8 hours. Mr Varley's advice was that Ms Nolan remained unfit for her substantive role and that she should remain on alternative work duties in an administrative role, with a view to continuing to increase to her hours. He stated he was unable to predict timeframes for her return to her substantive role and that if alternative work duties could not be accommodated, all other options had been explored and it was evident that Ms Nolan was unlikely to return to her substantive role, then medical re-deployment should be explored.

106. Ms Nolan says she did not see this Occupational Health report until later, but that Mr Varley had explained to her over the telephone that his advice would be that he had mentioned re-deployment. Because of that she says, she decided to apply for a maternity cover vacancy in the role of Patient Safety Officer. The Personal Specification is at page 242 and the

Job Description at page 235. Her application is at page 317. It was a band 7 role, (the claimant was on band 6). In her application under, "training courses attended" she listed her BSC Honours degree in Development and Health in Disaster Management from Coventry University in 2002. She gave as her reason for leaving her current post as, *"re-deployment due ill-health issues. Currently struggling with the physicality of being a front-line ambulance paramedic".* In answer to a question that, if she has a disability, does she wish to be considered under the Guaranteed Interview Scheme, "If you meet the minimum criteria as specified in the Personal Specification?" She has answered "Yes".

107. Applications for the role were anonymised. Two people reviewed the applications and shortlisted applicants for interview. One of those two people was Mr Brett, from whom we heard evidence. We have no documentary evidence as to how Ms Nolan scored, but in his witness statement at paragraphs 6 and 7, Mr Brett explained that 18 points were available in relation to, "essential criteria" and 2 points in relation to, "desirable criteria". He said he scored the claimant 10 out of 18 and 0 out of 2 respectively and that his colleague had scored the claimant 8 out of 18 and 0 out of 2. Overall, she had therefore scored 18 out of 36 or 50% for essential criteria and 0% for desirable criteria. She was not therefore invited for interview.

108. On 2 November 2019 Mr Chisam emailed Mr Martin to explain that he had received the latest Occupational Health report. He referred to Ms Nolan as currently failing a 3/12 RTW plan on admin work only on the back of a previous failed RTW. He wrote that Ms Howlett was going to arrange for a Case Review on her return from leave. He believed that this now needed to happen as a matter of urgency, pointing out that the report mentions re-deployment and that there was no timeframe for a return to substantive role. Mr Martin replied that given the wording of the Occupational Health advice and by reference to paragraph 12.1 of the Sickness Policy, he suggested a Final Formal Meeting should take place.

109. By letter dated 7 November 2019, Ms Howlett invited Ms Nolan to a Final Formal Health Review Meeting on 28 November 2019.

110. On 10 November 2019, Ms Nolan was informed that she had not been shortlisted for the Patient Safety Officer Role. She emailed Mr Martin asking for some feedback stating, *"I had applied as it's to cover maternity leave and possibly for temporary re-deployment to manage my current ill-health*". Mr Martin replied to point out he hadn't been aware that she had made the application and suggested she contact someone on the recruitment team for more information. She subsequently replied to say that the person he suggested she contact had told her that feedback could not be provided. She protested that she had explained on the application form that this was a re-deployment opportunity for her and that she should have qualified under the Guaranteed Interview Scheme. Mr Martin replied to her on 12 November, "*Further to your query I have been informed by Elizabeth that no feedback has been provided by the managers and that*

usually it is because the candidate did not meet the Essential Criteria". Ms Nolan replied on 13 November, *"Ok thank you for checking for me Tom. Ultimately I want to go back to front line duties but thought it would be wise to apply for the temporary position as a good opportunity to aid my recovery and believed that I had the majority of relevant skills and experience.".*

111. In the meantime, Ms Nolan had written to Mr Cason, (who was to chair the Final Formal Health Review Meeting) to protest,

> "I have to say a Final Formal Health Review seems a little excessive given the circumstances and I am unaware of having had any Formal Health Reviews or a Case Review. I only have only a few weeks to do on AWDs before I can start a return to work programme at the beginning of December. At no point have OH said I cannot return to front line duties and as I am deemed to come under the Equality Act this should be considered also.".

112. On 12 November 2019 Mr Martin made enquiries as to why it was that Ms Nolan had not been shortlisted for the Patient Safety Officer role. It was suggested that Ms Nolan makes contact with Mr Brett, which she did on 18 November. She relayed her conversation with Mr Brett to Mr Martin in an email that day, which is at page 344. She expressed surprise at being told that she had only met 50% of the essential criteria. She said the feedback she was given was that she did not have enough knowledge of governance and risk management, in response she made reference to her degree which she said, seemed to have caught Mr Brett by surprise. She reported Mr Brett as informing her that interviews had been set up so there was nothing he could do, *"unless they don't find the appropriate person in interview process and then they will look at applications again".*

113. So on 18 November, Mr Martin emailed Mr Brett and asked if there was any way that Ms Nolan could be interviewed? Mr Brett replied,

> "There is not enough time on Friday for Felicity to be interviewed – and I have already assembled a specialist for this day as I do not have safer recruitment training. I very much doubt even with this qualification being considered, it would give her enough of an essential criteria score to meet the grade of the short listed candidates. Unless you're telling me that it is mandated that I interview Felicity, I can't offer her the opportunity at this time. Sorry.".

114. Mr Martin replied,

> "I can only advise you. Felicity is likely to be classed as disabled under the Equality Act 2010 and is at risk of medical displacement. You could consider bridging any gaps in her application against the Essential Criteria through a reasonable adjustment. It is not a decision I can make, but one for you as the recruiting manager I am afraid.".

115. Mr Brett then replied,

> "Thank you for your response. In which case my decision remains as per my email to you and my call with Felicity yesterday that we would reconsider Felicity's application should we not find an appointable candidate on Friday.".

116. An appointable candidate was not found. However, no further contact was made with Ms Nolan. Mr Brett distributed the role amongst his existing team and no one was recruited.

117. Also on 18 November 2019, Ms Nolan had an email exchange with Mr Cason. She protested that the Final Formal Meeting was not appropriate. She said it had been causing her to become upset and lose sleep. She thought she only had a few weeks to go before she finished alternative work duties in December and would start a phased return to front line duties. She suggested that the Final Formal meeting was inappropriate and not in accordance with policy, because the policy states that Final Review Meeting can only be called if it is perceived that an employee is unlikely to return to their substantive role. Mr Cason replied on 19 November to say that the Final Formal Meeting was being held upon Occupational Health advice. He stated, *"If after that meeting there is a clear directed RTW then all well and good, we do need to meet to review that circumstance as supported by policy.".*

118. On 22 November 2019, Ms Nolan was in the computer room undertaking alternative work duties and talking to a colleague. She was discussing her concerns about the invitation to a Final Review Meeting. Mr Reddy entered the room, overheard the reference to Ms Nolan having been invited to Final Review Meeting and joked, "It's about time we got rid of you". Mr Reddy admits making the remark but does not recall that it was in the context of Ms Nolan referring to the Final Formal Review Meeting. We accept the evidence of Ms Nolan that it was, as corroborated by her grievance submitted in due course.

119. Ms Nolan and Mr Reddy had been colleagues since 2009 when she joined the respondent. They had worked shifts together, had a good relationship and would enjoy a joke together. Mr Reddy had been promoted and at this time, was a Leading Operations Manager, one of a number of managers holding that title who would be responsible, on a rota with others, for managing the shifts of approximately 20 ambulance crews. That would involve managing shifts on which Ms Nolan worked.

120. Ms Nolan was upset and tearful by the remark. She later that day challenged Mr Reddy. He said that he had intended it as a joke and he apologised.

121. On 1 December 2019, Mr Cason received an email confirming to him that the last time Ms Nolan had worked a shift on her substantive duties was 21 June 2018, (page 253).

