Case No: 2304377/2018
2301639/2019
2303176/2019
2304335/2019
2302407/2020

EMPLOYMENT TRIBUNALS

Claimant: Miss Anita Greene

Respondent: Brighton and Sussex University Hospitals NHS Trust
(also referred to as University Hospitals Sussex NHS Foundation Trust)

Heard at: **Southampton Employment Tribunal**
On: **7,8,9,10,and 14,15,16,17 September 2021**

Before: **Employment Judge Rayner**
Mr Spry Shute
Ms Lloyd Jennings

Representation
Claimant: Mr D Ibekwe, Brighton and Hove Race Project
Respondent: Mr Thomas Kibling, counsel

RESERVED JUDGMENT

Claim 1.

1. The claim of direct discrimination on grounds of race **is dismissed**

2. The claim of direct discrimination on grounds of disability **is dismissed.**
3. The claim of harassment related to disability **is dismissed**

4. The claim of harassment related to race **is dismissed**.

5. The claimant **was discriminated** against for a reason arising from her disability, in that she was not referred to occupational health.

6. All other claims of discrimination for a reason arising from disability in the first claim **are dismissed**.

7. The claims that there was a failure to make a reasonable adjustment by failing to refer to occupational health; not applying the sickness absence trigger, or by not starting the capability procedures **are dismissed**

8. **The respondents failed to make reasonable adjustments** by failing to provide the claimant with auxiliary aids and necessary support associated with them, by May June 2016 at the latest.

Claim 2.

9. The claimant was subjected to unlawful harassment related to disability, by the respondent's denial of her disability;

10. The claimant was discriminated for a reason arising from her disability by the respondent's denial of her disability and disabled status

11. The claimant was victimisation by the respondent's denial of her disability and disabled status.

Claim 3

12. The claimant was constructively and unfairly dismissed

13. The claimant was subject to unlawful victimisation by changes made to the 4-week trial period;

14. The claim of Victimisation in respect of the OH letter is dismissed.

Claim 4

15. We dismiss the claims set out in claim 4 in their entirety

Claim 5

16. We dismiss the claimants set out in claim 5 in their entirety.

REASONS

1. Ms Anita Green has five claims with the Employment Tribunal. The first claim was filed in 2018 whilst she was still employed, and her final claim was filed in 2020 following her resignation.

2. The claimant accuses Brighton and Sussex University Hospital NHS Trust of disability discrimination; race discrimination and of constructive unfair dismissal. In addition to naming the Trust as a respondent, she initially brought one of the claims against Mr Jim Valentine and one of her claims against Miss Linda Hooper. During the course of the hearing, both claims were withdrawn by the claimant against the individuals, although continued against the Trust.

3. The claimants 5 claims have been subject to a number of case management hearings and have been consolidated. The background to the claims was summarised in the case management order of employment Judge Maxwell.

4. The final hearing of the claim took place before me, Employment Judge Rayner sitting with Mr R Spry Shute and Ms C Lloyd Jennings. The respondent was represented by Mr T Kipling of counsel and the claimant by Mr Ibekwe, who is an adviser with the Brighton and Hove Race Council. We are grateful to both of them for their assistance in this matter; for their opening statements; for the agreed chronology, their closing written submissions and in particular the agreed consolidated list of issues.

The issues in the case

5. The consolidated list of issues runs to 91 numbered paragraphs with numerous subparagraphs.

6. Without detracting from the detailed particulars, the broad overview of the claimant's claim is as follows.

7. The claimant is dyslexic. She was diagnosed in 2012 whilst a student. She informed the respondents that she is dyslexic by providing information on her job application form.

8. Following completion of her college training, the claimant applied for and was interviewed for the post of a band five nurse with the Respondent Trust.

She was appointed following interview as a super numerary member of staff and started work on the 28 September 2019.

9. The claimant alleges that she is disabled by reason of dyslexia and also by reason of Irlen syndrome. The respondent now admits that the claimant was a disabled person by reason of both conditions at all material times, but does not admit knowledge at all material times.

10. As a newly qualified band 5 nurse the claimant was placed on a supernumerary contract for the initial few weeks of her employment, during which time she was expected to pass a drugs calculations test, referred to by the respondents as *the drugs test*, and an oral drug competency test. In addition, the claimant was expected to be able to demonstrate competency across the areas of practice required of a band 5 nurse. The competency in maths was necessary in order for the claimant to be able to administer medication to patients unsupervised. It was necessary for her to be able to calculate the amount of medication for each patient correctly. The expectation was that the supernumerary stage would last for 4 weeks.

11. The claimant failed the numeracy test on three occasions. The first occasion was in the initial two-week induction period. The second was on 23 October 2015 and the third on the 30 October 2015.

12. Whilst it was not unusual for newly qualified staff to fail once, it was expected that they would pass after three attempts, and this was the number of attempts usually allowed. The claimant was given further opportunities to complete the test. As well as failing the Maths test three times in the initial period, she also failed the oral drug test and was reported as showing a poor knowledge of anatomy and of physiology.

13. The claimant alleges that she was discriminated against on grounds of her disability and that reasonable adjustments should be made for her in respect of dyslexia. She also alleges that she was discriminated for reasons

arising from her disability and that she was harassed for a reason related to her disability.

14. The claimant initially alleged that Linda Hooper had subjected her to disability discrimination by seeking to have her referred to the NMC during the course of the claimant's employment. That claim is now brought against the respondent only. The claimant having withdrawn the claim against Miss Hooper as an individual.

15. The claimant filed her first claim to the employment tribunal on the 28 November 2018. She filed a second claim on 4 May 2019, and following the submission of her resignation letter on the 29 July 2019, she filed a third claim on the 11 August 2019. Her fourth claim was filed on 8 October 2019, following an interim order of the NMC and the fifth and last claim was filed on 17 June 2020.

16. Following her resignation from employment , she alleged that she had been constructively and unfairly dismissed . She also alleged that she had been victimised both by the respondent organisation and by Mr Jim Valentine, who had dealt with the referral of the claimant to the NMC following her resignation. She relied on the filing of claim number 2304377/2018 as a protected act.

17. The thrust of the claimants claim is that the respondent failed to acknowledge either that she is dyslexic or that her dyslexia amounted to a disability under the Equality Act 2010 at the appropriate times during her employment, and therefore failed to make the necessary adjustment, or give her support that she alleges she required and was entitled to as a disabled person.

18. She alleges that the respondent implemented a capability procedure aimed at managing her out of the organisation and that they failed to take expert

advice from occupational health in order to identify whether or not adjustments should be made.

19. The claimant also relies upon the capability proceedings as the basis of the claim of discrimination for a reason arising from disability. She said the thing that arose from her disability was a perception by her managers of her as incompetent rather than recognising that the capability issues were being induced or escalated by the respondents failure to handle the claimant's disability appropriately.

20. The claimant also relies upon the failure of the respondents to recognise disability, as unfavourable treatment for a reason arising from disability. She says the thing that arose from her disability as a consequence was an entitlement to certain benefits or protections from the respondents own policies or as a matter of law.

21. The claimant relies upon the failure to recognise her disability as falling under the Equality Act as an act of victimisation. She says that from the date that she issued her first claim there was a failure or a refusal by the respondent to recognise the disability and further failure to carry out any diagnosis or to blinker itself to the claimant's disability. Further she alleges victimisation in that the respondent denied her the benefit of protections that would have arisen from their own policies had they recognised that she was a disabled person within the meaning of the Equality Act 2010

22. The claimants claim of constructive unfair dismissal is based upon the treatment of the claimant by the respondent throughout her employment.

23. The claimant has brought a separate claim in respect of a referral made by the respondents of her to the NMC. This occurred after she had resigned and is the reason why she initially filed her claim against Mr J Valentine as a named respondent. The claim against him, and her claim against Miss I

Hooper as a named individual (see below) was withdrawn during the course of the hearing,

24. The claimant alleges that the referral of her to the NMC was an act of direct disability discrimination alleging that a person without her disability would not have been referred; she alleges that it was unfavourable treatment for a reason arising from her disability, and she alleges further that it was an act of unwanted treatment the purposes of section 26 Equality Act, being harassment for a reason related to disability.

25. The claim against Miss Hooper (now withdrawn)is that Miss Hooper referred the claimant to the NMC in November 2018, with the purpose of frustrating the claimants revalidation as a nurse. This is put as acclaim of discrimination for a reason arising from disability; direct disability and direct race discrimination.

26. The claimant has described the something arising from the disability for the purposes of the claim against Miss Hooper in a letter dated 24 June 2021. The claimant appears to suggest that having disclosed that she is dyslexic at the start of her employment, that when she needed to revalidate in accordance with professional rules that the respondent took steps or measures to refer her to the NMC.

27. The respondents defend all five claims brought by the claimant. In response to the first claim brought by the claimant the respondents denied that the claimant was disabled within the meaning of the Equality Act and also that they had knowledge of the claimant's disability.

28. At the time, the claimant remained employed and was being taken through the capability procedure. The claimant had had a number of difficulties with her work during the course of previous years and had been referred to Access to Work, which had made various recommendations for her in respect of aids she might use at work and also techniques that she might

find helpful in dealing with the day-to-day work. The respondent was fully aware of the adjustments and had paused its own internal capability process in order for the claimant to have all the adjustments implemented and to have time to start using the techniques and equipment in the workplace.

29. The claimant filed a second claim to the employment tribunal complaining that the respondent's refusal to acknowledge that she was a disabled person and that she had been a disabled person throughout her employment, was itself act of disability discrimination.

30. The claimant provided a disability report on her dyslexia at her own expense to the respondents.

31. Following receipt of this report and following the filing of the claimant's second claim to the Employment Tribunal the respondent did admit that the claimant was disabled at all material times, both by reason of dyslexia and by reason of Irlen syndrome.

32. They do not admit that they knew or ought to have known or could reasonably be expected to have known that the claimant was disabled by reason of Irlen's syndrome prior to the claimant being diagnosed in 2017.

33. The respondent also denies that it knew that the claimant was disabled whilst employed by them because they say, they were not aware of whether or not the claimant's impairment had a substantial adverse impact upon her ability to carry out ordinary day-to-day activities.

34. The respondents defence, in summary, is that they made all reasonable adjustments for the claimant whether they were made in knowledge of the claimant's disability or not, and that in spite of making numerous adjustments and accommodations for the claimant over a period of some

four years, she failed to meet the required professional standard expected of the grade 5 nurse. The respondent alleges that it followed the capability procedure fairly and in accordance with its own policy and that it gave the claimant sufficient time to demonstrate her ability and to improve both before and after adjustments had been made for the claimant.

35. The respondents deny that they failed to make reasonable adjustments for the claimant and denied that any of their actions were unlawful harassment related to race or disability. They also deny that their decision to follow the capability process or any decisions not to refer to occupational health in respect of the claimants disability amounts to acts of discrimination with the by reason of direct discrimination; harassment; or for a reason arising from disability.

36. In respect of the referral of the claimant to the NMC by Miss Hooper in 2018, the respondent says that there was in fact no referral made in any event, and that the actions of Miss Hooper were appropriate and justified in light of genuine and documented concerns in respect of patient safety.

37. Regarding the claimants fourth claim alleging that the referral of her to the NMC by Jim Valentine, after the claimant's termination of employment, was an act of discrimination, the respondents refer to the fact that the claimant had resigned part way through a capability process, and following numerous concerns having been raised about her during the course of her employment with the respondents, and at the point when the claimant had told the respondent that she did not feel confident to administer drugs without supervision. The respondents say that since there was a genuine concern that the claimant would have been dismissed for lack of capability had she not resigned, that they were required by reason of their professional regulatory framework to refer the claimant to the NMC.

Chronology and findings of fact

38. In February 2015 the claimant started a student placement with the respondent. Miss Hooper told us that this was an eight-week placement and that she accepted the claimant as an addition to pre-existing placement students because she was asked to do so.

39. We accept the claimant's evidence that she had been diagnosed with dyslexia whilst a student. The NHS had paid for a report in 2012 to assess what support would be required to assist her with her studies. That report was not referred to by the claimant at the point that she applied for a job with the respondents and it was not provided to them at any point. We have not seen that report.

40. Following completion of her studies, the claimant applied to the respondent for a position as a band five staff nurse for a vacant post in speciality medicine.

41. As part of the recruitment process the claimant was required to fill in various forms including an equal opportunity monitoring form. On this form, (p 223) she ticked a box saying she did not need any reasonable adjustments. She also ticked boxes saying that she did not have impairments, or a disability. There is no mention on this form of dyslexia.

42. However, there was a second form, the equality and diversity monitoring form which she filled in and replied *yes* to the question, *do you consider yourself to have a disability*. She identified dyslexia but stated that she does not wish to be considered under the guaranteed interview scheme.

43. The claimant failed her two-week induction period and an agreement was made with Karen Lee, the ward manager on the Jowers ward, that the induction period would be provisionally extended by two more weeks and that the claimant would resit the drug calculation exam on 23 October 2015 . The respondents say this is the first of many adjustments made for the claimant.

44. At this point the claimant disclosed that she was dyslexic (388) and stated that she would require additional and reasonable adjustments in respect of the dyslexia. In order to assist her she was provided with practice papers and given some one-to-one support and was also rostered to work alongside particular staff so that she could have consistency in her shift pattern and support from specified individuals.

45. Arrangements were made for the claimant to take additional maths lessons with Claire Martin at this point.

46. On 28 October, in advance of the claimant taking the test for a third time, Claire Gillespie and Gill Tallant had an email exchange about the claimant and their concerns about her maths test. Claire Gillespie was suggesting that the claimant might be moved to work as a band four nurse if she failed the test again, but was subsequently told that this was not possible.