122. The Final Formal Health Review Meeting chaired by Mr Cason took place on 6 December 2019. Mr Martin was present and wrote a letter dated

10 December confirming what had been discussed, page 368. The letter included the following:

> "As we discussed there have been a number of return to work plans since June 2018 but unfortunately you have not been able to complete them successfully. It was agreed that you have now managed to sustain working at your contractual hours however the concern management have is around you being able to sustain working in your substantive role as a paramedic …
>
> Whilst it is noted that you are undertaking alternative work duties and are in the workplace you are sick from your contractual role within the organisation and looking back to June 2018 the perception is you are unlikely to return to your substantive role (i.e. failed return to works and being able to sustain working your contractual hours as a paramedic)."

123. It was noted that Ms Nolan felt that there were inaccuracies in the Occupational Health report and that she is likely to meet the definition of a disabled person. Mr Martin wrote:

> "We both confirmed to you that the goal is to get you back to work as a paramedic and there is no hidden agenda to progress to Capability, however if a return to your substantive role (would need to be a sustained return with regular attendance) was not possible then we would need to explore permanent re-deployment and ill-health retirement whilst leading up to a Capability Hearing."

124. Following the Final Formal Health Review, a further referral to Occupational Health was made, asking a series of questions in light of Ms Nolan having failed to demonstrate a sustained return to her substantive role since June 2018. Expressly, Mr Cason requested OH conduct a face-to-face meeting with Ms Nolan. Advice was sought as to whether or not Ms Nolan would be able to sustain regular attendance as a paramedic and if not, on a return to work package that would support such a return and the likely timeframe. He also asked whether Occupational Health were still of the view that medical re-deployment should be considered and whether they would support an application for ill-health retirement (page 361).

125. On 11 December 2019, Ms Nolan complained about inaccuracies in Mr Martin's letter of 10 December, including that it was not correct to say that she had been unable to complete a number of return to work plans since June 2018, pointing out that she had only one return to work plan. She also pointed out that her symptoms were in remission, as she had explained. She also protested that she had been refused a copy of the Occupational Health report and she requested that future consultations with Occupational Health should be with a different advisor and in particular, a doctor. Initially Mr Martin refused the latter request, but on being pressed by Ms Nolan, agreed to it on 13 December, (page 376).

126. Ms Nolan provided the respondent with a fit note dated 19 December 2019 with boxes ticked and information provided to suggest that she may be fit for work if she is given a phased return to work and that this will be the

case for 3 months to 18 March 2020. The fit note explains that the illness is Chronic Fatigue and multiple joint pains, she was under investigation and awaiting referral to rheumatology.

127. In a meeting with Mr Chisam on 20 December 2019, Ms Nolan and he had a disagreement as he had misread the fit note, suggesting that it made no reference to a phased return to work and that therefore, Ms Nolan ought not to be at work, even on alternative work duties. Ms Nolan requested a change of manager. Mr Cason in reply, agreed to comply with that request, (page 390). Mr Smart was appointed to manage her. He met with Ms Nolan on 30 December.

128. In the meantime, the respondent had changed its Occupational Health advisor. Mr Smart therefore completed a fresh Occupational Health referral, (page 395). In the new referral, Mr Smart explained that Ms Nolan had been unable to return to full substantive duties since 22 June 2018 and had in the meantime been either on a phased return to work or alternative work duties. He referred to the fit note recommending a phased return to work over 3 months and he enquired of Occupational Health how that might be achieved.

129. On 2 January 2020 there was a further incident involving Mr Reddy. There is a conflict of evidence over what precisely was said. Ms Nolan's account is corroborated by a diary note she made at the time, (page 680) by a grievance she wrote that day, (page 373) and an email she wrote on 3 January 2020 at 14:15, (page 408).

130. On Mr Reddy's own account, he was advised by Mr Smart to make a contemporaneous note of what had happened and yet he did not do so.

131. The respondent seeks to rely upon the witness statement from Ms Dack, who gives a different account of what was said to that of both Ms Nolan and Mr Reddy. Ms Dack did not appear to give evidence. We were told this was because she was ill, but there is no evidence of her illness. Ms Nolan says that originally, Ms Dack had agreed to give evidence on her behalf supporting her account of what had happened that day.

132. The context is that the incident occurred again in the computer room where Ms Nolan was working. The respondent had operated a fleet of Mercedes ambulances but was in the process of replacing them with ambulances made by Fiat. Training was required before a paramedic could work on the new ambulance. Mr Reddy was having to arrange a vehicle swap and was instructing Ms Dack to crew a Fiat. She commented that she had not been trained. Mr Reddy explained that she was going to be a third member of that particular ambulance crew and therefore did not need training. Ms Nolan made a remark cautioning Ms Dack about crewing a new ambulance if she had not had the appropriate training.

133. Ms Nolan's evidence is, (as she demonstrated in her oral evidence) that Mr Reddy leant forward, wagged his finger at her and spoke in a loud and aggressive manner saying, *"Don't you start! I'm going to knock someone out in a moment".*

134. Mr Reddy's evidence is that it was a very friendly and jovial conversation, that he laughingly wagged his finger in the claimant's general direction and said something like, *"Don't you start, or you'll get a slap as well".*

135. Ms Dack in her witness statement said that Mr Reddy had jokingly wagged his finger in the general direction of both herself and Ms Nolan saying, *"It's because you lot keep breaking them*". Not in an angry or aggressive way and apparently intended as a joke. She expressed surprise at Ms Nolan's subsequent reaction.

136. It is common ground that Ms Nolan's reaction was that she immediately became upset and left the room.

137. We noted that in oral evidence, Mr Reddy had suggested he could not have shouted at the claimant aggressively; because of the layout of the ambulance station, other people would have heard and intervened. That is not evidence which he gave in his witness statement. We also noted that whilst in his witness statement Mr Reddy had said it had been a particularly busy shift, in cross examination he had said it had not been a particularly busy day.

138. We prefer the evidence of Ms Nolan and find the incident occurred as she described it.

139. Aware that he had upset Ms Nolan, Mr Reddy spoke to Mr Smart, who advised him to make a note of what had happened. Advice as we have said, he did not take.

140. Later that day, Mr Reddy sought out Ms Nolan and apologised to her.

141. Ms Nolan submitted a formal grievance on 2 January 2020 which begins at page 370 and runs to 6 pages. Although it is dated 11 December 2019, it had been submitted by Ms Nolan to her Union for approval on that date and the final version was submitted with the date unaltered, on 2 January 2020. In summary her grievance was that the respondent had:

    141.1 Failed to support her by making reasonable adjustments to aid her return to her substantive duties;

    141.2 Failed to follow its sickness policy process and had given inaccurate information to Occupational Health;

    141.3 Failed to comply with her subject access request, (relating to the occupational health report and correspondence), and

141.4 Had discriminated against her by not considering her for the Patient Safety Officer role.

142. The grievance included, as noted above, reference to the two incidents involving Mr Reddy on 11 December and 2 January.

143. Mr Martin and Mr Cason acknowledged receipt of the grievance on 3 January and in a sequence of emails through to 8 January 2020 at pages 405-408, a discussion ensued as to whether the complaint about Mr Reddy's comments should be dealt with under a different policy and generally, whether the complaints were capable of informal resolution. Ms Nolan made it clear that she regarded that suggestion as a failure by the respondent to recognise the seriousness of the matters raised in her grievance. The respondent acknowledged that the grievance would be dealt with formally and investigated independently. In this correspondence, Ms Nolan requested referral to a counselling service, with which the respondent in due course complied.

144. On 31 January 2020 Ms Nolan indicated to Mr Martin that she had applied for a vacancy in a role known as Freedom To Speak Up Guardian. Mr Martin replied to express confusion, as he had understood from the review meeting with Mr Cason that she was clear she was going to return to her paramedic role. He queried whether this meant she wished to explore re-deployment on ill-health grounds. Ms Nolan replied to say that she had been told in the review meeting in no uncertain terms, *"If I fail at any point during the return to work that I would be looking at re-deployment and capability"* and so she had decided to apply anyway.

145. Mr Martin's reply was:

> "… you were adamant you could return to your paramedic role and just needed some extra time, Nick just required OH assurance this was the case.
>
> The agreement was that you would continue on AWDs until you had seen OH after which we would hold a Case Review meeting to discuss next steps (ie return to substantive role, re-deployment or capability).
>
> In essence we aren't at the re-deployment stage yet unless of course you are telling me you do not foresee yourself returning to your paramedic role due to health related matters?"

146. Ms Nolan applied for the Freedom To Speak Up Guardian role on 4 February 2020. The application included under the heading, "reason for leaving", "*Due to ongoing chronic health condition (which is recognised under the Equality Act), I am struggling with the physicality of being a front line ambulance paramedic. I am therefore looking for another role within the Trust that involves less heavy manual handling and lifting*.", (page 433). The Personal Specification is at page 719 and the Job Description at page 397. Shortlisting for interview in respect of this role was undertaken by a Ms Price and by Mr Chase, from whom we heard evidence. They identified from amongst their applicants, two people

including the claimant, who had indicated they were disabled and potentially at risk. On 18 February 2020. Ms Price wrote to somebody in "Recruitment" querying whether they should automatically go through to interview, indicating neither applicant would ordinarily have done so. Someone from the respondent's HR department responded with the advice that they would need to evidence where each candidate did not meet the essential criteria. In response, Ms Price provided that information on 19 February, (page 737). The applicants were anonymised and not known to Ms Price and Mr Chase. We are told that the email at page 737 relates to Ms Nolan. There appears to be five criteria on which she has scored 8/10, 10/10, 2/2, 6/6 and 2/2. She appears therefore to have fallen short on one of those criteria, but only by 2 out of a possible 10 marks.

147. Receiving no further advice, Mr Chase chased on 26 February but still received no response. On 3 March 2020, Mr Chase emailed the respondent's Deputy Director of People and Culture asking for help, explaining that recruitment had not assisted. In the meantime, he gave instructions at 17:27 on 3 March that the two at risk applicants, (including the claimant therefore) be invited to interview.

148. On the morning of the interview, 6 March 2020, Mr Chase received written advice from an interim HR manager, Ms Ladbrooke, following a telephone conversation the previous evening. She explained that Ms Nolan was unfit for a substantive post, looking for medical re-deployment and was therefore entitled to be considered for a guaranteed interview under the respondent's disability and recruitment policies. She advised Ms Nolan should be given an interview and interviewed first, scored immediately after her interview and should not be compared to the other candidates. She advised that scoring should only be against the competency and behaviours required for the role. This email is at page 746. It appears that a sentence is missing from the penultimate paragraph, but the indication appears to be that if Ms Nolan could meet the competency and behaviours required with appropriate training, she must be appointed to the role.

149. On 7 February 2020, Ms Nolan was informed that her grievance would proceed to the second stage.

150. On 13 February 2020, Ms Nolan was informed by her Rheumatologist that she had serious issues in her lower spine and should do no more heavy lifting, (page 455).

151. A further Occupational Health report was received dated 14 February 2020, (page 472). It was reported that the advisor had been notified by Ms Nolan orally that there were degenerative changes, wear and tear in her lower spine, as result of which she was not to perform any heavy manual handling tasks. She expected to receive written confirmation. As a consequence, the opinion of the advisor was that Ms Nolan was unfit for her role as a front-line paramedic, she would be unlikely to be able to sustain regular attendance in that role and she should be considered for other non-front line paramedic roles. Medical re-

deployment should be considered. They would not support an application for ill-health retirement.

152. Also on 14 February 2020, Ms Nolan applied for another vacancy, that of Specialist Clinician in the Hear and Treat at the Emergency Clinical Advice and Triage centre (ECAT), page 442. This was in response to an advertisement for the role which is at page 553: it is a band 6 role and there are full and part time permanent roles (plural) rotational dual working for paramedics and bank contracts. All work was over a 24 hour period. Flexible hours were said to be available for part time staff working evenings, nights and weekends.

153. We were not referred to a Job Description or Person Specification for this role.

154. The ECAT Team consists of approximately 130 people. Its purpose is to find alternative pathways for people who call 999 for medical reasons, but actually, do not need an ambulance. The work in ECAT requires a particular aptitude for clinicians: an ability to assess patients over the telephone without seeing them face to face and reasonable keyboard skills. People wishing to joint the team are therefore required to undergo a physically observed assessment, whatever their qualifications or abilities as clinicians. If they pass the assessment, they would then undergo training followed by an audit, before final appointment.

155. Arrangements were made for Ms Nolan to go to ECAT and observe the work of the team, but those arrangements were cancelled because of lockdown as a result of the Covid pandemic.

156. In the meantime, on 17 February 2020, Ms Nolan informed Mr Cason and Mr Martin about her back condition and confirmed that she was now seeking medical re-deployment.

157. Shortlisting for the FTSUG role by Mr Chase and Ms Price was undertaken on 17-18 February 2020. There were 50 applicants of whom 11 were shortlisted.

158. On 21 February 2020, Ms Nolan applied for the role of Mental Health Advanced Practitioner. She has withdrawn her complaint about not being considered for that role on a non-competitive basis.

159. On 24 February 2020, Mr Cason wrote to Mr Martin to explain why he considered the latest Occupational Health report unsatisfactory, namely because it was based upon what the advisor had been told by Ms Nolan rather than on hard evidence. Given the implications that this report had for Ms Nolan's future, he felt it important that the written advice from the consultant at the least, ought to be available.

160. On 27 February 2020, Ms Nolan provided the respondent with a copy of her rheumatologist's letter, which confirmed spine disc disease and that she should avoid lifting heavy objects.

161. On 3 March 2020, Ms Nolan was emailed an invitation to attend for interview on the FTSUG role on 6 March, page 488. Ms Nolan says that she was not at work and therefore did not receive this email, (sent to her work email address) until the next day. She confirmed in oral evidence that when she received the email she asked for time off to prepare, that she was given that time off and that she spent 10 hours preparing.

162. The respondent claims that a document in the bundle at page 742 shows that all other candidates invited for interview were invited on 2 March 2020. It is an auto generated email sent to Mr Chase by the respondent's software to confirm that the assessments have been set up and that he was listed as a member of the panel. It is not evidence that the candidates were informed of their interviews on 2 March. One would have thought that if the respondent can produce the document at page 742, it would have been able to produce emails to the other candidates informing them of their interview. Ms Nolan's complaint is that she had less notice than the other candidates, who had over a weeks' notice. She says that when she attended the interview and assessment day, the other candidates complained about only having a weeks' notice. Neither Ms Nolan nor Mr Chase have first-hand personal knowledge of when the candidates were notified of the interviews. It is clearly the case that Ms Nolan had less notice, given that the email to her was late on 3 March and the document at page 742 confirming to Mr Chase that the interviews had been set up, was on 2 March. We note that the allegation that the other candidates had at least one weeks' notice to prepare for the interview appears in the original list of issues agreed at the preliminary hearing. The respondent has therefore known all along that this was an issue it would have had to deal with. They have failed to produce evidence that one would have thought would have been readily available. We found Ms Nolan's evidence credible. We conclude, on the balance of probability, that she was told by the other candidates that they had a weeks' notice and that in fact, they did have a weeks' notice.

163. On 4 March at 13:43 Ms Nolan emailed Mr Martin to say that she had just found out that she had been invited for an assessment in respect of the Freedom To Speak Up Guardian role and said that she thought that members of staff at risk of re-deployment should be considered under a non-competitive process. Mr Martin replied to say that he had not been aware that she had made the application and offered to speak to the recruiting manager.

164. The assessment took place on 6 March 2020. The process was to be a morning of assessments which included a scenario, a 3 minute, "verbal standing elevator pitch" and a group session. The top 3 candidates were then to be interviewed in the afternoon.