47. On 29 October, Stacy Cuthbert, who was an HR relationship manager and who we have not heard evidence from, wrote to Gillian Tallant, and set out some suggestions and thoughts about the maths test.

48. She asked the purpose of maths test and whether or not other staff had experienced difficulties and if so what had been done for them.

49. She also asked whether the member of staff had been asked where she was experiencing difficulties and what might help her to pass. She suggested, by way of example, that larger print maybe required and that she may need to use a calculator or that she might require further time to do test.

50. She also asked whether there was any support available from Knowledge and Education (part of the respondent staffing support) or funding support for a dyslexia workplace assessment. She asked whether she had a mentor,

and how long qualified nurses usually took to complete their inductions; whether Miss Greene was clear what was expected of her; whether an action plan had been developed and what timeframe was reasonable given her dyslexia. She also asked whether the Trust could obtain advice or support from a Dyslexia Association regarding reasonable adjustments.

51. We observe that the questions and suggestions made by Stacy Cuthbert appear reasonable and appropriate given where the Trust was on 29 October 2015 with the claimant's training. We have seen no response from one in this email.

52. By the end of October 2015 Karen Lee knew that the claimant was dyslexic and there was discussion among the respondent managers with HR input and at least one person, S Cuthbert asks if there was anything else that the respondent should do to do.

53. On 30 October 2015 Ms Tallant received a further email telling her that the recruitment section of the respondents had checked her application form and stating that *she did disclose her dyslexia on her application form.*

54. In response, Ms Tallant stated that she was glad the claimant had disclosed her dyslexia on her application form, and says, *however having this disability does not explain why she is practicing beyond her scope of competence*. We understand that this is a reference to a concern that she had been administering medication without supervision.

55. Ms Tallant contacted Claire Gillespie and suggested that the claimant was moved to a bigger ward as a band five nurse; that the claimant be supported by Jo McGuinness on the daily drug round and that another named member of staff be allocated to the claimant to do one-to-one pharmacology sessions.

56. Ms Tallant knew the claim was dyslexic, HR knew the claimant was Dyslexic, Claire Watson knew, and we heard evidence from Karen Lee, who was the manager of Jowers ward that she had interviewed the claimant, and confirmed in her evidence to us, although not in her statement, that the issue of the claimants dyslexia had come up at interview. In addition, it is noted by the respondents that the claimant raised the fact of her disability during discussions in October 2015.

57. At this point, it was suggested internally that she take the tests again and if she passed that she return to work on the Jowers ward. If she failed the test again then it was suggested that a referral was to be made to the NMC. Claire Martin was the head of nursing and midwifery education at this point

58. By 30 October 2015, the respondents knew that the claimant had an impairment because she was dyslexic and they knew that she was having difficulties at work. They had identified that she was struggling with some aspects of the training and that her dyslexia may be a factor in her difficulties. Suggestions were made for adjustments and for obtaining further advice to identify potential difficulties the claimant was having.

59. Despite this no steps were taken at this stage by the Respondent to seek any support for the managers dealing with the claimant, by way of advice on managing a nurse with dyslexia, and nor was any request made for any input from a third-party expert, such as occupational health, as to the extent or impact of the claimants dyslexia upon her ability to carry out the role of a band five nurse.

60. There was no discussion with the claimant about the impairment that she had. A number of the respondent's staff were involved in managing the claimant, but no one took action to seek further advice or support either internally or externally.

61. We find that the only reason why the respondents did not identify that a reason for the claimant facing difficulties in her work was the fact that she was dyslexic at this point, was because they did not seek advice.

62. Although a number of people managing the claimant knew that she was dyslexic , the information was not we find shared across the organisation . For example Claire Gillespie, who knew that the claimant was dyslexic, says she did not disclose this to the ward manager because she would not do so. The lack of sharing of the information about and the lack of discussion with the claimant herself about dyslexia laid the groundwork we think for later misunderstanding about the claimant. We accept the evidence of the respondent witnesses that the reason why the fact of the claimants dyslexia was not discussed more widely was because of a number of factors. Firstly, in a busy hospital environment ward, managers expected matters of this type to be dealt with by human resources. Secondly, a number of managers considered that there may be privacy issues about sharing acts about the claimant with others, and thirdly, there was a lack of awareness amongst many staff. We heard from, of the need to consider at all, whether they might be dealing with a disabled employee.

63. Despite this, we find that a number of steps were taken by the respondent to provide the claimant with support in order to assist her to pass the necessary tests .She was moved to a larger ward where she could be provided with greater support; she was given extra tuition and allowed extra time to take the necessary tests .

64. There was no referral to occupational health at this point, but we find that the respondents did make adjustments for the claimant and that they did take account of her dyslexia when doing so. What they did not do was investigate the extent to which the claimant's dyslexia was impacting upon

her ability to do certain aspects of her job, and therefore achieve or meet the required standards.

65. On 3 November 2015, Claire Martin the practice development manager wrote to Abbi Denyer in HR, cc Karen lee, Sarah Allen and Ms Watson (Matron ward manager and practice educator) stating that they have *a great plan for her but if does not result in change that we can go down the capability and competency path efficiently*.

66. On 3 November 2015, Claire Martin wrote of the claimant, *it's not through lack of support but rather AGs knowledge deficit that at present has resulted in her failing her drug test three times.* We find that this was an assumption made by Miss Martin rather than the result of any assessment of the impact of the claimant's impairment upon her abilities.

67. Whilst we consider a referral to occupational health at this point would have assisted the respondents and would have resulted in a clear statement that the claimant was disabled and required adjustments , there was no requirement or need for them to make a referral to OH at this point.

68. The lack of a referral of the claimant to occupational health, does not mean that the respondents had failed to make reasonable adjustments .

69. We find at this point that reasonable steps were taken by the respondents aimed at assisting the claimant to improve her skills and reach the required level of performance. There is no suggestion from the claimant that she herself suggested any particular adjustments to the respondents or suggested any other steps that should be taken at that point. We find that at this stage the respondent's actions were reasonable and proportionate.

70. By November 2015. The respondents had put in place an action plan and part of the proposal to support the claimant was a move to Donald Hall and

Solomon ward for 12 weeks in January 2016. The reason was that the respondent thought be easier to supervise the claimant on a larger ward.

71. The action plan was discussed with the claimant at a meeting on the 18 November. There was no discussion of the claimant's impairment of dyslexia, although we find that it this point the claimant's managers were doing what they thought was best to try to support her to succeed in her job. At this point her managers appear to have considered that she was doing okay on a day-to-day basis, but it was noted that she seemed to be concerned about getting questions wrong. We find that this was an observation of the claimants growing anxiety about her own performance.

72. When the claimant failed her maths test again , Marie Dormer , who we did not hear from contacted Claire Gillespie wondered if AG had a problem with visualisation of size and numbers . Claire Gillespie told us in her evidence that she recollected Marie Dormer suggesting that a workplace assessment would be helpful. She thought that there had been an exchange of emails about this and suggested it was in December 2015 but did not know of the exact date.

73. The employment tribunal ordered any emails to be disclosed but none were produced during the course of the hearing.

74. The practice educator Miss Gillespie told us in her evidence that she did carry out some research into dyslexia when she realised that the claimant was dyslexic. She also told us that she suggested obtaining a workplace report. She was sure that she had written an email to this effect and we accept that she did so. Despite the order, it could not be found by the respondent. Her evidence to us which we accept, was that she did not pursue this, because shortly after she had made the suggestions, she was told by Miss Hooper to step back from assisting the claimant . Miss Hooper was her line manager and she did as told and had no further involvement with the claimant.

75. We find that the suggestion of a workplace assessment was made and was made at an early stage, and that an email was sent by Miss Gillespie to that effect. We also accept her evidence that she did not at that point have any discussion with Miss Hooper about the claimant or dyslexia or any steps she was pursuing.

76. On 8 December 2015 the claimant passed her maths test on the fourth attempt.

77. On 10 December 2015 Claire Martin contacted A Gibbons, to say that there was a strong feeling that AG should be referred to the NMC. Concerns were raised about her competency in the administration of medication, a fundamental aspect of a band five nurses work, and about her professional behaviour.

78. An internal discussion then took place between a number of the respondent managers, including Claire Gillespie, Sara Allen, and Abbi Denyer from HR. Ms Denyer, the human resources adviser pointed out that there were no patient safety concerns because of the claimant remained under supervision. This would usually be the basis for a referral. It was also stated that it would be unusual to refer somebody to the NMC whilst they were in an extended supernumerary period.

79. In part, the concern of the respondent officers at this point arose because they believed that the claimant may be intending to take on bank work or other nursing work at another institution whilst she was on annual leave . In fact, the respondent was wrong about this, but we accept that the question about whether a referral should be made at this point, was raised because of a genuine concern that the claimant was not safe to practice unsupervised, and maybe doing so elsewhere.

80. At this point some of the respondent managers also discussed whether or not it was appropriate to start capability proceedings in respect of the claimant. Ms Watson suggested that it may be the appropriate time to move to the first stage of the capability procedure. This discussion was tied up with the discussion about whether or not to refer to the NMC.

81. On 7 January 2016 a meeting took place with the claimant at which the claimant's progression in post was discussed again. At this point the respondent officers recognised that there had been a misunderstanding in respect of the claimant's intention to work elsewhere during her annual leave.

82. At that meeting it was agreed that she would start work on the larger Solomon Ward, so that she could be given more support and assistance. She was due to start on 14 January 2016 and was to remain there for 12 weeks. Her ward manager was Mark Holmes.

83. The claimant was provided with the action plan and it was proposed that she would be supported and her working days structured so that she was off duty until 21 February; the claimant was asked to keep a record of all medication calculations she carried out, so that these could be checked, and was given a pocketbook to record them in; she was asked to read a number of policies and make sure that she was clear about specific sections related to practice. These included policies for the administration of liquid oral medicines; policies for reducing harm caused by misplaced nasogastric tubes; policy for unlicensed medicine products and guidelines on hypoglycaemia in adults with and without renal and cardiac impairments. She was told that time would be provided to her during her working week to do this. She was told that a further meeting would take place on 17 February 2016 to discuss her progression.

84. The respondent did not consider whether or not the claimant was placed at a substantial disadvantage compared to those who are not disabled by any

of their policies; criteria or practices, or by the physical workplace or by any need the claimant may have for an auxiliary aid .

85. At this point a number of things were happening.

86. Firstly, the respondent continued to put in place support for the claimant which was aimed at assisting her to succeed. We find that the plan put in place for the claimant was aimed at providing her with some extra support to assist her to succeed in meeting the targets. We find this was no different to the sort of support that would be put in place for anyone who was failing at this point.

87. We find however that the support was significant and did address many of the difficulties that the claimant had, as follows

88. By January 2016 the respondent had identified the following issues and take the following steps.

89. Between the 28 September 2015 and 13 January 2016, the claimant was working on Jowers ward. During this period of time she failed her drugs calculation test which has also been referred to as the maths test, on three occasions. She was supported by having organised maths lessons and by receiving support from the patient drug lead, Jo Magennis. She was supported by Edda Henslar, practice development manager by being given one-to-one sessions on pharmacology and drug policy.

90. The respondent had noticed that she had poor anatomy and physiology knowledge and had been referred to additional reading.

91. The claimant had also failed the oral drug competency examination and had received input from four trained nurses which included support from mentors.

92. A decision had been taken to redeploy her from the smaller Jowers ward to the larger Donald Hall and Solomon ward, for 12 weeks, which would allow the respondent to provide her with more one-to-one support, because of the higher number of nurses working.

93. On 27 January 2016 the claimant was working on Donald Hall and Solomon ward. At this point she had still not been signed off on the oral drug administration assessment. This meant that she was not allowed to administer drugs orally, without supervision. The claimant was sent a follow-up letter to the meeting of the 7 January 2015.

94. At this point she was not in the formal capability process, but was given an action plan and objectives to be reviewed on 17 March 2016. The claimant was told that any further incidents in the 4-week period could lead to the review period being brought forward and the informal stage of the capability procedure being considered.

95. Although significant support had been put in place the claimant, and much of it would have been great assistance to the claimant None of it took specific account of the claimant's disability. Some of the support mechanisms, including the requirement that the claimant read and absorb documentation relevant to her practice, were themselves potentially problematic for the claimant.

96. The claimant would, we find have benefited at this stage from the provision of auxiliary aids and training which were subsequently provided to her following a referral to Access to Work.

97. The sessions of counselling and support on workplace techniques. She was provided would also have assisted her at this point in dealing with the types of tasks that were identified as challenging for her.

98. The respondent did not look at the claimants for performance through the prism of her impairment of dyslexia, and therefore they never considered whether any of the way that the work needed to be done, or the practices or policies themselves might be preventing a barrier for the claimant . They therefore did not consider if there were additional steps or adjustments that they might have to make, targeted at removing any specific disadvantages that the claimant as a dyslexic nurse might face.

99. Secondly, by January 2016, a number of the respondent officers had formed views about the claimant's abilities, based on her performance. The claimant had not performed to the standard that would be expected from a newly qualified band 5 nurse and there were legitimate concerns about the claimant's abilities. There were discussions about using the capability process.

100. Thirdly, at this point in the chronology the attitude of some of the respondent staff was to mistrust the claimant, to refer to her as dishonest and to seek referral to the NMC, because of concerns that she may be practising elsewhere without supervision during her leave , without ever having spoken to the claimant herself in order to ask her what her intentions were. We find that this was indicative of a negative attitude towards the claimant; a frustration that she had not yet achieved the standard required of a band five nurse but continued to require support and supervision to do her role. Had the adjustments been provided at this stage, there may have been greater understanding of the reasons why the claimant was not progressing as expected, and attitudes may have been different.

101. Nonetheless, we find that the claimant was not performing to the required standard in early 2016 and that the respondent had genuine reasons for considering what steps they might have to take if the claimant did not show the necessary improvement. The respondent provided the claimant with the capability policy, so that she could see that the 3-month period of informal support had been extended.

102. On 5 February Sara Allen, who was the matron in specialist medicine and senior to both Karen Lee, the ward manager of Jowers Ward, and Mark Holmes, the ward manager of Donald Hall and Solomon, received some feedback from Mark Holmes about the claimant. He stated that the claimant was generally doing okay but that she was very slow in her work; that she lacked initiative and that he felt she would struggle in a ward environment. He commented that her performance was consistent, but that she was not progressing.

103. As a result of this, Sara Allen contacted Gillian Tallant, HR, and asked whether or not it might be possible for the claimant to be referred to an outpatients ward instead of being moved back to Jowers ward. She raised concerns about the claimant struggling in the ward environment and having to look after a larger number of patients. She asked Ms Tallant to put out some feelers.

104. We accept the evidence of Sara Allen that she got no response to this suggestion.

105. On the 10 February Ms Tallant, from who we have not heard evidence, but who we find was one of the individuals who was expressly aware of the claimants dyslexia when it was discussed in October 2015, stated in an email that the formal capability process should be started. (p 358 on 10 Feb).

106. The respondent staff who worked with the claimant has identified that she was struggling within a ward environment. We find that at least part of the reason for the claimant struggling in the ward environment was because she is dyslexic. We find on balance of probabilities that the requirement to work independently and carry out all the tasks required of a band five nurse

in a busy ward environment, placed the claimant at a substantial disadvantage when compared to those who were not dyslexic. It was noted that she worked more slowly, and we find that she was less able to deal with written materials; with note taking; with calculations for the administration of drugs at this point as quickly as others might.

107. We find that the move of the claimant to an outpatient's department may have enabled the claimant to practice as a band five nurse, because of the different levels of expectation and requirement and because the ward would be less pressured.

108. Instead Miss Tallant asked Mark Holmes and Karen Lee to put together as much documentary evidence about the claimant as possible. Essentially, she was asking for evidence of the claimant's failings and shortcomings. Nothing was said by her or anyone else at this stage about the potential impact of dyslexia on the claimant's performance and abilities

109. By 16 February, Gillian Tallant reported back to Sara Allen that Sarah Kestle agreed that a formal capability process should be started in respect of the claimant.

110. On 19 February Claire Watson provided HR with a report setting out all the alleged failings of the claimant up to that point.

111. In this report, it is stated that at the meeting in October 2015, Anita had disclosed her dyslexia and the fact that she would need additional and reasonable adjustments. (p 388). This fact does not appear to have been picked up by anyone.

112. The report states that although that the claimant had passed the calculation test on the fourth attempt on 8 December 2015, there were still concerns that the claimant continued to have difficulties in practice in respect of the identification and use of a variety of drugs and that in practice

she had been unable to complete a number of drug calculations in practice. The specifics of the concerns were set out within the report. These are set out the page 390.

113. It is noted that the claimant had failed to keep the drug calculation diary as had been agreed on 18 November and that she could not therefore produce the evidence required to demonstrate her capability to apply drug calculation in practice.

114. It was also noted that the claimant had failed her oral drug competency assessment on 16 February 2016. She subsequently passed on the 24 February 2016.

115. The issues that they were identifying meant that there was a significant concern that the claimant could not work independently, because she could not safely administer drugs to patients. We accept that this was a serious concern and one which the respondents needed to address. We also find that the respondents had failed to consider whether they needed to make any further reasonable adjustments, which may have assisted the claimant with these difficulties.

116. A review meeting was organised 17 March 2016, but the claimant did not attend due to a genuine mistake on her part. The meeting was therefore rearranged.

117. At the rearranged meeting the performance management action plan was discussed with the claimant and areas of her performance where she required improvement were identified.

118. There were a number of concerns raised with the claimant about her behaviour; her conduct; her practice and ability to safely. There were concerns about her administration and regarding the basic care of patients and her ability to recognise the needs of sick patients. Additional concerns

were raised about her knowledge and ability to follow the trust's policies and procedures.

119. Following the meeting the claimant was given dates on which her practice of performance would be reviewed.

Drug competency test

120. On p 393 of the bundle, the last page of the report by C Watson, there is a reference to the claimant having failed her oral drug competency assessment. It seems to us that this was the main barrier to her passing her probation at this point. Despite her difficulties and despite the concerns, there was evidence that she was making progress in other areas. Some of the criticisms about her behaviour related to her failure to follow the rules in respect of the earrings she was wearing and the fact that she wore gel nails to work. Whilst these were valid concerns and it was right for the respondent to raise them with her, no one has suggested to us that these failings alone would have led to her failing the probationary period. We find they would not have done. We find that the fundamental problem and the real issue for the claimant at this point was her in inability to safely administer medication and drugs to patients.

121. In the report there are a number of specific observations about the claimants practice that raise concern. These include the claimant's ability to manage distractions and her difficulty in correctly ordering medication and accurately reading the drug charts. The general feedback refers to poor time management which then leads to the delay in the administration of drugs, with a concern that the delay between a breakfast dose and a lunchtime dose were being given too close together with inherent risks to the patient.

122. With the benefit of the later reports into dyslexia , and the benefit of the advice given by Access to Work we find that a number of the concerns about the claimant abilities which were being raised in early 2016 were on balance of probabilities, things which were related to or caused by, or affected by the claimant being dyslexic .

123. In fact, the claimant did pass her oral drug competency on 24 February 2016. A review was set for her on 17 March 2016.

124. On 31 March 2016, Bijal Patel set out in an email some further concerns about the claimant and her administration of drugs, the errors identified are about making errors on drugs and patches, but also about administration and not filling in forms correctly. We find that the sort of errors that the claimant was making were the type of errors and mistakes that an employer of this type deal with through the capability process for any employee.

125. The issue at this point is that the claimant's performance difficulties arose at least in part from the fact that she had an impairment of dyslexia. The respondents knew that she was having difficulties but still failed to ask the question to what extent if any are her difficulties connected to the fact that she is dyslexic?

The safeguarding issue

126. On the 23 March 2016, the claimant was observed attempting to insert a catheter for a patient in an allegedly inappropriate way. As a result of this procedure and the claimant's actions, a colleague raised a concern and the matter was identified as a possible safeguarding concern. It was not one of the issues raised by Bijal Patel or S Allen.

127. Although the concern was reported and investigated it did not form any part of the subsequent capability process, because following the investigation, steps were put in place to prevent recurrence and no further action was taken.

128. Initially, however the claimant was told by Sarah Allen that the matter would be referred because it was considered a safeguarding matter. It was referred on 1 April 2016 and at that point some changes were made to the

claimant's shifts and a meeting was set up to discuss matters with her on the 5 April 2016.

129. Following this incident, the claimant was signed off on sick leave with stress.

130. On 1 June 2016 the claimant was referred to Occupational Health. The referral was in respect of her workplace stress and not in respect of dyslexia.

131. On 22 June 2016 Occupational Health replied to the respondents, recording that the claimant was suffering with stress following the safeguarding issue. The respondents had not asked occupational health to address any other issues and the claimant had not raised dyslexia or other issues with them. When asked by Counsel in cross examination why she did not do so, she stated that it was because the referral was about workplace stress and not about dyslexia. We find that it was the respondents responsibility to raise questions about dyslexia and it was not the responsibility of the claimant. Whilst she could have raised the fact of her dyslexia with Occupational Health, we understand why she did not consider it appropriate to do so at that point.

132. During the claimant's sickness absence, it was decided that her period as a supernumerary member of staff would be extended for a further six months. This meant that the claimant was employed as an additional nurse and this in turn meant that there was a cost associated with her continued employment. At this point a timeline of the claimants employment history and the concerns about her abilities had been produced by the respondent, and concerns were being expressed by people in senior positions, including the directorate manager, about the reason why the claimant was employed and the timeline for the capability process.

133. At this stage a number of people working with the claimant were fully aware that she was dyslexic, but this information was not being shared more widely.

134. From the respondent's point of view, they were employing a band 5, nurse on a supernumerary contract, who was not meeting the required standards, and about whom a variety of issues had been raised. The emails and correspondence we have seen about the claimant are not positive.

135. A number of senior people wanted to refer her to the NMC, several recommend capability and a senior manager asks why she was employed at all. No one who was aware of the fact that the claimant is dyslexic suggested at this point that she was in need of support as a disabled employee. We find that this is because no one had actively considered that it might be an issue. We find that by this stage it was not part of anyone's thinking. It had simply been overlooked and forgotten.

136. We find that at this stage the decisions being made about the claimant were being made on the basis of information available to the respondents about the claimant's performance, but not her impairment. Whilst they could and should have raised the questions in respect of the claimants disability, we find that because many of the respondent staff were not aware that the claimant had an impairment, that none of their actions were motivated or caused by a conscious awareness of the claimants disability.

137. The extension of the claimant's supernumerary position was intended to give the claimant a further time to prove herself, but it also caused the claimant further stress. Since the claimant's performance remained well below what was required, and despite the failings of the respondent to consider disability at this point, we find that in the circumstances this was a reasonable step for them to take.

138. Following a referral to occupational health a recommendation was made that the claimant returned to work on a phased basis.

139. The Claimant returned to work and met again with Sara Allen for a discussion about her performance and her return to work. At that point the claimant was still in the informal stage of the capability process. She was told that if there were any further issues with her work within the next four weeks then she would be progressed to the first formal stage of the capability process.

140. In the following month, whilst the claimant was working on the Jowers ward, 3 colleagues raised further written concerns about the claimant's practice and performance with Karen Lee. One was about the claimant having left keys for the drugs cabinet on the table whilst she had lunch. All three complaints are about matters that are of a serious nature and raise concerns that required further consideration.

141. On 12 September the claimant was invited to a meeting, which would be the first formal stage of the capability process, to take place on 16 September 2016.

142. In fact, a meeting took place on 30 September 2016. Concerns were discussed and the claimant was noted to have had 7 further incidents. Whilst these should have been discussed with the claimant by the ward manager, this did not happen. They were discussed at this meeting and the claimant was told that the Trust would now move to the first formal stage of the capability process.

143. At this meeting the claimant raised the fact that she is dyslexic. In the letter to the claimant written by Sara Allen after the meeting, it says that the claimant had not previously disclosed her dyslexia. This is not true. The claimant had disclosed it, and the respondent officers were aware of it, even if they had not told Sara Allen. This indicates that no one looked at the

claimant's HR file or checked what may have been said previously or been known more widely in the organisation. The attitude of her managers was implicitly critical of the claimant.

144. Ms S Allen told us that when she was told that the claimant is dyslexic, it was a light bulb moment for her, because it explained for her some of the claimant's difficulties. We find that at this point she was making a clear link between the claimant's difficulties and the fact of the claimant's dyslexia. She realised that the dyslexia may well be the cause of some of the claimant's difficulties.

145. At this meeting there was discussion about whether or not the Jowers ward was the correct environment for the claimant, because of the small team being unable to provide the supportive environment the claimant required. There were two treatment nurses on duty and a move to a different ward, where the claimant could be supervised by Sarah Jane Simmons was discussed.

146. Discussion took place about how the claimant could be supported and the claimant was advised to make contact with Access to Work. The respondent advised that if a formal diagnosis has been obtained and she was eligible, the claimant could apply online for assistance.

147. We note that in the letter sent to the claimant there is no suggestion of any assistance that the respondent might otherwise provide to her and nor is there any reference at this stage to any need to review or pause the respondents capability procedures. Despite Ms Allen's lightbulb moment, there does not appear to have been any discussions at this stage about whether and if so how the claimants condition may impact upon her work and whether and if so to what extent the fact that she is dyslexic may be impacting upon the way in which she was carrying out her work or may be contributing to the difficulties she was clearly having in the workplace .

148. Going back to the discussion about moving the claimant to a different ward, we find that this was in part because of some concerns about the difficulties that the claimant had had. These were described as traumatic, in one email. It was suggested that the claimant would benefit emotionally and professionally if she could spend some time working with Caroline Brown who had been an informal mentor to the claimant in the past. It was suggested that this would be formalised.

149. The correspondence at the time makes reference to concerns about Egremont ward and the experience of *some of our BME nurses in the past*.

150. The claimant has brought claim race discrimination but her focus in her witness evidence and in cross examination evidence was on disability and very little refence has been made to race at all by the claimant or her representative. Our attention was not drawn specifically to these emails, but we note that at this point the claimant's history there was a recognition that the claimant's race may be a factor and this may be the reason why the claimant had been referred to Caroline Brown, who was a member of the BME group, in the first place. We find that the respondents considered a possible issue and were dealing with it in a sensitive manner.

151. In the meantime, the claimant and the respondent met again, and the claimant received a letter on 10 October 2016 confirming that she would be moving to Egremont ward. It was also noted that the claimant would meet with Bethany Allen to apply for assistance with the diagnosis of dyslexia. Following the meeting, and the suggestion by Miss Hooper that the claimant required a formal diagnosis of dyslexia, Miss Hooper was told by human resources not to pursue this matter. No investigation or report was requested.

152. The claimant was told that there would be a further review in four weeks' time. In addition, it was formerly noted that Caroline Brown would be providing her with support as a formally recognised mentor.

153. We note that on 11 October (page 479) when Ms B Smith the Employee Relations Adviser, wrote to Simon Anjoyeb, she again states that a member of staff has confirmed dyslexia *however we were not made aware of this*. Again, she did not check to see whether or ot this was in fact true, with anyone.

154. We note that had the any of the respondent managers involved with the claimant carried out any investigation at this stage, they would have been bound to realise that the claimant had disclosed dyslexia at the point that she applied for the job and during the course of her interview. They would also have been bound to realise that she had received support during her educational phase and the fact that she was dyslexic was known to human resources, as well as others.