165. Mr Chase says that, because of the advice he had received from Ms Ladbrooke, he told Ms Nolan in the morning when she arrived that she would be interviewed and interviewed first but suggested that she go through the assessment that morning anyway, in order to gain insight into the role. Ms Nolan adamantly denies that this conversation took place. She says that the only time Mr Chase spoke to her was over lunch, when they had a conversation about Buddhism. We note that in a later email on 11 December, (page 747) Mr Chase reported back to Ms Ladbrooke to the effect that Ms Nolan had been unsuccessful, commenting, *"I have provided the feedback to Felicity and explained the process we undertook regarding the At Risk Process, as she seemed not to understand how it would be applied …".* That seems to suggest that perhaps the process was never explained to her in the first place. Having regard to that and the fact that we found Ms Nolan a credible witness, we find on the balance of probabilities that it was not explained to her on the day she should go through the morning assessments to gain insight into the role and that she would be guaranteed an interview.

166. Ms Nolan was interviewed first but apart from that, there is no evidence that the advice from Ms Ladbrooke referred to above was ever passed onto the interviewers, (Mr Chase was not an interviewer). The scores on the assessment exercises are reproduced in the bundle at pages 749-757. We do not have the benefit of any explanation from anybody of what we see there and everything in relation to the other candidates is redacted. Certainly, it looks from the annotations as if the claimant was taking part in a competitive exercise. Be that as it may, she was of course interviewed by three individuals and the interview question and answer sheets are reproduced in the bundle at pages 758-772. It is a hopeless document. It has been copied in such a way that the scores have been excluded. We do not have the benefit of evidence from the individuals who did the interview and we have no explanation of the handwritten annotations that appear there. The score sheets seem to suggest that Ms Nolan was assessed on the same basis as were the other candidates. There is no evidence that there was any discussion with her, where they may have been some shortfall on her part, as to how that shortfall might have been accommodated or, "bridged" as the respondent puts it.

167. On 11 March 2020, Ms Nolan was informed that she had been unsuccessful in the FTSUG role. In his report to Ms Ladbrooke, Mr Chase wrote, *"Felicity interview score was well below the point of qualification and the gaps were considered too great in relation to closing with development that would be needed.".* We note there is no record anywhere of any such consideration and no evidence from the respondent by way of explanation, (page 747).

168. A Ms Vickary was appointed to investigate Ms Nolan's grievance and she wrote to confirm this was so on 20 February 2020, (page 503). She sought to arrange a meeting after she returned from leave on 27 February. Ms Vickary made contact with Ms Nolan again on 4 March 2020, inviting

her to offer some dates for a meeting. Email correspondence continued until 10 March, when the meeting was set for 17 April.

169. On 16 March 2020, an administrator called Ms Seaman emailed Ms Nolan, trying to set up a Case Review meeting, (page 512). She tried again on 19 March, (page 511).

170. Because of the Coronavirus crisis and the strain placed upon the respondent's resources, on 18 March 2020 Ms Vickary had to withdraw as investigator of Ms Nolan's grievance. She wrote to explain that to Ms Nolan on 18 March. Ms Nolan replied, *"Of course Sarah. Totally understand.".*

171. Also at about this time, Mr Smart had been exploring with the manager of ECAT, (Ms Treacher) the possibility of Ms Nolan working in ECAT in exchange for a paramedic who was working there and was fit for duties. Proposals for that arrangement unfortunately came to an end on 19 March 2020 because Ms Nolan was required to self-isolate, being regarded as potentially at high risk from Covid.

172. On 20 March 2020, Ms Nolan was invited to a further Case Review meeting to take place on 20 April 2020, (page 522).

173. On 24 March 2020, Ms Nolan was, "stood down for 12 weeks" because of her underlying health condition and the risk of Covid.

174. On 26 March 202, Ms Nolan wrote to Mr Martin to say that she had been invited for interview for the ECAT role on 3 April and she would not be able to attend because she was self-isolating. She made the observation that yet again, it appeared as if she was being subjected to a competitive process while at risk of medical re-deployment. Mr Martin replied pointing out that once again, Ms Nolan had made an application without informing him so that he did not have an opportunity to contact the recruiting manager and make the necessary arrangements so that she was taken out of any competitive process. He also pointed out that the Case Review meeting had not yet taken place and so they had not had the opportunity of discussing re-deployment in detail. He explains that over the years he had supported many staff through re-deployment and that he would do everything he could for Ms Nolan, but she needed to work with him. He wrote that he felt as though she was setting him up to fail. He made clear that he would speak to the recruiting manager for the ECAT role, (pages 528/7). Ms Nolan replied on 27 March thanking Mr Martin for his support and confirming that she recognised things had dramatically changed on being informed of her spine condition and the need to avoid heavy lifting. She confirmed she had applied for the ECAT role on 14 February and the Mental Health Advanced Practitioner role on 21 February. She was not sure who the recruiting managers were, but thought it might be Ms Treacher.

175. On 27 March 2020, Mr Martin emailed Ms Treacher to explain that Ms Nolan was at risk of medical displacement, noted that she had been offered an interview, but explained that she would not be able to attend in person due to Covid and self-isolating. He suggested a discussion by telephone and explained that she should be assessed outside a competitive recruitment process. Ms Treacher replied to say that an interview could be done over the telephone but there is an assessment which has to be done in person. She suggested that this takes place after isolation. Having been copied in on that, Ms Nolan made the point to Mr Martin that it still appeared to be a competitive process. Mr Martin wrote to Ms Treacher to reiterate that it should be a non-competitive process. Ms Treacher replied that an assessment was key to the role, everyone who goes to ECAT has to have undergone such an assessment. Mr Martin asked whether that could be done by telephone, Skype or Teams? Ms Treacher replied that it could not, that it must be done in person. Mr Martin explored whether arrangements could be made in some other way for the assessment to be undertaken and the email exchanges culminated in an email from Ms Treacher of 30 March 2020, copied to Ms Nolan, which confirmed that ECAT recruitment was not a competitive process due to the number of vacancies.

176. In a separate email trail which starts on 30 March 2020, Ms Treacher enquired of Mr Martin to double check that Ms Nolan could work nights. It was confirmed that she could not. Ms Treacher then wrote, *"So unfortunately we cannot take anyone that cannot permeant [sic] nights in our team or at least till 04:00, even if they are being re-deployed as we cannot facilitate this as a team."* Mr Martin challenged that, asking whether she was certain no reasonable adjustments could be made around the working hours, to which Ms Treacher responded:

> "Yes happy to justify this. We do not recruit and have not taken anyone who cannot work nights for the past 2 years, also our own staff we are not able to accommodate anyone who cannot work nights in any new flexible working. This is because we have insufficient cover still overnight.
>
> This reasonable adjustment has not been made for anyone in this time, so yes Tom and I am very certain, because if I do it for her I have a long list of staff who will grievance me, and we just cannot accommodate this."

177. Mr Martin replies that he understands.

178. The ECAT role is popular with clinicians seeking alternatives to physical front line duties. 80% of the team are on some form of flexible working. A proportion of such people are unable for health reasons, to work nights. On the establishment of the team at this time, 25% were unable to work nights. On the existing team, 34 now, 8 in 2018, had been refused requests that they be permitted not to have to work nights. Those 8 from 2018 are still waiting. Since 2018 a decision had been made not to take anyone onto the team that was not able to work nights.

179. The NHS's National Social Partnership Forum issued a statement on industrial relations during the pandemic on 1 April 2020. It states:

> "Employers and unions agree that the workforce and their managers and Union representatives, should not be distracted from meeting the emergency faced by the country and protecting patients and staff. In some cases, for the duration of the outbreak we need to work in new ways and in others to pause or vary our typical employment relations activity."

180. Under a heading for Disciplinary Matters, Grievances and other procedures is the following statement:

> "Employers will pause disciplinary and other employment procedures (for example, sickness and capability triggers) while the crisis lasts, except where the employee requests proceeding as it would otherwise cause additional anxiety, or where they are very serious or urgent …
>
> Where employees raise urgent grievances, for example, concerning health and safety, then these should be considered in the normal timeframe set by agreed local policies.
>
> Other grievances, appeals and procedures (and all relevant timeframes) should be paused on the understanding that they may be taken up at a later date by the employee without detriment."

181. The Case Review planned for 17 April 2020 was cancelled due to the Covid outbreak and sadly, a bereavement suffered by Ms Nolan.