155. This did not happen, and the Respondents continued to assert a defence up to the hearing and throughout, that they did not know or could not reasonably have been expected to know that the claimant was disabled, because she had not told them until this meeting, that she was dyslexic.

156. To be clear, we find that not only had the claimant told the respondents at the outset of her employment that she is dyslexic, but that the fact was known to several managers within the respondents and that any enquiry into this matter would have made it clear to the respondents and their advisers, that several of the respondents staff who were involved in managing and advising about the claimant, knew or ought to have known that the claimant was dyslexic. The continued denial of this fact by the respondents underlines our finding of fact, that the respondents did not ever check their own files or the knowledge of the many people involved, to verify who knew what and when.

157. As a result of this meeting, the claimant was moved from Jowers ward, to Egremeont ward where she was supervised by Sister Sarah Jane Simmons.

158. Other than referring the claimant to Access to Work the respondent took no other steps to research the claimant's condition or to take advice. We accept that there was a lack of expertise about the impact of Dyslexia amongst the respondent staff, and that there was an expectation, certainly from Ms Smith, that Access to Work would give them the advice that they required, but no one took any steps to check what would happen, and whether or not advice would be given to them as an employer of a disabled employee.

159. The claimant made contact with Simon Anjoyeb, who was the diversity manager at the Trust, who agreed to assist her with the application to Access to Work.

160. Simon Anjoyeb had, we were told, been the author of a useful guide to disability and reasonable adjustments. We were referred to the document. This guidance written in August 2012, is clear and sets out for managers guidance on determining who is disabled under the act and sets out a checklist of good practice for advisers and mangers. It sets out guidance and best practice for managers of disabled staff, as to what they can do and ought to do to support and assist their staff.

161. The duty to make reasonable adjustments is also clearly explained. Examples of adjustments which can be made are given, and references to disability leave, flexible hours and reallocation of duties to others, or transferring the employee to another job are set out.

162. No one ever referred any of the claimant's managers to this document. We find this astonishing. Since the Trust had a diversity manager, and since this guide had been produced, it must have been

intended as a resource to be available to managers. Instead manager after manager told us that they were not aware of it and had not been referred to it. No one could explain why. Even Human resources staff seemed unaware of the resources available to them. We were alarmed to hear that the HR professional who gave evidence was unaware of this guidance until shown it as part of these proceedings.

163. At this point in the chronology, we find that none of the respondent managers took any active or positive steps themselves, either individually or as a team, to find out more about dyslexia, or how it might be impacting on the claimant.

164. The claimant was not referred to occupational health at this point in respect of dyslexia, and no consideration was given by anyone to looking at or asking about any of policies or processes or resources that might be available to them as managers. The response for those managing the claimant at this stage was to put the onus on her, and to stay the capability process.

165. We all agree that at this point, a number of the people managing the claimant felt that they had done enough for the claimant. There was, we find, a level of frustration shared by a number of managers, including Linda Hooper and HR staff, that the Trust had progressed with the capability process, and were now required to stall that process. This in turn meant that there was an unwillingness of any one to take responsibility for an employee, who was now known to be potentially disabled, and certainly suffering with an impairment which was impacting on her ability to do her job.

166. We find that had anyone made even the most cursory of enquiries about how to manage and support an employee with dyslexia, that they would have been referred at some point to this very helpful guidance. We also find that on the information available to them, the question of whether

or not the claimant was disabled would inevitably have been raised, as well as the question of whether or ot there was nay duty to make any reasonable adjustments.

167. The claimant was helped by Simon Anjoyeb to make an application to Access to Work, and this involved Access to Work carrying out an assessment of the claimant.

The lack of a referral to OH

168. Mr Ibekwe has been critical of the respondent for alleged failures to follow their own policies and procedures. The clamant alleges that as a result of these alleged failures, and because of a failure to recognise her as a disabled person, she has been denied certain benefits of those polices.

169. We have therefore considered the policies in some details.

The capability policy.

170. Mr Ibekwe focused on the bullet points in the disciplinary policy which state that the informal stages must involve a discussion of the possible reasons for the employee's shortfalls. We accept that this is a requirement of the informal and the formal procedures.

171. At formal stage one, the policy states that there would be consideration of whether a referral to OH is needed and action taken on any advice.

172. It is consideration of the possible reasons for the employees shortfalls that must be considered, and the consideration is then whether or not to refer to OH. It is not a requirement, but we find that in this case it would have been an obvious step to take.

173. We find that there was, on numerous occasions both before and following the start of the capability process, discussion with the claimant about the reasons for her performance, but not in context of dyslexia.

174. We find that on 30 September 2016, when the claimant raised dyslexia again, there was some discussion of what action to take as a result.

175. No referral was made to OH and we have not seen any evidence that this was considered or discussed at the time. The claimant was referred to Access to Work, and the performance management process was stayed.

176. Looking forward in time, we find that a referral to OH was not considered when the respondent managers, such as Sara Allen, were discussing the recommencement of the performance process, after the recommendations which Access to Work had been implemented. (see post).

177. More than one witness, including Ms B Smith , told us that they assumed that Access to Work was carrying out some sort of workplace assessment. She told us that she assumed this would be done but that she had no experience and that she thought that the report carried out by someone she thought was an expert was enough.

178. We find that no one ever checked what the process entailed or asked the claimant about this, no one asked Mr Anjoyeb, and no one thought to ask either Access to Work themselves or their own OH advisors. No one took responsibility for the process of addressing the claimant's impairment at all, and, when there was no workplace assessment, no one raised the matter or expressed and concern or interest at all.

179. We find that the references to an assumption that the referral to Access to Work would provide a workplace assessment, was not actively discussed or considered by any one at the time, but is an explanation given to us in hindsight, as an attempt to justify a lack of engagement and action by any one at the Trust.

180. We also take note of the evidence of the OH manager who told us that, had a referral been made to them for a dyslexic employee at any time, that the first step would be to refer to Access to Work.

181. We find therefore that on balance of probabilities, had a referral to OH been made, that the advice would have resulted in the same referral. What may have happened in addition, however, was someone in OH taking ownership of the process from a management point of view. This would, we find, in all likelihood have resulted in a consideration of the claimant's abilities in the specific workplace.

182. We also considered what would have happened if, at the first informal stage of the performance management process when, we find, the respondent knew or ought to have known that the claimant was dyslexic, OH had been involved and had made a referred to Access to Work. We find, since this was said subsequently, that it is highly probable that they would have told the claimants managers that the dyslexia was potentially a disability under the Equality Act 2010.

183. We also find that OH may have then alerted HR and the managers to the existence of the reasonable adjustment guidance which was produced to us.

Access to Work recommendations

184. On 20 January 2017, following the assessment by Access to Work, the respondents received the notification of what Access to Work would do and what the respondent would have to pay as contribution to the costs.

185. The recommendations made involved both the purchase of equipment and the provision of coaching for the claimant, in the form of 6 counselling sessions. This required the claimant to be absent from work.

186. The Respondent agreed to all the recommendation. These were we find, adjustments which it was reasonable for the respondent to avhe to make, and they made them.

187. The respondent managers did not consider what more, if anything, it needed to do, and did not consider whether the managers themselves may need to be educated about Dyslexia and the impact upon the claimant.

188. On the 8 February 2017, Sara Allen suggested internally, that as Access to Work were working with the claimant from 26 January 2017 until 25 July 2017, that a review of the claimants performance would be timetabled for her, as a first formal stage of the process, in July 2017.

189. The claimant has criticised the respondent both because they did not make a specific referral to OH , but also because they did not at any point consider stopping the performance management process to give her a chance to adapt to the various techniques, before considering afresh whether or not she was able to perform her job.

190. We accept that for the claimant this was a stressful time, and we can see that from her perspective, the logical process would be to simply start again.

191. Not only was the claimant now receiving some practical assistance with working methods, but she had been provided with several auxiliary aids to use at work, and she had been diagnosed with Irlens Syndrome. This impairment affects the claimant's eyesight and the provision of corrective glasses meant that it was easier for her to read text.

192. The claimant did not make this complaint at the time and did not at the time complain about the respondents responses at all. We find that she was focussed on the fact that she was receiving support; that the respondents had acknowledged that she had an impairment, and the

performance management process had been suspended to ensure that she was able to receive the support and training from Access to Work, and therefore learn the adaptive techniques to assist her in doing her job.

193. The respondents did continue with the capability process, but not until the claimant had received the benefit of the auxiliary aids and additional training.

194. By May 8 2017, the respondent was still chasing the various aids and the setup of the aids to assist the clamant. Sara Allen sought confirmation that the devises had been received and all was in place.

195. The claimant had had a period of sickness absence unconnected with her disabilty and was referred to the Health Employee Learning and Psychology (HELP) services by Linda Hooper on 15 May 2017.

196. The stated reason for the referral was that the claimant had failed to arrive at work the previous week and had not contacted the ward following a report of seven phone calls that she said she had made reporting that she was unable to sleep. She reported a heightened state of stress due to both exterior circumstances related to her finances and the fact that she was on stage I of the formal capability within her role. It is noted that she has been referred to a counsellor and it is suggested that the claimant being in a constantly stressed state had provoked unprofessional behaviour from.

197. By 18 May 2017 Simon Anjoyeb confirmed that items and services ordered from Access to Work had in fact been ordered. They were an electronic medical spellchecker which had been received; an initial diagnostic screening test; the full Irlen evaluation, testing and tinting, and six two-hour work-related dyslexia strategy coaching sessions.

198. On the 25 May 2017, Linda Hooper wrote to Sarah Allen, noting that the claimant had had seven episodes of sickness past two years. She states

that she had spoken to Karen, who had told her that the claimant's file was a mess. This was in the context of sickness absence information. Linda Hooper remained concerned about the capability process and chased up on reasons for the delay. She noted that the review was due the following week .

199. In a reply to Linda Hooper, Sarah Allen stated that there was a delay in taking things forward and that the meeting with the claimant had to be postponed because it had been intended to allow 12 weeks for her to work with the equipment and have her support sessions, and at that point, they had only in place for a couple of weeks. She also stated that at the that point she was not aware of any further clinical matters of concern.

200. The claimant had not, by that point, done her counselling sessions with Chris Stibblehill from ATW nor did she have her Irlen glasses. She got lenses in August but not the frames.

201. In on the 26 May 2017 the claimant was referred to OH by Linda Hooper.

202. In early June the claimant received notice of the strategy coaching sessions which she would be attending the first of which would be the six June and the last of which would be the 26 October 2017.

203. On the 9 June 2017, the claimant met with Linda Hooper. The meeting was to discuss her sickness absence and her return to work as well as to receive an update on the support the claimant was receiving in respect of dyslexia. Linda Hoper did not at that stage have the OH report. The claimant told the respondents that she had met with the coach regarding the coaching sessions, and also discussed the Irlen assessment .

204. At this meeting. Linda Hooper raised four incidents which had occurred since January 2017.

205. The first incident was on 16 February 2017 and the claimant was observed to raise her voice during a discussion with her mentor and then walk away. The second incident related to the claimant's attitude in a discussion with one of the band six sisters; the third incident related to a statement made by a member of the housekeeping staff and concerned the claimant's attitude in demanding hot drink for a patient immediately. These matters discussed with the claimant. None of them were about her clinical practice.

206. Following the meeting Linda Hooper did receive the OH report dated 12 June 2017. The reason for the referral was primarily to consider the claimants sickness absence, arising from symptoms of stress which the claimant said in part arose from her working environment . In the report, it states as follows

Anita also has dyslexia, for which she was assessed at University, Anita told me she has difficulty processing some types of information e.g. she may read three rostered shifts, but that her brain may be only process to. Anita told me that this has led to her misunderstanding ship thinking that she had an off day when in fact she was scheduled to work, I understand Anita from your referral form that Anita is currently being assisted with the condition by the access to work team and I therefore do not plan to comment further on this condition. Anita told me that she is also receiving counselling, the dyslexia specialist which although she has only had one session she is finding of I understand from both your referral form, and from Anita that she is currently undergoing the trusts capability process, which she has been supported by. Anita told me that she is finding that things are starting to get better at work with support. She is receiving. Anita denied generalised feelings of anxiety, stress or anxiety and stress related to the workplace. She advised me that her feeling of anxiety relates specifically to her chronological condition which hopefully will improve with treatment and counselling.

207. The occupational health practitioner also stated that dyslexia is a learning disability rather than a medical condition, and as *Anita had already*

undergone an assessment at University and the access to work team are already involved as above. I have not commented on this further.

208. It was at this point that Linda Hooper asked Rachel Atkinson, the employee relations manager, whether or not there had been a formal diagnosis of dyslexia for the claimant and where the respondent stood in asking to see it. The response from Ms Atkinson was that she would not suggest going down that route and reminded Miss Hooper that she had occupational health's confirmation that the claimant had dyslexia

209. In the report, it is stated that *it is likely in my professional opinion that Anita's dyslexia would meet the criteria of the disability as defined by the Equality Act 2010*.

210. This report says that the employer has duty to make reasonable adjustments and says may find helpful to contact equality and diversity and human rights team for advice and guidance on reasonable adjustments for staff with disabilities.

211. Linda Hooper said in her witness statement that she did not do this because Access to Work were involved and she assumed they were dealing with it.

212. In her oral evidence to us, she said there was nothing more she could do. She said she had looked at the guidance and the list of reasonable adjustments and said they had done all that they could do.

213. She said that they had made lots of adjustments and named the yellow sheet, the Irlen glasses and the extra time and mentoring for AG.

214. In her evidence to us she stated that the Trust had done enough to support *this young lady*, meaning Anita Green. She considered that the respondent had done all that they needed to do – that there was no

necessity to ask further questions or do as OH suggested. We find both from her evidence and from the correspondence at the time that Linda Hooper was frustrated with the time it was taking to manage the claimant at that point.

215. We find that Linda Hooper had been a motivating force behind the possible referral of the claimant to the NMC; that she had taken a lead role in the management of the claimant, and we find that her motivation and objective was to manage the claimants poor capability, with a view to terminating her employment at some point in the future.

216. We infer from the evidence we have heard, that when LH requested confirmation of a diagnosis, it was because she doubted the claimant, not because she was seeking to assist her.

217. We find that LH believed that enough had been done by the trust, not that she ever considered whether the trust should be doing anything additional, in the future to support a disabled employee. She did not make any effort to follow up the suggestions for support and advice she was given, and we find the reason was that she was did not want to do anything more to support the claimant. She wanted to proceed with the performance management.

218. We have no evidence before us to suggest that Miss Hooper would have treated a person who was not disabled any differently, if a sickness issue had arisen, and we do not have any evidence to suggest that her frustration and desire to proceed arose from any thing other than a wish to ensure that she had capable and competent staff working in the hospital.

219. We did find Mrs Hooper a challenging witness, but we do not find that she was motivated in her dealings with the claimant either consciously or unconsciously by the fact of the claimant being dyslexic. Once she was told that the claimant was dyslexic, her failing was that once she was aware of

the dyslexia, she did not consider that it may explain the claimants difficulties, or be a reason to think again about how to support the claimant to become a capable and competent nurse. She ignored the possibility that the claimants problems might, or as we find did, arise at least in part from her disability.

220. Whilst the Trust had, we find taken many sensible and appropriate steps to support the claimant, over a long period of time, the realisation that the claimant was probably disabled, and needed specific auxiliary aids and assistance of a particular nature was a source of frustration to Miss Hooper , we find.

221. We find that she formed an early view that the claimant as someone not capable of being a nurse who would not become capable of being a nurse, and that she looked only at the evidence which supported her view.

222. When she was provided with evidence that suggested that there may be a good reason for the claimant not having performed to the required standard, and that this could be remedied, she became frustrated with the impact that the process of implementing the adjustments had on the time taken to manage the claimant through the capability process. We find that she suffered from confirmation bias in her thinking about the claimant.

223. Following this meeting, there were some further reports of issues with the claimant.

224. On 28 August 2017 an issue arose following the claimant entering figures for residual urine output on a critical care patients fluids chart. On 4 October 2017 the claimant was recorded as having admitted that she had *guesstimated* the urine output, but later denied saying this. A statement was made by SR Pardilla, and sent to Sara Allen who was dealing with the formal capability process.

225. We observe that this was a significant error and matter that would obviously raise concerns.

226. On 2 November 2017 the claimant met again with Linda Hooper. The claimant was accompanied by Caroline Browne.

227. Simon Anjoyab had suggested that the claimant use a yellow film over written material, as a temporary measure to assist her with Irlens Syndrome pending the provision of her glasses. The claimant had been doing this. All the respondent witnesses who were asked about adjustments made reference to this yellow film as an adjustment. At the time, it was intended to be a temporary measure pending the outcome of Access to Work, and it was not the only adjustment required.

228. The claimant suggested that she might use a recording machine for handovers, and this was agreed to. The claimant complains that the batteries were expensive and that she was unable to get help with the cost of them, and that after a while she stopped using it. There is no suggestion that after the meeting on 18 November anyone helped the claimant with this, or reassured her over the cost of batteries, or made sure that she was able to use it or was using it, but nor is there any suggestion form the claimant that she raised the issue or asked for help.

229. At that meeting the claimant stated that she was having a positive experience on the ward.

230. Sister Sarah Jane, the ward manager was reported as saying that the claimant was doing very well, was cheerful, kind and trying very hard to make good progress. Despite this, concerns remained around the claimant's ability to safely administer medication.

231. We find that the claimant was making progress and that there are some parts of the job that she was clearly able to do, despite there being

other parts which she had difficulty with. She was doing well on a smaller ward, and was able to practice as a competent and useful member of the team, albeit with some mistakes.

232. In the letter following this meeting Miss Hooper notes that by July 2017 the claimant's mentors had felt that she had made improvement and was ready to take on duties. Refresh refresher training sessions on IV training and an acute study day were identified as being of help for the claimant

233. It was also noted that she now had the equipment to support her in the workplace, including the Irlen tinted glasses and the spellchecker. She noted that the claimant was using a recorder during handovers, and that she had completed her coaching sessions, except for the last one, the claimant had told her that there had been a huge improvement using the glasses, and that the claimant had expressed that she felt ready to no longer be supervised.

234. Miss Hooper also noted that despite improvements there had been three further incidents, including on completion of paperwork. The claimant had expressed a different view of events.

235. Miss Hooper noted that following the three-month period for the claimant to make improvements, that there would be a further monitoring period, the six weeks until the 11 December 2017, and that a review meeting was scheduled for 14 December 2017

236. The claimant was told that during the following six weeks, she would continue to be supervised by her mentors and she was told that the improvement plan had been adapted to include how each of her job objectives would be measured.

237. The claimant was reminded that whilst she had been working on the Egremont Catherine James and Overton Wards, that this was a supportive measure during the capability process and that her substantive position remained on the Jowers ward which she would return to once she had been signed off as competent.

238. The Claimant expressed reservations about returning to that ward and was told that she would be supported and that if she wished to work elsewhere, then she could apply for other nursing roles and follow a standard recruitment process. She was provided with an adjusted performance management plan which set out the expected level of performance, and training to be offered.

239. On the 11 December 2017, Miss Hooper wrote to the claimant again, inviting her to a review meeting on the 15 December 2017. This meeting was in line with the Trusts capability policy and the purpose was to formally review the claimant's progress within the capability process. At that point the claimant had been in receipt and support of all necessary equipment for a three month period.

240. The letter reminded the claimant that if the findings indicated that there had been no improvement on her performance at the end of the formal review period it would mean a move to stage II of the capability policy where the claimant would remain supernumerary. If there was no improvement on her performance in a further three month period, a stage III meeting, resulting in a possible hearing would be convened to consider her continued employment with the trust.

241. The meeting took place on 28 December 2017. The claimant attended with Caroline Brown and Linda Hooper was accompanied by Jade Carter Moore with Rachel Atkinson in attendance.

242. From the notes taken at that meeting, it is clear that following the review that claimant had made improvements in some areas of work, but that there were some remaining concerns. Miss Hooper identified five instances of poor practice, including the claimant needing to be prompted over medication dose; the claimant being prompted to check prescription ; the claimant not being a team player and being unconfident about washing a patient on her own ; the claimant needing help administering by the medication - which Ms Hooper recognised the claimant was yet to be signed off on and therefore discounted , and a drug error made on 14 December 2017 .

243. We accept that by 28 December 2017, Miss Hooper remained justifiably concerned about the claimant's abilities to practice at the required standard.

244. During the discussion that followed, the claimant was told that Miss Hooper did not feel able to sign her off to work on the Jowers ward. The claimant stated that her problems had started because of her dyslexia and that she hadn't made any further mistakes. There was clearly a disagreement between her and Miss Hooper about whether the errors and mistakes made by the claimant were serious enough to warrant a move to the stage II meeting. The claimant stated that she felt it was unfair that some of the mistakes and errors were not serious and that suggested that other nurses had made far more serious mistakes but the outcome of that meeting was that the claimant was not signed off and therefore she was referred to the next stage of the formal capability process.

245. This was confirmed in writing to the claimant in a letter dated 2 January 2018. The letter sets out the various concerns and states that in line with the Trusts capability process, she would now progress stage II of the capability procedure.

246. On 10 January 2018 the claimant called into work, saying that she was unable to work because she had a bad back. The claimant remained off work without providing a sickness certificate and was referred to occupational health on the 24 January 2018.

247. The claimant did subsequently provide a sick certificate and remained of sick until 23 February.

248. The claimant was invited to and did attend an informal sickness absence meeting on 23 February 2018. She reported that she has been suffering from back pain and believed she would be off sick until at least 20 March 2018.

249. The claimant was back at work by 28 March 2018 on which date the note was made of the personnel file that it had been reported that the claimant had been rude to members of staff and to relatives. During a conversation with the ward sister, her line manager, it is reported that the claimant accuses her line manager of lying, and then leaving the meeting was going on her break.

250. On 11 April 2018, Linda Hooper invited the claimant to a stage II capability meeting. The meeting took place on the 19 April 2018. It was acknowledged that the claimant had been off work sick and had had a phased return to work, and it was explained to the claimant that the stage two of the capability process, the eight week period, would starting from that date.

251. Concerns were raised on the claimant's behalf about confidentiality having been broken in respect of the various allegations being made about the claimant. The claimant raised concerns about her health and concerns about where she was working. These were concerns that everybody and everything was against her, whilst she remained working in the Barry building.

252. The respondent explained to the claimant that they still had a number of concerns about her practice. These concerns included her communication skills and abilities to prioritise identify and escalate matters in respect of deteriorating patients; dealing with documentation; managing her time and being able to recognise when she could not cope and being able to highlight this to others.

253. There is reference to a recent occupational health report which had not been available at time of the meeting. The report had been reviewed following the meeting, and it was suggested that the claimant might obtain further support from the equality, diversity and human rights team who may be able to provide some further advice on disabilities including dyslexia. Miss Hooper stated in her letter that she would make arrangements to meet again with the claimant when she returned from her sickness absence.

254. On 24 May 2018 the claimant attended at the informal sickness absence review. She had been absent from work. Since 22 April 2018. At this meeting. She explained that her doctor had put her on antidepressants and that she was continuing to experience low mood and anxiety. The claimant said she felt bombarded by all the different things that were going on, and that the amount of information she was receiving was impacting on her low mood. She said she was constantly afraid of making mistakes, but also felt that she was constantly being pulled up on things and that she was suffering significant levels of anxiety and depression.

255. In fact the claimant remained signed off on sick leave and a further referral was made to occupational health in June 2018. The claimant was referred again to occupational health on 1 June 2018 and stated that she could not face returning to the acute respiratory ward because she felt frightened and considered that it was having an adverse impact on her health and well-being. She remained signed off on sickness absence.

Process of revalidation

256. Whilst the claimant was absent on sick leave NMC pin required revalidation. The process of revalidation has been introduced relatively recently. The claimant contacted the trust and asked what process was. She was told that the revalidation would need to be considered by somebody more senior and that the respondent needed to take some advice.

257. We accept the evidence of Ms Hooper that this was the first time that the respondents had dealt with revalidation of somebody who was also going through capability and that advice was sought because of the unusual situation.

258. Ms Hooper then spoke to the chief nurse Nicola ranger, who asked Ms Hooper to contact the NMC about the process and seek guidance on whether revalidation was appropriate and if so process, when the employee in question was part way through the capability process.

259. After speaking to the NMC. Miss Hooper wrote a report for her chief nurse in which she expressed her grave concerns about the claimants abilities and stated that she thought that it was now time to submit a fitness to practice report.

260. It was unclear to us why Linda Hooper decided that this was the appropriate point to submit a fitness to practice report to the NMC. She has not provided us with a full explanation of this.

261. We accept that there were concerns about the claimants abilities, and we accept that the claimant was part way through the capability process. However, the respondents capability process is described as a supportive process which is aimed at getting the employee to the required stage of performance and at this stage, the process had not been completed and the claimant was absent on sick leave.

262. Following the submission of the report from Lynda Hooper Nicola ranger decided not to support the revalidation of the claimant and was supported and her decision by the nurse director for the workforce. It was also agreed that the claimant should be referred to the NMC fitness practice.

263. The decision about the claimant's abilities as a practitioner, and her lack of competence. At this point, and the conclusion that a referral to the NMC was necessary were based on the report that had been by Ms Hooper.

264. In the meantime, the claimant had taken matters into her own hands and asked Caroline Barrett Brown who was her mentor to revalidate. Caroline Brown agreement to this. We find that this was a legitimate act for Mr Brown and we do not criticise her.

265. However, we also find that it is unsurprising that the respondents were concerned that the claimant had taken this step because the claimant had already raised the issue with other staff members and had been told that the matter was looked into. No reply had been provided to.

266. We find as fact by at this point in the chronology a number of senior people and the respondent organisation had a negative view of the claimant and her ability to perform her role. In part, this was based on the report, written by Linda Hooper.

267. We find that the information provided by Linda Hooper was based on genuine concerns about serious issues which had arisen over significant period of time. We find that the views about the claimants' abilities at the time were not unreasonable and had nothing to do with the fact that the claimant is a disabled person.

268. We all agree that at this point. Linda Hooper had formed a negative view of the claimant and was of the view that the claimant would not and

could not improve. She considered that the claimant had been given as much support as was necessary, and that nothing else needed to be done for her. We find that she considered that the respondent had done enough to assist the claimant and did not need to take any further steps.

269. We find that at this point Ms Hooper was not able to take an objective view of the claimants disability and the fact that she may well require further help or assistance or adjustments made to her role. We find that Ms Hooper was focused on progressing the claimant through the capability procedure rather than assisting her to improve.

270. However, we find as fact that the reason why Linda Hooper wrote her report, and the reason why she had a negative view of the claimant was because she had genuine reasons to be concerned about the claimant's abilities. Those concerns led her to consider that the claimant was a failing practitioner, who should not be revalidated. These were appropriate professional concerns to raise they were understandable given the claimant's past performance and arose in the context of a new process and a novel situation. We find as fact that the real and only reason for the investigation and request for advice from the NMC was this genuine concern about the claimant and the process of revalidation.

271. We also find that Linda Hooper ceased to have any further input into the claimant's management after the claimant raised her grievance. Once the claimant returned to work and following her redeployment to the new Timber ward. Miss Hooper had no further involvement with the claimant.