182. Ms Nolan's Trade Union representative, Mr Jarvis, proposed on 17 April that the Case Review be postponed till Ms Nolan was out of isolation as he felt the prospect was having a negative effect on her. Oddly, Mr Martin replied suggesting he had spoken to Ms Nolan recently and she was keen to go ahead with the meeting. Ms Nolan responded to that, making it quite clear she did not know where he had got that idea from, stating that she had made it very clear in a conversation on 2 April that she was incredibly upset and distressed, not only with regard to her bereavement but also in the way that she felt that she was being treated. She felt it was very unfair indeed that her case was being progressed whilst her grievance was postponed. Mr Martin replied to confirm agreement that the Case Review would be postponed.

183. Mr Cason wrote that he did not agree that lockdown should prevent cases from moving forward and he proposed that the Case Review meeting should proceed, "out of process". He wrote:

> "I would offer the guarantee that if we continue to hold the meeting on Monday, as we suggest, it would only be to discuss these elements, bearing in mind at our last formal meeting you were determined you would be coming back to work and that has changed. We would not look to arrange any Capability at that meeting only to reconvene a Case Review at a more suitable time (but subject to any "lockdown" caveats although your isolation may be a consideration)."

184. Ms Nolan replied to query, did that mean that her grievance would be going ahead as well? The concluding a paragraph of this email reads, *"To be perfectly honest I'm absolutely exhausted with it all and nearly at breaking point".*

185. Mr Cason replied that he understood and it was agreed there would be no further, "progression" suggesting that the meeting on the following Monday would be an opportunity to clarify finer points regarding re-deployment and ill-health retirement.

186. In another email on 17 April 2020, Ms Nolan informed the respondent that she had been diagnosed with Post Viral Chronic Fatigue Syndrome and was therefore unable to work nights.

187. Mr Martin wrote a separate email seeking to reassure Ms Nolan that there was, "no hidden agenda".

188. The proposed, "informal meeting" therefore took place on 20 April. Mr Cason wrote an email on 22 April summarising what was discussed, pages 609-610. It was noted that Ms Nolan would not be able to return to her substantive role and that she had made four applications. A request was made that Ms Nolan involve Mr Martin in future applications so that he could assist and ensure she was assessed outside a competitive recruitment process. It was agreed that Mr Martin would email Ms Nolan vacancies within the Trust each week. It was identified that she did not want to work anymore than 30 hours a week. Her ideal role would be sedentary. It was explained that any gaps in her applications against essential criteria could possibly be bridged through reasonable adjustments. She was told she would receive pay protection if she was re-deployed to a lower band. It was noted that she would not be able to work nights, no later than 1900 or 2000 hours. The concluding paragraph reads:

> "Whilst we did not discuss in detail progression to a Capability hearing please be aware that if permanent re-deployment is unsuccessful then your case will need to be heard at a Capability hearing where your contract of employment could be ended on health grounds."

189. On 20 April 2020, Mr Martin double checked with Ms Treacher, explaining Ms Nolan's inability to work nights was because of her Chronic Fatigue and that this could be the difference between successful re-deployment or not. Ms Treacher replied, *"So we haven't been able to take anyone who cannot work nights for some time and I am not able to provide this to my own staff with OH issues.".*

190. A further Occupational Health report was provided on 22 April 2020. which confirmed that Ms Nolan was at amber risk with regard to Covid.

191. On 24 April 2020, Ms Nolan provided written confirmation of her diagnosis of ME/CFS, (page 616).

192. From 27 April onwards, Mr Martin began sending Ms Nolan weekly lists of vacancies.

193. At around about this time, Ms Nolan made an application for a job with a charity known as St Giles.

194. On 21 May 2020, Ms Seaman wrote to Ms Nolan seeking to arrange another Case Review. Ms Nolan replied, copying in Mr Cason and Mr Martin. She said that she was going to take Union advice because she felt that progressing her case during the global crisis felt incredibly unfair. She explained she felt it only fair that the Case Review should be postponed until she could attend in person, making the point that her grievance had been postponed since March. She felt this was unjust.

195. Mr Cason replied on 26 May saying that he wished to continue with a virtual Case Review and proposing 24 June as a date for meeting.

196. On 10 June 2020 Ms Nolan responded having had the chance to speak to her Union representative. She said that she did not wish to proceed with a virtual Case Review as she did not feel that such a meeting was either supportive or appropriate and complained about the fact that her grievance has been suspended yet the respondent felt able to press on with sickness management.

197. Mr Cason replied saying that he could chase the grievance so that could move forward as well, but that sits separately, that one is not dependant on the other. That was on 10 June. On 16 June Mr Cason wrote again, asking Ms Nolan to confirm she wished to proceed with the grievance. Ms Nolan replied complaining that her grievance should never have been postponed whilst the case review continued, particularly as the grievance was as a direct result of how her case had been handled. She said that moving forward with a Case Review that could lead to Capability whilst ignoring her grievance was completely unacceptable. Mr Cason replied on 18 June to say that they would pause the sickness process, asking whether she was happy for the grievance also to remain paused. Ms Nolan replied on 26 June saying that she would prefer to see her grievance investigated in a timely manner. She explained that she understood why the grievance had to be paused in March during the global crisis, but she did not understand why the same principles were not applied to her sickness absence process. The outcome of this exchange of correspondence was that on 29 June 2020, Mr Martin confirmed that the sickness process was paused and he asked Ms Nolan to clarify whether she wanted her grievance to proceed.

198. Ms Nolan suggests that Mr Cason only agreed on 10 June that the grievance could move forward because by then, he had received a request for a reference from St Giles and so he knew that she was likely to leave the respondent's employment. Ms Nolan's evidence was that on 10 June she had been told by St Giles that they were going to contact the

respondent for a reference. The email from Mr Cason on 10 June is timed at 11:47, it seems to us unlikely that by then he had seen or knew of the reference request. Mr Cason's evidence was that he received the request for a reference on 15 June and we accept that.

199. On 8 July 2020 Ms Nolan resigned. Her resignation is set out in an email copied at page 656. She referred to her life-long ambition having been accomplished but ultimately impacted by health issues. She wrote:

> "… after many difficult months of meetings and communications, as well as applying for various roles within the Trust unsuccessfully, I unfortunately have absolutely no faith whatsoever, that the Trust will do the right thing in supporting me through ill-health re-deployment. Because of this, and because of the recent failure of the Trust to consider me for a position in ECAT, a role that would have been ideal for me, I have no choice but to hand in my resignation. It is not a decision I have come to lightly.
>
> The fallout from the way in which the Trust handled my case has been an immensely detrimental effect on my physical and mental health …"

200. Ms Nolan gave four weeks' notice to expire on Wednesday 5 August 2020.

201. Mr Cason replied 6 days later on 14 July acknowledging receipt of the resignation and querying whether she wished to proceed with her grievance. She replied on 21 July saying that she obviously would have liked to have seen her grievance investigated and resolved but could not see how that could be achieved within the few weeks remaining of her notice.

202. Ms Nolan's employment with the respondent came to an end on 5 August 2020.

Conclusions

203. We approach our conclusions following the list of issues, but we will begin with discrimination and end with constructive dismissal.

Direct Discrimination

204. There is a single allegation of direct discrimination, "On 04 March 2020 the claimant was informed that she would be interviewed for the position of "Freedom To Speak Up Guardian" on 6 March, whereas other candidates had at least one weeks' notice to prepare for the interview.".

205. Ms Nolan was informed by email timed late on 3 March which she did not open until 4 March. We found on the evidence that the other candidates had at least a weeks' notice before the interviews on 6 March.

206. Having less notice of an interview than other candidates is a disadvantage, a detriment.

207. Was it less favourable treatment on the grounds of disability? Ms Nolan relies upon the five other candidates as her comparators. Those other candidates were not in the same circumstances as Ms Nolan, because they were not the subject of an enquiry by Mr Chase of Human Resources, who were not responding timeously.