272. The conclusion of the respondents in respect of the referral to the NMC , following consideration internally, was that because there were capability issues, the correct process was for the respondent to follow the capability process, and only to refer to the NMC If the claimant was in fact dismissed following the conclusion of such process. Since that stage, had not yet been reached. No referral to the NMC was made. Linda Hooper

retained the report. She had written in case she needed to use it at a later stage. We note that it did form part of Mr Valentines report to the NMC which she compiled claimant had resigned.

273. What did happen was that on 28 June 2018 whilst the claimant was still absent on sick leave, the respondent wrote to her, and in that letter. Miss Hooper reminded the claimant that NMC pin was due to expire on the 31 July 2018. Miss Hooper referred to the revalidation process and expressed her concerns that the claimant had proceeded to revalidate herself, despite the respondent having some concerns about the process.

274. Following referral to occupational health and the occupational health a recommendation that moved to a new ward assist the claimant, the claimant was signed off by her doctor as fit to return to work . This was in October 2018.

275. At that point the trust did not wish the claimant to return to work and told her to take annual leave instead. The reason for the claimant being required to take annual leave rather than any other sort of leave has not been explained to us.

276. We find that the trust had several other types of leave that could have been allocated to the claimant and these included disability leave or special leave. We find that it was wrong of the trust to tell the claimant to take annual leave and the reason they did this was simply because they were not willing to have the claimant returned to work at that point.

277. The claimant did return to work and with the agreement of the respondent, she returned on a phased return and was redeployed to the New Timber Ward.

278. The claimant filed her first claim to the Employment Tribunal on 28 November 2018.

279. In this claim the claimant alleged direct disability discrimination and set out the failure of the respondent to protect the claimant from treatment which had the effect of damaging her professional confidence performance and impacting disability and secondly bites failure to make reasonable adjustments.

280. The claimant alleged disability related discrimination on same grounds, and disability harassment on the same grounds. The claimant also set out the failure to make reasonable adjustments, and set out the PCP of a requirement to carry out work in a constantly turbulent environment without predictability, stability and also ability and secondly a PCP that was to attend work consistently the specified minimum duration represented by trigger all of which created challenging obstacles to or for her condition disability.

281. The claimant also alleged race discrimination.

282. In the details to the claim, it states that the claimants condition/disability requires or demands predictability stability and also 20 as a means of obviating or reducing or masking the adverse impacts necessitated by. It is absolutely counter-productive to treat the claimants condition as either an illness lack of articulacy all of which constitutes adverse triggers it is suggested that the respondents failed from the outset of the claimants employment, to assist by getting expert analysis or by assisting or supporting management of the claimants condition. It is suggested that the claimant being on stage II of the capability process has exacerbated the claimants stress.

283. It states that the respondent has continually refused to consider transferring the claimant to the hospital Princess Royal Hospital located at Haywards Heath as a way one means of giving her a semblance of fresh start.

The respondents position on disability

284. The respondent replied to the claimants first claim in pleadings dated 31 December 2018. They denied disability. They accepted that she had the impairments of dyslexia but did not admit that the dyslexia had a substantial adverse effect on her ability to carry out daily activities . The claimant was put to strict proof of disability but nothing was said about the basis if the denial. No reference is made to Irlen syndrome but it is right that the claimant has not identified the disability she was relying on in her pleadings.

285. The claimant was assisted in bringing her claim to the tribunal by Mr Ibekwe , who has assisted her throughout.

286. A case management hearing took place, by telephone on the 12 March 2019 in front of the acting regional judge .In respect of the issue of disability, the tribunal directed that each party should disclose to the other party all documents relevant to the issue disability, such as medical notes occupational health assessments et cetera on or before 26 April 2019 .

287. Following the case management hearing the respondent requested further particulars in respect of the discrimination claim which the claimant provided. The request was for further identification of the incidents and dates of the incidents acts or omissions been relied upon for the discrimination claim. The claimant provided further particulars and the respondents then provided an amended grounds of resistance on the 24 April 2019.

288. At this point the claimant had identified that her allegations about disability discrimination concerned the respondent's actions in writing reports, starting the capability process, and continuing with it, without having taken advice from OH. She complained about the escalation of the capability procedure without occupational guidance and its continuance at stage II, with reference is made to the manager's perception, or conception that the claimant was incompetent during the relevant period mentioned at

the effective date of transfer the claimant Princess Royal Hospital at Haywards Heath.

289. Her complaints were that instead of recognising or acknowledging that her capability issues were being induced or escalated by a potential failure to identify and manage the claimant's disabilities, the process its self was discriminatory.

290. She compared herself with people who did not have her disability who were referred to the occupational health and the capability system or others who did not have her disability and who were not referred or subject to capability.

291. In the amended grounds of response, the respondent noted that the claimant relied of dyslexia and disorder/syndrome.

292. The respondent admitted that the claimant had dyslexia but continued to dispute that it amounted to a disability under the equality act because it did not admit substantial adverse effect on her ability to carry out daily.

293. In respect of Irlens syndrome, the respondent disputes that the claimant had all that it was a distinct recognised clinical condition. the respondent denies that it had a substantial adverse effect on the claimant's ability to carry out daily activities, and also denied that they were aware of the and disorder and could not reasonably have been aware of such as the dates of the alleged disability discrimination

294. In respect of the duty to make reasonable adjustments, the respondent states that it did not and could not reasonably have known that the claimant was disabled and that her disability was liable to disadvantage her substantially. In effect respect of the claimant's allegations of discrimination arising from disability.

295. The respondent also relied upon the statutory defence available to them under the Equality Act 2010 stating that the respondent takes all forms of discrimination seriously, and that they had a comprehensive package of policies and training addressed at preventing all forms of discrimination, including race

296. It referred to its equality, diversity and inclusion policy and its dignity at work policy which referred to the steps taken to ensure that all employees were aware of the policies and the mandatory of equality and diversity training both on commencement of employment and at three yearly intervals thereafter.

297. On the 11 May 2019 the claimant was directed to provide a disability impact statement, explaining the length of the disability; the nature of its effect on day-to-day activities, and any existing medical evidence relied on. She was to do this by 31 May 2019 and the respondent was to indicate whether or not accepted that the claimant was disabled as alleged by 14 June 2019. A further case management hearing was listed for 20 June 2019

298. The claimant provided a report that she had commissioned and on 17 May 2019 the respondents confirmed that they accepted that the claimant was disabled by reason of Irlen's and Dyslexia.

299. The respondent continued to dispute knowledge of both disabilities.

300. A further amended grounds of resistance was provided on 29 May 2019.

301. At that point the claimant remained temporarily deployed at the new Timber ward.

302. The amendment made to the pleadings at paragraph 8 was to identify that the claimant had disclosed her dyslexia at a meeting on 30 September 2016, and to delete the previous assertion that the claimant had not disclosed this to the respondent before.

303. In respect of dyslexia the respondent accepted that the claimant had notified the respondent of this condition in her job application, but relied on the confidential health questionnaire suggesting that the claimant indicated that she did not have a disability which may affect the work and indicating that she did not require any adjustments. It is stated that the potential of the dyslexia having any impact on the claimant -related to performing her role did not arise initially until October 2015 and thereafter when expressly raised by the claimant on 30 September 2016 in the capability meeting.

304. Regarding Irlen disorder, it was the respondents understanding with which we agree that the claimant was unaware of it until it's diagnosis on 12 June 2017. The respondent also asserted that although they were advised of the claimant's assessment of and disorder that they never received a diagnosis of it until the disclosure of medical information.

305. On the 17 July 2019 the respondent filed a further amended ET3. One of the amendments at this point in respect of the managing sickness absence policy is an amendment which add in a line that the respondent obtained appropriate advice from occupational health, and access to work and made changes as were appropriate and reasonable to accommodate the claimants disabilities. We find that no appropriate advice about disability was sought form OH.

306. The respondents amendments were that no occupational advice had been taken until 16 June 2016, before stage I of the formal capability proceedings were commenced. The respondent is right that the claimant did not refer to dyslexia when she did meet with OH about another health

issue, but we find that the reason for that meeting was nothing to do with the claimant's performance and that the respondent never asked whether dyslexia may be having an impact of her performance, as their own policy suggested.

307. The respondent accepts that it did not refer the claimant to occupational health once access to work were involved.

308. The respondent also asserted that they did not know and could not reasonably have known that the claimant's poor performance was allegedly due to her disability of dyslexia for any period prior to 30 September 2016 and did not and could not reasonably have known that it was due to any disorder the reasons set out

309. By July 2019 the respondents had admitted that the claimant was disabled by reason of both her impairments, but continued to deny that it knew that the claimant was disabled by reason of dyslexia or that the claimant's dyslexia was the cause of or contributed at all to her poor performance until October 2015.

310. On the fourth of May 2019 the claimant filed her second claim to the employment tribunal. This claim was complaint of disability discrimination because of a failure by the respondent to recognise when investigate her disability and, according the benefits that would follow had she been accepted as a disabled person.

311. The allegation is put in three parts, that there was a failure or refusal to recognise the claimants disability from the date of diagnosis; a failure to carry out any diagnosis of and/or blinkering itself to the claimants disability, and the denial to the claimants of the benefits of protections that would flow from the respondents recognising her disability whether under its own policies or as a matter of law.

312. These claims are set out in detail in the case management order of employment judge Maxwell of 20 September 2019, and we do not refer to that detail further here.

The referral to OH in 2019

313. Although no referral was made In respect of dyslexia, the claimant was seen by OH because of work related stress and OH did comment on the fact that the claimant is dyslexic. The relevant OH reports all state that the claimant could be disabled by reason of dyslexia and we find that there was at that point no valid basis at all for the respondent to suggest that the claimant was not disabled.

314. On 30 April 2019 Judy Flahey wrote to Ms Pearson, telling her to talk to the claimant about a referral to OH, and attached the information from Access to Work and a draft referral. Ms Pearson was asked to share this with the claimant.

315. She says that it is important to note that this is a supportive mechanism *for her to Identify if there is anything else we need to do in the workplace and also get OH view on whether permanent redeployment is an option.*

316. At that point, an adjustment of permanent redeployment was clearly in the respondent's mind.

317. On 3 May 2019 the claimant wrote to Judy Flahey with a formal response to the capability proceedings. She had been asked for her input as to the way forward , and as part of that , she stated that *the Trust must admit or accept that I have a disability that is protected under the Equality Act, and afford me all such benefits and protections and which the trusts own policies and procedures affords me.*

318. On 8 May NP wrote to the claimant asking her to attend at a meeting and to consider a referral to OH, to see if any further support was required. She stated, *I will share the referral with you before sending it.*

319. In May 2019, the claimant obtained her own report about her dyslexia. She did this at her own expense, because of the respondent's denial of her disability. Mr Ibekwe, the claimant's representative sent the report to the Respondent solicitors on 13 May 2019.

320. On the 16 May 2019, in an exchange between JF and NP, JF instructs NP not to share the OH referral with the claimant at this point.

321. The respondent witnesses have not explained in evidence the reason for what we find was a change in approach over sharing the draft referral to OH with the claimant. We find that what had happened in the interim was that the claimant had disclosed her own report to the respondent and had requested a formal admission of disability by the respondents.

322. At a meeting with the claimant on 20 May 2018, the respondent stated that it was important to support the health and well-being of the claimant and that they wanted to get an occupational health report. The claimant confirmed that she was open to the OH review, and stated that she wanted the capability process to end.

323. The respondent told the claimant that once they were satisfied that she had been fully supported with any adjustments that occupational health might recommend, that the claimant would be expected to work unsupervised for a period of time, to demonstrate her competency. The claimant was told that If she was able to do this, then the capability process would end.

324. She was told that arrangements would be made for a review in four weeks' time to see how the claimant was progressing.

325. The clear expectations of Natalie Pearson on 20 May 2019 were that, as the claimant had consented to the referral, the claimant would be referred to occupational health following the meeting , and secondly, that once a response to that referral was received by the respondent and any further adjustments which might be recommended were put in place, that then and only then would the claimant be expected to demonstrate her ability to work unsupervised for a short period, following which the capability process may well come to an end.

326. On 20 May 2019 the respondent knew that that two things had to happen, the OH referral and the implementation of any further adjustments, before the claimant would be expected to demonstrate that she could work unsupervised. It was implicit that following the meeting, there would be a further period of delay.

327. We find that at this point the reports were that the claimant seemed to be doing well in her work on New Timber ward. She was receiving good and positive feedback. Miss Pearson said in her evidence that the claimant had settled well and was making progress.

328. The only thing standing between the claimant and the ending of the capability process, and her confirmation in post was her ability to demonstrate to the respondent that she could work unsupervised.

329. The necessity of taking the last advice from OH to see if any further reasonable adjustments were needed was a sensible and standard step to take, in light of the claimant's disability.

330. Following this meeting the claimant had a period of annual leave. The referral to occupational health was delayed until she returned. A further meeting then took place with the claimant on 3 July 2019.

331. By that point the claimant had filed her second claim to the Employment Tribunal; provided her dyslexia report to the respondent and raised her concerns in writing about the process being followed for capability.

332. We have been referred to a draft referral to the occupational health service at p 155, on which it is recorded that the claimant had given her authority for her dyslexia report to be shared with OH. The referral set out a number of questions for OH, including whether or not the claimant has implemented the self-help strategies suggested to her and whether there was any further advice on the strategies to help the claimant. The referral also asked OH to advise on any further or additional adjustments other than the ones listed. The draft referral does not ask about a permanent redeployment.

333. At this stage we find that Natalie Pearson knew that the claimant had given her consent to the disclosure. That is why she signed and dated the referral on 3 July 2019.

334. We were told in evidence that the delay in making the referral was because of a confusion about whether or not the claimant had given her consent. We have been referred to a letter from Ms Flahey sent on 5 July stating that the referral would be made once the claimant states that she consents to the report.

335. In response the claimant replied stating that she did not think her consent was necessary but that confirming that in any event she had already provided it.

336. We find that the claimant had already consented and that the respondents knew this. We find that this was not, therefore the real reason for any delay. We find that in fact there was no valid reason for the respondent to delay the referral to Occupational Health.

337. Natalie Pearson told us that she completed the referral to occupational health on the same day as her letter to the claimant.

338. However, the claimant was not given an appointment with OH up until the point of her resignation on 29 July 2019. No explanation has been given by the respondents for not doing this.

339. On 3 July 2019, a stage 2 capability review meeting took place. This was the review of work done from the mid-point of 24 April 2019.

340. At this meeting it was noted that the claimant had raised a concern at the meeting with her mentors on 21 May 2019, that she did not feel safe to administer drugs on her own.

341. Natalie Pearson recorded that the decision of the meeting on 3 July 2019 was that the claimant had not been able to demonstrate an ability to work unsupervised, and that therefore they would be progressing her to a final capability hearing.

342. Natalie Pearson records that adequate time and support had been given to the claimant since starting on the ward, and that therefore, taking everything into consideration, they were obliged to inform the claimant that she may be dismissed on grounds of capability. She concludes the letter by stating that *in the meantime I will progress your referral to OH*.

343. We find that this letter and the decision made at that meeting, are a complete reversal of what had previously been agreed and set out to the claimant by the respondents in May 2019.

344. We find that the respondent had deliberately moved the goal posts and progressed to a final hearing before getting the OH advice, which they themselves had recognised as being necessary and which we find was a crucial stage of the process. They had not given the claimant a further period of time to demonstrate that she could work unsupervised, but instead had taken her honest expression of concern about her confidence as an excuse for saying that she had not shown an ability to work unsupervised.

345. We find that this change of approach is not explained in any true or credible way by the respondents.

346. The only two things that had happened in the time frame that we are aware of, were that the claimant had filed a second claim to the Employment Tribunal and that the claimant had provided her own dyslexia report to the respondent.

347. The claimant wrote to Natalie Pearson 9 July 2019. We find that this letter is a fair reflection of what had happened. We agree that the claimant did not refuse to work unsupervised, but rather honestly stated that she had lost confidence. She refers to her disability.

348. We find that the claimant is right about the assessment of events at this point and in particular note that the insistence of her working 4 weeks unsupervised, at para 4 is a fair summary of the issues.

349. There is no response to this letter at all from the respondent.

350. At this point there is evidence in the correspondence both from Judy Fahey and Linda Hooper, who were having written discussions about the management case for the purposes of the capability process, and we conclude their focus at this point was on moving to terminate the claimants employment, rather than supporting her to succeed in her employment.

351. There is no explanation for the failure to reply to the claimant's letter.

352. In the meantime, the claimant received a letter from the OH department. This letter is dated 25 June 2019 and we accept the claimant's evidence that she received it a few days later.

353. The background to this letter was that the claimant required a referral for a blood test because of an incident that had taken place with some sharps. This was standard practice for any nurse and was a health and safety requirement to ensure that there had been no cross infection.

354. This letter from occupational health to the claimant states that the follow up blood test will not be provided because the claimant is no longer an employee of the respondent.

355. The claimant told us that she believed the letter was true, even though she remained in work. She did not raise this with her employer at the time, and she explained that she saw little point in doing so as she had raised many issues with her employer in the past and got nowhere. We find that at this point the claimant had lost all trust in her employer.

356. She did refer to the letter from occupational health and the statement that her employment had been terminated, in her letter of resignation, and we accept that it was a factor which lead to her decision to resign.

357. When the respondent received her letter of resignation, they did not respond to the claimant about this particular point. From their evidence we find that they carried out no investigation at all until very much later as to why the claimant had received a letter stating that her employment was ended.

358. The respondents suggest that the letter was sent in error. We heard evidence that there are live employee files with OH, and that OH are sent the list of employee leavers on a regular basis, when employees leave the employment of the Trust.

359. There is then an administrative process which involves the removal of the employees file to an archive.

360. We heard evidence that at the point the letter was written to the claimant she had not in fact appeared on the list of employees who had left the employment of respondent and that her file had not in fact been archived.

361. No one who was involved in writing the letter, or making the decision to write the letter, has given evidence. We heard from the OH manager, who frankly admitted that she did not know why the letter was written, but guessed that it was because of the claimant had made a claim to the ET, and that information would have been on her file. She suggested that someone looking at the file may have assumed that therefore the claimant had in fact left the employment of the respondent. This is wholly unsubstantiated by any direct evidence and we reject it.

362. We do not accept that the letter can be explained as an error, on the evidence we have before us. We do not accept that there is any valid, innocent explanation at all about this from the respondents. We consider that the timing of the letter and the context is wholly suspicious, and we are unsurprised that the claimant was deeply upset and troubled by it.

363. Telling an employee that their employment has been terminated when it has not been, would be upsetting for any employee, and we find that for this employee at this point in her employment, it was a breach of the term of mutual trust and confidence, because whether intended to or not, it

seriously damaged or destroyed the relationship of trust, and did so, on the evidence we have, without reasonable cause.

364. The letter is a breach of the implied term of mutual trust and confidence contract and is fundamental at any stage in employment. For this employee at this point in time, it was capable of being a breach by itself, and we find it was, but it was also capable of being a final straw,

365. We all agree that for this claimant, the combination of these factors led her to think about the letter from OH again, following the meeting of 3 July 2019, at which the respondents as we have found, changed the goal posts. This reversal of an agreement remained unexplained, and the letter the claimant sent was not replied to. We find that the letter from OH was capable of being a last straw following the meeting of 3 July 2018, because that meeting cast a different and new light upon it, or alternatively because the events confirmed what the claimant had believed.

366. The timing of the resignation and her reliance upon this letter as a final straw is entirely reasonable in these circumstances and is also understandable in light of the claimant's disability. We find that the letter and the meeting were the reasons for the claimant's resignation, that she acted in response to them and did not delay in doing so.

367. It is ironic that at the point she resigned, the claimant was by all accounts doing reasonably well, and was receiving appropriate and targeted support for her disability. We find that there was a real possibility that the claimant would have been able to gain sufficient confidence to work unsupervised if she had been supported for some further time by a ward manager such as Natalie Pearson.

368. We also find that in any event, had the respondents received further advice from occupational health and had the claimant continued to have difficulties working unsupervised, that it may have been possible to redeploy

her to a different role within the Trust where she did not need to administer drugs or medication.

369. Neither of these things happened.

370. We find that the claimant resigned from her employment because of the events which she alleges were a series of breaches of her contract by the respondent, and we find she resigned promptly and we find that she did not at any time affirm anything which we subsequently consider may amount to a breach of contract.

The Referral to the NMC and ET claim 4

371. The claimant's 4th claim to the ET was a claim against Mr Valentine as named respondent. The claimant withdrew the claim against him as a named respondent during course of this hearing and proceeded against the Trust alone.

372. The claim is that the decision to refer the claimant to the NMC, following her resignation was an act of disability discrimination. Alternatively, it was put as an act of race discrimination.

373. At the relevant time, Mr Valentine was head of nursing for the specialist division. He has now retired.

374. He received the claimant's resignation letter and wrote to her acknowledging it on 2 August 2019 and warned her of a possible referral to the NMC.

375. He states in the letter that the capability hearing will not now go ahead, but states that given ongoing concerns about her practice which

could amount to a patient safety risk, *I am obliged to undertake a full review in order to consider whether a referral is necessary* (P 178 SB)

376. We find that at the point she resigned, the claimant was not confident to administer drugs or medication without supervision. The respondent's capability process at that stage was focussed on this part of her practice. It was the key aspect of her practice, and one thing outstanding as a necessity for her to be signed off as a band 5 nurse. All parties agree that the claimant had not, up until then, been able to demonstrate that she could administer medication unsupervised. The claimant had been supernumerary at this point for 4 years.

377. Whatever the causes of the claimants lack of confidence at this point, we find that there was a valid basis for the respondents to consider whether or not there should be a referral to the NMC. There was an outstanding concern about her practice that could give rise to a patient safety issue.

378. It is of course correct t that the claimant had filed claims to the tribunal and had resigned accusing the Trust of discrimination and constructive unfair dismissal. The claimant was disabled and was challenging the process of capability itself as an act of discrimination.

379. Mr Valentine had not been involved at all in any of the day to management of the claimant and had not been involved in any of the decisions or acts or omissions she was complaining of.

380. He told us that he then reviewed the documentation that he was given and met with LH; JF and KL and read their documents and background material.

381. He told us and we accept that having reviewed the documents, he determined that the claimant was not capable on balance, at that point, of

working independently to administer drugs, and that therefore there was an issue about patient safety, should she apply for another band 5 job.

382. Whilst she had worked in the hospital, the Trust could supervise her, but once she left they had no power to prevent her from working as a band 5 nurse elsewhere if she chose to do so. Even if the claimant was prepared to say that she would not do so, the Trust had no further power to manage or control her work. Only the NMC could do that. Mr Valentine told us and we accept that, in his professional opinion, given his view of the risks, he considered that he was required to make referral to the NMC.

383. We accept that there is a requirement for health Trusts amongst others, to make referrals to the NMC, if there is a genuine concern about patient safety. Here the claimant had resigned part way through a long running and changing capability process, which had not concluded, and which was itself about the claimants ability to administer medication unsupervised.

384. Despite the chronology of events and the possible motivations of others in this case, in respect of Mr Valentine, we have no evidence that he was motivated by anything other than his professional obligations.

385. When he made the referral, the documentation was put together by others, but he reviewed it fairly, and made a professional and understandable decision on the basis of it. We note that there was reference made to the claimant's dyslexia.

386. We find that Mr Valentine would have made the same decision ot refer any one with the profile of the claimant at that point regardless of any claim to the ET , disability or race.

387. We have no evidence before us of any motivation or causation for his decision to refer, other than the paperwork he had before him, and the

professional views he formed as a result of reviewing them. We find that he drew his conclusions and made the decision on the basis of information which outlined a series of genuine concerns which had arisen over the years, and that the one outstanding matter in respect of the a safe administration of drugs, was a key concern for him, and for good reason.

388. He made the referral we find, because of his own genuine concerns about patient safety and in his understanding of the NMC rules and guidelines.

Applicable legal principles

The duty to make reasonable adjustments

389. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments includes the requirement that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is for the employer to take such steps at it is reasonable for them to have to take to avoid the disadvantage.

390. The duty to make adjustments comprises three discrete requirements and the effect of section 21 of the Equality Act is that the proof any one of them can trigger an obligation on the employer to make an adjustment that would be reasonable. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against a disabled person.

391. The first requirement applies were a provision, criterion or practice has been applied by the employer that puts is disabled person at a substantial disadvantage in relation to relevant matter in comparison with persons who are not disabled.

392. The second requirement arises where a physical feature puts a disabled person at a similar substantial disadvantage in relation to relevant matter.

393. The third requirement is relevant where the lack of provision of an auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter.

394. In considering the duties that arise under section 20 and 21 of the EqA , we have borne in mind the guidance in *Environment Agency v Rowan [2008] ICR 218* in relation to the correct manner for approaching those sections. The at case reminds us that in order to make a finding of a failure to make reasonable adjustments, the tribunal must identify the following

a. the provision, criterion or practice applied by or on behalf of an employer or

b. the physical feature of premises occupied by the employer or the auxiliary aid that was required ,

c. the identity of any nondisabled comparators where appropriate and

d. the nature and extent of the substantial disadvantage suffered by the claimant .

395. We have considered what is necessary in terms of the adjustments themselves and remind ourselves that it is necessary for any proposed adjustment to have been both reasonable and to operate so as to avoid the disadvantage. This does not of course mean that there needs to be a certainty that the disadvantage with would be removed or alleviated by any particular adjustment proposed, but rather that there is a real prospect that it would have had that effect. See *Leeds Teaching Hospital NHS Trust v Foster 2011EqLr 1075* and *Romec Ltd v Rudham Unreported, UKEAT/0069/07/DA*

396. There is no requirement on an employer to make an adjustment which might require or cause a drop in standards of competence. See for example *Hart v Chief Constable of Derbyshire UKEAT 0403 /07/ZT*.

397. The respondents referred in particular to *Chief Constable of Lincolnshire Police v Weaver UKEAT 0622/07* , in which the Court of Appeal stated that the obligation to have regards to all the circumstances, including the wider operational objectives of the employer is self-evident. We accept that in considering reasonable adjustments an employer running a hospital is entitled to take into account the safety of users.

398. Our attention was drawn to the guidance in the EHRC employment code of practice in respect of the wider consideration and we note in particular that when considering whether any adjustment proposed would be reasonable, that the question of whether a particular adjustment would increase the risk to health and safety of any person, including the disabled worker is a relevant factor. See paragraph 6.27 EHRC code.

399. We also remind ourselves that the test of reasonableness of any step an employer may have to take is an objective one which depends on the circumstances of the case.

400. Turning to the question of the policy criterion or practice relied upon which the claimant alleges has put them at a substantial disadvantage, we are reminded by Mr Kipling that it is for the claimant to clearly identify the PCP, which she says should have been adjusted for her. *Secretary of State for Justice v Prospere [2014] EAT 0412/14.*

401. In this respect we remind ourselves that the claimant's case, as pleaded, and the list of issues, as agreed by the parties, are what identify the elements of the case, including the PCP relied upon.