208. The correct comparator and therefore the hypothetical comparator we adopt in this case, would be a person applying for the post for whom the respondent might have an obligation to give priority, might have to afford a non-competitive interview, of whom the person organising the interviews may have made enquiries of Human Resources and in respect of which enquiries, Human Resources have not replied in good time. An example of such a person might be a person who is not disabled who is at risk of redundancy and in respect of whom in accordance with the employer's redundancy policy, is entitled to a non-competitive interview. In respect of such a person, we find that Mr Chase would have delayed informing them that they were invited to interview, pending the receipt of advice from Human Resources, just as Mr Chase had done. There are no facts from which we could properly conclude that Mr Chase has treated Ms Nolan any differently from the way that he would have treated the hypothetical comparator. The complaint of direct discrimination therefore fails.

Discrimination arising from disability

209. The something arising relied upon is Ms Nolan's inability to work nights, her need for reasonable adjustments, her inability to work as a front-line paramedic and her sickness absences. These do all arise from her disabilities.

210. There are three allegations of unfavourable treatment relied upon:

    210.1 Ms Nolan being informed on 4 March that she would be interviewed for the Freedom To Speak Up Guardian role on 6 March, whereas other candidates had at least one weeks' notice. That is unfavourable treatment, because the claimant has less time to prepare than other candidates. The legitimate aim relied upon was that Mr Chase was seeking to ensure that he acted on correct Human Resources advice to ensure that disabled candidates are treated fairly and consistently and that he was making all the reasonable adjustments required. That is a legitimate aim. However, the means adopted were not proportionate; whilst Mr Chase as an individual cannot be blamed, the respondent as an organisation can, in that he was not provided with an answer to his query promptly and his reminders were ignored. Ms Nolan's claim in this respect therefore succeeds.

    210.2 Unreasonable delay in investigating and addressing the claimant's grievance of 2 January 2020. The grievance was suspended on 18 March when the investigator was caught up in the additional demands being made of the respondent's service as a result of the

Coronavirus crisis. Ms Nolan was understanding of that at the time. In light of the National Social Partnership Forum statement on 1 April 2020, an agreement between the Unions and employers, the decision to suspend the grievance and for it to remain suspended during the Coronavirus crisis of the Spring and Summer of 2020 was reasonable. This allegation is not made out.

210.3 Pressurising Ms Nolan to attend Case Review meetings and continuing with the sickness absence procedure. There were ongoing concerns about Ms Nolan's health and its impact on her ability to undertake her substantive contractual duties and other duties to which she was assigned, (the email correspondence clearly shows that she was struggling with the HALO role i.e. even after that had been amended to focus on report writing). However, the SPF statement of 1 April 2020 anticipated that all employee relations procedures, other than the most urgent, would be suspended. Whilst it is correct to say that a sickness absence and capability management process should, (and does in the case of the respondent's policies) include provision for providing support and assistance to an employee in adjustments to duties, it is also unrealistic to ignore the fact that ultimately such procedures may lead to dismissal. That inevitably, is a cause for concern for an employee going through a capability management process. To put an employee through such a process is therefore unfavourable treatment. It is however ordinarily, a proportionate means of achieving a legitimate aim: the legitimate aim to manage absence either by making adjustments to accommodate the employee or ultimately dismissal or ill-health retirement, so as to enable the employer to maintain a healthy productive workforce. In this case however, the legitimate aim becomes no longer proportionate after 1 April 2020, when there has been agreement between NHS employers and the Unions that all employee relations activity, (save for the most urgent) will cease so that the NHS and its employees can devote their time and energy to dealing with the Coronavirus crisis in the awful situation that they faced at the time. It is in our judgment unfair and disproportionate for Mr Cason to have insisted on pressing on with the Capability Review process notwithstanding the SPF statement, the fact that the claimant's grievance had been suspended and the fact that Ms Nolan was in any event unable to work as she was having to shield because of her vulnerability. On the latter point, nothing was going to be achieved in getting Ms Nolan back to work in the immediate future anyway. Ms Nolan's claim in this respect, succeeds.

211. Although paragraph 12 of the list of issues queries whether the respondent could show that it did not know and could not reasonably have been expected to know that Ms Nolan had a disability, that is not the respondent's position. It accepts that she was disabled.

Failure to make reasonable adjustments

212. The PCP relied upon is requiring employees to perform their full contractual duties. Ms Nolan's contractual duties were those of a paramedic, (page 212).

213. The respondent argues that it did not apply such a PCP. Miss Twomey's written submissions at paragraph 25 suggests that there are numerous alternative options which the respondent offers senior paramedics unable to carry out their role, which do not result in dismissal, including re-deployment, ill-health retirement, alternative working duties, flexible working arrangements.

214. There cannot be any doubt that the respondent has a requirement that its employees carry out their contractual duties. We point out that the PCP we permitted and allowed to go forward at the outset of the hearing as noted above, expressly excluded the proposed words, "in order to avoid the risk of dismissal".

215. The alternative options to which Miss Twomey refers are potential alternative roles by way of reasonable adjustments in the face of the PCP relied upon placing an individual at a disadvantage.

216. The disadvantage relied upon is that because of Chronic Fatigue Syndrome and Myalgic Encephalomyelitis and her spinal disc disease, Ms Nolan was unable to perform her substantive role, which had the result of her being managed under the respondent's sickness absence management policy, one outcome of which was dismissal.

217. The respondent argues, (paragraph 26 of Miss Twomey's written submissions) that Chronic Fatigue did not put Ms Nolan at a disadvantage because she acknowledged in cross examination that it was only her back condition that prevented her from returning to her substantive role. We do not accept that. Ms Nolan's CFS/ME prevented her from performing her contractual role at the relevant time and meant that she was being, "managed" under the sickness absence scheme. That is a disadvantage. It might ultimately have led to dismissal if it had gone on for too long and no alternative arrangements could be made to keep her in gainful employment in the meantime. Further, whilst she was unfit and therefore unable to work at all, her sick pay would in due course be reduced from full pay to half pay and ultimately to zero. Further, her CFS/ME made it more difficult for her to fulfil her contractual duties and self-evidently, that placed her at a disadvantage in the face of a requirement to fulfil her contractual duties.

Patient Safety Officer

218. The first reasonable adjustment contended for at paragraph 15.1 of the list of issues is the suggestion that Ms Nolan should have been interviewed for the position of Patient Safety Officer in November 2019. It is

convenient to consider at the same time, the suggested adjustment of allowing her not to take part in a competitive selection process and to have provided training and support in respect of the Patient Safety Officer position; paragraphs 15.2 and 15.3 of the list of issues.

219. The respondent says that Ms Nolan did not meet the basic criteria for the role. Mr Brett identified three specific failings: (1) that her application did not demonstrate experience of using root cause analysis methodology, (2) nor possessing management and leadership experience, or (3) knowledge or experience with the Care Quality Commission, NHS Resolution or the Medicines and Healthcare Products Regulatory Agency.

220. In her application form, Ms Nolan stated that she had received training in root cause analysis. She had set out areas of experience which, whilst not amounting to direct management experience, was indicative of someone who may have an aptitude for management and leadership, (she was a lead clinician, blue light champion, a wellbeing officer, Union steward and Unison LGBT+ officer). She explained that she had worked as an emergency management consultant and had been responsible for multi-agency emergency exercises which indicated that she had an ability to work with other agencies, suggesting perhaps that a lack of direct knowledge and experience of the agencies mentioned could be overcome. There was no exploration with Ms Nolan about the depth of her knowledge of these matters and the extent to which any shortcomings might be overcome with training. There was no analysis in evidence from the respondent of what training was available and how that might or might not have been adequate. Mr Brett's oral evidence that training in root cause analysis would take 2 days was extraordinary, in that in the first place he had earlier commented that training is not the same as experience and in the second place, suggest that it is something relatively minor. Similarly, his suggestion in oral evidence that management training would take more than a year seemed extraordinary, particularly given the lack of supporting evidence or any reference to this in his witness statement.

221. We note the email exchange between Mr Martin and Mr Brett on 18 & 19 November. Mr Martin was advising Mr Brett that he ought to interview Ms Nolan and Mr Brett declined to take that advice. He said that he would reconsider Ms Nolan's application if he should not find an appointable candidate at the forthcoming interviews. He did not find an appointable candidate. He did not reconsider Ms Nolan's application. He redistributed the duties of the person on maternity leave amongst the team. If it was possible to do that, one would have thought it would have been possible to allocate duties to Ms Nolan and insofar as there might have been gaps that were not bridgeable, those duties might have been redistributed. Due to lack of evidence from the respondent, we cannot say for sure.

222. The role was for one year's maternity leave. At the time, the claimant's known disability was her CFS/ME and not her back. That year might have

been just what she needed to recover and be able to return to her front-line duties.

223. Ms Nolan has proven facts from which, absent explanation from the respondent, we could properly conclude that there was a failure to make reasonable adjustments: here was a role that looked as if Ms Nolan might be able to perform. The burden of proof therefore shifts to the respondent to satisfy the Tribunal that in fact, there was no failure to make reasonable adjustments. Mr Brett did not satisfy us that he properly considered Ms Nolan's application. His evidence about the gaps in her experience was unconvincing. He did not provide evidence or analysis on what it was in the role Ms Nolan would not have been able to do, what training was available and why it would not have been reasonable to provide that training to Ms Nolan and distribute aspects of her role to others in the team whilst she completed the training. Ms Nolan's complaint of failure to make reasonable adjustments in respect of the Patient Safety Officer role succeeds.

Freedom To Speak Up Guardian (FTSUG)

224. The complaint in respect of this role, as at paragraphs 15.2 and 15.3 of the list of issues, is the failure to make the adjustment of allowing Ms Nolan not to take part in a competitive selection process when she applied for the role and the failure to provide training and support. The respondent says that there were adjustments, in that Ms Nolan was interviewed even though she did not pass the assessment, (paragraph 30a of the respondent's submissions). This contradicts Mr Chase's evidence that Ms Nolan did not have to undergo the assessment and merely did so for the purposes of familiarisation.

225. The respondent says that Ms Nolan fell well below the standard reasonably required for a person in this role. There is no direct evidence of that. Mr Chase did not conduct the interviews. None of the three interviewers gave evidence. Their scoring was not visible to us. There was no explanation to us of how she performed.

226. The respondent suggests the interview was not competitive, but from the documents in the bundle in relation both to the assessments and the interviews, they have every appearance of being part of competitive exercise. Further, the notes do not appear to record any discussion with Ms Nolan about where there may be short comings and how they may perhaps be overcome by accommodating her in some way, making adjustments or as the respondent put it, "bridging the gap". Nor is there any note or evidence of discussion between the interviewers after the exercise, either to show that all three of them were of the view that Ms Nolan was well below the standard required nor of any discussion about how adjustments might be made to accommodate her.

227. We are told that Ms Nolan scored 28 out of 30 on essential criteria. That does not strike us as a candidate who has fallen, "significantly short". One

would have thought such a shortfall could be overcome with adjustments and allowances, but we have no evidence of what those shortfalls were, nor analysis of their importance or why it is they could not be overcome, if that is the case.

228. By the time of the interview, (6 March 2020) Ms Nolan's back diagnosis was known. All causes of disability were therefore in play.

229. Ms Nolan has proven facts from which we could properly conclude that the respondent has failed to make a reasonable adjustment: she appears to have been subjected to a competitive process, no consideration appears to have been given to her disability, her shortfall in essential criteria seems marginal. The burden of proof shifts to the respondent. The respondent has failed to provide direct evidence of how the interviews were conducted, what Ms Nolan's scores were, how those scores compared to the other candidates, where her failings were and why it is that they could not have been overcome. The claimant's claim in this respect therefore succeeds.

Emergency Clinical Advice and Triage (ECAT)

230. There are three aspects to Ms Nolan's complaint of the respondent having failed to make reasonable adjustments in respect of this post. In accordance with paragraphs 15.2 and 15.3 of the list of issues, she complains that the respondent should have allowed her not to take part in a competitive selection process and should have provided training and support. Under paragraph 15.4 of the list of issues, she says the respondent should have made the adjustment of recruiting her into this role, notwithstanding her inability to work nights.

231. We accept the evidence of Ms Treacher that it was necessary to conduct a physically observed assessment of any potential candidate to work in ECAT to ensure that they had the appropriate aptitude and keyboard skills to conduct a triage by telephone, rather than face to face.

232. We accept the evidence of Ms Treacher that the appointment of a nurse or paramedic to ECAT is not a competitive exercise. The number of vacancies were such that if such a person passed the assessment, (which is not competitive, it was simply a case of demonstrating the necessary aptitude) then that person would be appointed.

233. We accept the evidence of Ms Treacher that a person appointed to the role would undergo hands on training followed by a final audit which if passed, would result in the individual being permanently appointed to the role. That is not competitive.

234. The key issue in relation to the ECAT role was Ms Treacher's insistence that nobody who could not work nights would be recruited to the role. This was an unwritten policy because of operational and employee relations issues, arising out of the fact that a number of members of the ECAT team

had requests for exclusion from night working refused because there was insufficient cover for night work.

235. We accept that Ms Treacher and the respondent had an issue with insufficient cover for night work, such that a number of individuals who had requested shifts that exclude night work for a variety of reasons, including disability, had those requests refused and were effectively on a waiting list. However, there was no evidence or analysis from the respondent of the precise number of such people on the team at the time, nor of the reasons those individuals did not want to work nights. Some of those people may have had very good reasons, perhaps better reasons than Ms Nolan. Some might not.

236. There are other reasons why the respondent's argument that it could not accept Ms Nolan on the ECAT role if she was not able to work nights is unconvincing. Ms Treacher's verbal evidence was that demand for this role was such she was never refused a budget extension for an extra person. It seems possible therefore that the respondent could have appointed Ms Nolan to an ECAT role as an extra numery, to workdays only. Appointing her to workdays would not have had the effect of reducing in any way the existing night work capacity. We were told there were a lot of vacancies; the new recruits might have been required to undertake more night work so that Ms Nolan could workdays only. We had no evidence before us as to how much demand there was or what level of calls there were, at night as compared to daytime. Nor did we have evidence about the number of people available to cover nights as compared to days. Those who had requested and been refused exclusion from night work, from whom Ms Treacher was anticipating grievances, were obviously available to continue to work nights, for they remained on the ECAT Team. Ms Treacher said that she had made adjustments for them and they remained on the team.

237. That those who had been refused exclusion from nights might submit grievances is not, in our view, an excuse for not doing the right thing with regard to Ms Nolan. Those grievances might or might not be justified. If the grievances are unjustified, then the fear of them is no good reason not to make a reasonable adjustment for Ms Nolan. If the grievances are justified, it may well perhaps be that the respondent is failing to make a reasonable adjustment for others, but two wrongs do not make a right; that does not justify not making a reasonable adjustment for Ms Nolan.

238. It seemed to us likely that the situation here was that the respondent had taken the position, "this is too difficult so we will take no one onto the team who cannot work nights". That is too blunt an instrument.

239. In respect of potential industrial discontent; good management could have ensured Ms Nolan's incorporation in the team with understanding by everyone as to why it was necessary that she did not work nights.

240. Miss Twomey submits at paragraph 30d of her written submissions that the only condition for which the respondent was required to adjust for was Ms Nolan's back and because her back condition was not the reason she was unable to work nights, that aspect of her claim must fail. The respondent accepts Ms Nolan was disabled by reason of CFS/ME and her back condition. The back condition was the reason why Ms Nolan accepted that she had to be re-deployed into another role, so that is the reason why as a reasonable adjustment, she was seeking the role on ECAT. Recruitment to the ECAT role was made conditional on a willingness to work nights. Ms Nolan's CFS/ME meant that she was unable to work nights. The reasonable adjustment contended for in that respect, is to remove the requirement to work nights.

241. The claimant has proven facts from which we could properly conclude that the respondent has failed to make a reasonable adjustment in this respect: there is a role which she very probably would be capable of performing, (subject only to the assessment, which most people passed) but for the fact that she cannot work nights and the respondent refused to remove the requirement to work nights. The burden of proof therefore shifts to the respondent. The respondent has not produced evidence to satisfy the tribunal that it was not possible to accommodate Ms Nolan on the team's rota in such a way that she was not required to work nights. Her complaint in this respect therefore succeeds.

242. Paragraph 16 of the list of issues poses the question whether the respondent did not know or could not reasonably be expected to know that Ms Nolan had a disability or was likely to be placed at a disadvantage. This is not an argument pursued by the respondent.

Harassment related to disability

243. There are five allegations of unwanted conduct:

    243.1 Mr Reddy did on 22 November 2019 say to the claimant, "It's about time we got rid of you".

    243.2 Mr Nick Cason did on 6 December 2019 say to the claimant that, "He felt she would unlikely be able to return to her substantive role as Senior Paramedic in the future".

    243.3 Mr Reddy did on 2 January 2020 shout an angry comment at Ms Nolan pointing his finger at her aggressively saying, "Don't you start, I'm going to knock someone out in a moment.".

    243.4 The respondent did not unreasonably delay in investigating and addressing Ms Nolan's grievance.

    243.5 The respondent did pressure Ms Nolan to attend Case Review meetings in the emails and letters as stipulated.

244. The next question, as posed at paragraph 18 of the list of issues, is whether such conduct related to Ms Nolan's protected characteristic i.e. her disability? We will deal with each of the four upheld allegations in turn:

244.1 The context of Mr Reddy's comment on 22 November 2019 was his overhearing Ms Nolan make reference to her concerns about the Final Review Meeting to which she had been invited and the fact that she had been on alternative work duties away from working as an ambulance paramedic for some time. His comment was therefore related to her disability.

244.2 Mr Cason's remark about it being unlikely that she would be able to return to her substantive role was clearly to do with her disability.

244.3 Mr Reddy's remark on 2 January 2020 was in our view more to do with his anger at the problems that he was facing juggling crews between Mercedes and Fiat ambulances, some people having had appropriate training and others not. We do not accept the claimant's submissions that there is a stigma attached to paramedics being on alternative work duties and we do not accept that any such stigma or irritation at people being on alternative work duties was behind Mr Reddy's outburst.

244.4 Seeking to arrange Case Review meetings is plainly related to Ms Nolan's disability.

245. The question then posed at paragraph 19 of the list of issues is whether such conduct, (Mr Reddy's comment on 22 November 2019, Mr Cason's comment on 6 December 2019 and the respondent pressuring Ms Nolan to attend Case Review meetings) had the purpose or effect of violating Ms Nolan's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

246. In respect of Mr Cason's comment, his statement appears to go beyond the wording of the Occupational Health report that the meeting had been called to discuss. There appears to be no basis for his assertion at that time that he perceived Ms Nolan was not going to be able to return to her substantive post. At that time, Ms Nolan thought that she was on her way back to her substantive post, anticipating starting out again on the ambulances in accordance with the rota prepared for her with Ms Howlett on 28 October, (page 315).

247. Taken together, Mr Reddy's remark on 22 November 2019, Mr Cason's comment on 6 December 2019, (reiterated in his letter of 10 December) and chasing Ms Nolan to attend Case Review meetings after the 1 April 2020 in the context of her grievance having been suspended because of the Coronavirus crisis, these matters together created for her an intimidating and hostile atmosphere in which she reasonably perceived a negative attitude towards her and her ill-health which was hostile in tone

and intimidating in her perceived job security. Ms Nolan's claims in this respect succeed.

248. Although at paragraph 20 of the list of issues the question posed is whether the respondent took all reasonable steps to prevent the harassment complained of, this is not an argument which has been advanced by the respondent.

Constructive discriminatory dismissal

249. The respondent did not directly discriminate against Ms Nolan, but she was subjected to discrimination arising from her disability, there was a failure to make reasonable adjustments and she was subjected to harassment. Such conduct is a breach of the implied term not to discriminate and the implied term to maintain mutual trust and confidence. Those are fundamental terms of the contract of employment. Ms Nolan was entitled to resign, without giving notice, as a consequence. The fact that she gave notice does not in any way intimate the breaches were not serious.

250. The circumstances of Ms Nolan's resignation were the significant knock back of her not being considered for the ECAT role, feeling pressured to attend Case Review meetings, (notwithstanding the suspension of her grievance) and her feeling unsupported in her job applications, particularly that for the ECAT role. That is why she started looking for another job. In her text message to her Union representative copied at page 689 she wrote, *"… seems obvious the Trust aren't going to support me with re-deployment …".* She went on to say, she could not afford to be unemployed. She said in her witness statement, and we accept, *"With months of suffering harassment and discrimination from managers, I had absolutely no faith that the Trust would support me, and I just didn't have the energy to fight any longer.".* So, in answer to the question posed at paragraph 24 of the list of issues, we find that Ms Nolan did resign in response to the acts of discrimination to which she was subjected.

251. Ms Nolan did not affirm the contract; there was no inordinate delay on her part following her failure to be appointed to the ECAT role and the ongoing pressure to attend Case Review meetings. An employee is entitled to hold back from resigning whilst she tries to find other work.

252. There are two further aspects to the constructive dismissal claim that do not come within the context of the discrimination claim. Those are the complaints at paragraph 2.7 of the list of issues under the heading of constructive unfair dismissal, namely in respect of alleged inaccuracies in the statements made by the respondent about Ms Nolan's work, ie:

252.1 The statement in the Occupational Health referral of 17 October 2019 that she had been, *"unable to carryout admin role for 8 hours"* and that this was a, *"second return to work failure"*, and

252.2 Mr Martin stating at the end of the meeting on 6 December 2019 that Ms Nolan, *"had failed a number of return to work plans".*

253. At the time it is right to say that Ms Nolan had been in the HALO role. She had been writing emails explaining she was finding it exhausting and was clearly struggling to cope. However, she is right to point out that the HALO role was not an admin role and in that respect, the statement was inaccurate.

254. Ms Nolan is also right to say that she had not failed a second return to work plan (and neither therefore, a number of return to work plans). She had failed one and was in the course of undergoing the second, which she had not failed. She was struggling, but she had not failed and she was planning in the new year to go back on the ambulances in accordance with the plan worked out for her by Ms Howlett. There is a sense of the respondent overstating the situation and wishing to push on with the managing absence process, a sense which continues throughout, becomes discriminatory and amounting to harassment and causing Ms Nolan to resign.

Orders

255. This matter is now to be listed for a Remedy Hearing with a time estimate of 2 days. In preparation, the parties are to:

255.1 Inform the Employment Tribunal's Listing Team within 14 days of the date this decision is posted to them, their dates of unavailability for a 2 day Remedy Hearing after 31 March 2022. Thereafter, the Listing Team will list this case for a 2 day Remedy Hearing in person, (which may be converted to a CVP hearing if the availability of resources and the interests of justice so require) regardless of whether or not the parties have provided their dates to avoid. Postponement will only be granted in the most extenuating of circumstances and only where supported by evidence.

255.2 By the date no later than 42 days after the posting of this decision to the parties, they are to provide copies by way of disclosure of any further documents in their possession relevant to the issue of remedy.

255.3 By the date no later than 56 days from the date this decision is posted to the parties, the claimant is to prepare and copy to the respondent a bundle containing the documents both sides wish to refer to at the Remedy Hearing. The claimant shall bring four paper copies to the Remedy Hearing and make an electronic pdf copy of the bundle with optical character recognition available through the Tribunal's Document Upload Centre.

255.4 By the date no later than 72 days from the date this decision is posted to the parties, they are to exchange statements of any

further witness evidence upon which they intend to rely on the issue of remedy.

255.5 By the date no later than 14 days before the date of the Remedy Hearing, the claimant is to provide the respondent with an updated Schedule of Loss.

255.6 By the date no later than 7 days before the Remedy Hearing, the respondent is to serve a counter Schedule of Loss.

_____
Employment Judge M Warren

Date: 24 November 2021

Sent to the parties on:

29 November 2021

For the Tribunal Office