402. We have been referred to the judgement of the Court of Appeal in *Scicluna v Zippy Stitch ltd & others [2018] EWCA Civ 1320*, and in particular, to paragraphs 14 to 16 in which Longmore LJ summarised the function of a list of issues in ET litigation

403. In paragraph 32 to 33 of *land Rover v Short [2011] UKEAT 0496 10/R.N.* in which Langstaff J approved the submission of counsel that it was trite law that it was the function of an employment tribunal to determine the claims which the claimant had actually brought rather than the claims which he might have brought and that accordingly, the claimant was limited to the complaints set out in the agreed list of issues.

404. In similar vein Mummery LJ in *Parekh v London Borough of Brent [2012] EWCA Civ 1630* Mummery J said *a list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimized, the list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed then that will, as a rule limit the issues at the substantive hearing to those in the list.* We agree and have reminded ourselves of this guidance when considering the claimants claims.

Knowledge of Disability

405. When considering whether or not a respondent knew or ought to have known that claimant was disabled at the material time we have been referred to *Gallop v Newport City Council [2014] IRLR 211*. At paragraph 36 of his judgement, Rimer LJ agreed with counsel that the correct legal position was as follows:

406. Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person and for that purpose the required knowledge, whether actual or constructive is of the facts constituting the employee's disability, as identified in section 1 (1) of the DDA (now of the relevant section of EQA). Those facts can be regarded as having three elements to them, namely

a. a physical or mental impairment which

b. has a substantial and long-term adverse effect on

c. his ability to carry out normal day-to-day duties ;

and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by schedule 1 of the act.

407. This does not mean that the employer needs to know as a matter of law, the consequence of such facts would be that the claimant is disabled.

Direct discrimination - s.13 Equality Act

408. Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

"*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.*"

409. The protected characteristic relied upon by Miss Green was disability and / or race.

410. The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

"*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

411. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

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

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

412. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but the claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others who did not have her disability, or of a different race, because of her disability or race.

413. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the

strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

414. If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

415. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider ‘the reason why’ something happened first, in other words, before addressing the treatment itself.

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

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

Discrimination for a reason arising from disability

418. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been a loose connection and there might be several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (*Pnaiser-v-NHS England* [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17).

419. In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

420. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

421. When considering whether or not any unfavourable treatment found was a proportionate means of achieving a legitimate aim, the Employment Tribunal is required to make our own judgement as to whether, on a fair and

detailed analysis of the working practices and business considerations involved, the practice was reasonably necessary .

422. Objective justification requires both a legitimate aim and consideration of whether the unfavourable treatment found was a proportionate means of achieving that legitimate aim.

423. This requires an objective balance between the discriminatory effects of the treatment and the reasonable needs of the employer or respondent . *Hampson v Department Education and Science 1989 ICR 179 CA* .

424. It is the tribunal that must weigh up the real needs of the undertaking against the alleged discriminatory effects of the requirements . A measure may well be appropriate to achieving the aim, but may go further than is reasonably necessary in order to do so and will be therefore be disproportionate. see *Homer v Chief Constable of West Yorkshire Police* Force 2012 UK SC 15 per Baroness Hale at paragraph 15.

425. We remind ourselves that in carrying out this assessment, we must also take into account the business needs of the employer, and we had in mind the judgement of Singh J in *Henze v MoD UKE 80/0273/18 BA* in this respect.

Harassment

426. The claimant brings a claim of harassment contrary to section 26 of the Equality Act. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

427. There are three elements to harassment claim. Firstly, there must be unwanted conduct proven secondly, the conduct must have the statutory effect of violating the claimant's dignity or causing the offensive

environment, and thirdly, that it must be related to the claimant's disability. See for example *Richmond Pharmacology v Dhaliwal* EAT [2009]724.

428. As to causation, we reminded ourselves of the test set out in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564 as an example. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). We must also take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived *her* the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

Victimisation s. 27 Equality Act

429. The claimant relies upon the first, second and third claim is being protected acts for the purposes of the victimisation claim section 27 of the equality act. She also relies on the grievance filed on the 15 October 2018.

430. The respondent reminds us that the purpose of section 27 is to confer protection from people who make allegations in good faith which have the necessary connection with the equality act.

431. The respondent also referred us to the case of Dr Cecil dear the University of Oxford[2015]EWCA Civ 52, in which it was stated that *there will be very few if any cases were less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes or is reasonably likely to cause distress or upset will reasonably be perceived as a detriment by the person*

subject to the discrimination even if there were no other adverse consequences. In dear, counsel to the University. ….accepted that there will be cases where procedural failings may give rise to a detriment even though it is plain that they had no effect on the substantive outcome of the investigation, but she submits that this is not such a case. Elias LJ disagreed, holding, at 48, in principle, I do not see why not. If the appellant were able to establish that she had been treated less favourably in the way in which proceedings were applied and the reason was that she was being victimised for having lodged sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound and damages the fact that the outcome of the procedure, would not have changed will be relevant to any assessment of any compensation, but it does not of itself, defeat the substantive victimisation discrimination claim. .,…

432. The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised '*because*' she had done a protected act, but we were not to have applied the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

433. In *Martin-v-Devonshire Solicitors* [2011] ICR 352 a claim of victimisation failed because the motivation for the unfavourable treatment had not been the fact of the Claimant's complaints, but the way in which they had been made. The Claimant had been dismissed as a result of an irretrievable breakdown in the working relationship between her and her employers. The Tribunal dismissed her claims, holding that there were several things about the Claimant's behaviour in relation to her grievances (their frequency, repetitive nature and untruthful) which affected the employer's view and which owed nothing to the fact that the grievances had

raised allegations of sex and disability discrimination. Having reviewed the law in this area the then President of the EAT, Underhill J, encouraged tribunals to concentrate upon the statutory language on causation (in the context of this case, the word '*because*') and he referred back to Lord Nicholls' test in *Nagarajan-v-London Regional Transport* [1999] ICR 877; "*whether the prescribed ground or protected act 'had a significant influence on the outcome'*" (paragraph 36).

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

Discussion and conclusions

The respondent's knowledge of the claimants disability.

435. The claimant's allegations against the respondent in respect of discrimination arising from disability, or in respect of reasonable adjustments will not succeed if the respondent did not know that the claimant was disabled.

436. The claimants second claim to the ET alleges that the respondents denial of disability as part of their response to her claim, coupled with a failure to carry out an assessment and the respondent blinkering itself as to the claimants disability and denying her the benefits and protection that arise from disability being accepted, amounted to acts of disability discrimination . She puts this as harassment; discrimination for a reason arising from disability and victimisation.

437. In their response to the claimants second claim and her complaint that their refusal to recognise the fact that she was a disabled person and the consequences of that failure amounts to acts of discrimination, the respondent states, in summary, as follows.

438. The respondent has accepted the claimant had dyslexia from the date of her employment. At the point at which it became apparent that her dyslexia may be impacting on her role, enquiries were made. The respondents stated they were unaware of Irlen disorder until 2019. Regarding the initial denial of disability, the respondents say they did not have sufficient information to assess whether the claimant met the conditions of disability. They say the response and denial of disability was a proportionate means of achieving a legitimate aim, the legitimate aim being to defend litigation and to require the claimant to provide evidence which demonstrated her disability. They say, they took honest and reasonable steps in litigation at this point, as the information available to them prior to the acceptance of disability was not sufficient to satisfy them that the claimant satisfied the legal test.

439. Part three of schedule 8 of the Equality Act 2020 states at paragraph 20 (1) that a part, in this case the Trust, is not subject to a duty to make reasonable adjustments. If the Trust does not know and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage set out in section 20 subsection 34 and five of the equality act.

440. This means that the respondent must know both that the claimant had a disability and that either a provision, criterion or practice of theirs puts the claimant at a substantial disadvantage compared to people who are not disabled, or, as is relevant in this case, that the disabled person would, but for the provision of an auxiliary aid be put at a substantial disadvantage in relation to relevant matter in comparison with persons not disabled.

441. We have therefore considered, firstly, whether or not the respondents knew or ought to have known that the respondent satisfies the definition of disability in section 6 of the Equality Act, and when. That is, did they know that the claimant had a physical or mental impairment and that the impairment had a substantial and long-term adverse effect on the claimant's abilities to carry out normal day-to-day activities.

442. We have reviewed the findings of fact in respect of the time period between the start of the claimants employment, and January 2016 when formal capability proceedings were being considered.

443. We conclude that by January 2016 the respondents knew the claimant was dyslexic and knew that she was having significant difficulties in the workplace with ordinary matters such as recording information absorb information carrying out calculations in respect of the administration of drugs.

444. We conclude that the difficulties that the claimant was having were difficulties within the context of her hospital work but were also difficulties that she would inevitably have also experienced in carrying out ordinary day-to-day activities. Someone who has difficulty reading and absorbing information or carrying out simple mathematical calculations will have difficulty managing many aspects of the ordinary day-to-day affairs, such as dealing with bills claimant household expenses and dealing with banking.

445. we conclude that by January 2016 the respondents knew or ought to have known that the claimants impairment of dyslexia would, on balance of probabilities have a substantial adverse impact on her ability to carry out ordinary day-to-day activities

446. in any event, we conclude that the most cursory of enquiries of the claimant herself or of the claimant with the assistance of occupational health would inevitably have led to the respondent being told that the claimant probably satisfied the definition of disability within the Equality Act and that she therefore required further workplace assistance, since when the respondents did eventually address the question of dyslexia and a referral to access to work was made, auxiliary aids were identified to assist the claimant.

447. We have considered whether or not the respondent could reasonably have been expected to know, by January 2016, that the claimant was disabled and that their policies and procedures or the lack of auxiliary aids were placing her at a substantial disadvantage.

448. We conclude that they could have been reasonably expected to know. We take into account both the information they had about the claimants difficulties; the information that was available to them from their own internal sources, including the advice of Simon Ajoyeb, and occupational health, and the discussions and questions raised by a number of people who worked with the claimant and who worked in human resources at this time. In addition, we have considered the respondents own policies and procedures.

449. The capability procedure suggests that a referral to occupational health would be considered.

450. The difficulties which the claimant was having were difficulties in meeting the criteria of a band five nurse and complying with the various policies and practices of the respondent. The respondent had identified that the claimant was less able to achieve the required standards of work. It could reasonably have been expected to ask the question why a nurse with dyslexia might be finding it harder than others to reach the required standard of whether the policy practices being applied to her, such as the requirement

to read copious documentation or to work in a busy ward environment was a cause of her difficulties.

451. We find that the hospital, with all its internal support ought to have made reference to occupational health, which would we find of inevitably led to a referral to access to work, and identification of the need for auxiliary aids.

452. Had the respondent taken those steps in January 2016, we conclude that they could reasonably have been expected to know that the claimant required or would benefit from the use auxiliary aids, and they would know this within a short period of time.

453. We have then considered whether or not they knew or could reasonably have been expected to know that, because of the claimants disability, any provision, criterion or practice of theirs put her at a substantial disadvantage, and in this respect we have considered the various policies and practices applied by them for training and supporting a new band five nurse; and secondly in respect of auxiliary aids, whether the claimant would be put at a substantial disadvantage compared to other people, if auxiliary aids are not provided to her.

454. We have considered at what point the respondent had constructive knowledge of the claimants disability and also, at what point the respondents knew or could reasonably have been expected to know that the claimant was disabled, so that a potential duty to make adjustments arose.

455. We have also considered whether we conclude from the facts found, that the claimants issues were, on balance of probabilities anything to do with her dyslexia and asked, if so, could the respondents have reasonably been expected to know that ?

456. We have considered what the concerns were that the respondents had about the claimant and what information they had available to them about the claimant at the time.

457. The respondent knew that the claimant was dyslexic from the outset of her employment with the Trust. Whilst the respondent may not have been aware that the claimant's impairment amounted to a disability at the start of her employment, within a very short time of the claimant starting as a supernumerary problems started to arise of the type that ought to have flagged up a concern about the claimants learning abilities.

458. We also conclude that from October 2015 the relevant people within the respondent organisation knew that the claimant was dyslexic and had information available to them internally, both in the expertise of OH and from policies and guidance about Dyslexia and disability. We conclude they were aware that the fact of the claimant's dyslexia may be a factor contributing to her difficulties in performing to the requisite standard at work.

459. Did the fact that she has dyslexia, on balance of probabilities make it harder for her to do the things the respondents identified her as having difficulties with? Was her performance affected? Was the fact that she made the mistakes anything to do with her being disabled?

460. We have considered both the mistakes and shortcomings we have been told about and we have also looked at the matters identified in the witness statement and evidence of Karen Lee over 2015-16. These are the errors which lead to the start of the capability process. We all agree that any or all of them could have been affected by the fact that the claimant is dyslexic.

461. At this point we find that the respondent ought to have referred the claimant to occupational health in order to obtain some form of assistance either in the form of recommendations from occupational health themselves or by a workplace assessment.

462. We were told by the occupational health manager that she would expect managers within the trust to follow the advice given by occupational health. She told us and we accept that had occupational health been asked for advice about the an employee with Dyslexia, that either they would have suggested a referral to Access to Work or they would have consulted an internal expert. Either way, we conclude that an early reference to occupational health, with specific questions about whether or not the claimant's dyslexia amounted to a disability or whether it impacted upon her abilities to carry out the various tasks required of a band five nurse would have lead to advice being given that first, the claimants impairment would probably amount to a disability under the Equality Act and second, that reasonable adjustments should be made and auxiliary aids provided, as set out by Access to Work in 2016.

463. We conclude that, since the respondent was considering use of the capability process, and since various issues had been identified in the Autumn of 2015, that a referral ought to have been made at the end of 2015 or early 2016.

464. We have then considered what would have happened, and have considered what did happen, when Access to Work were involved at a later stage.

465. Since it took Access to Work and the respondents some time to process the claimants application and to source and put in place the various support mechanisms the claimant required, once they were applied for, we conclude that a referral at the end of 2015 or early 2016 would have resulted in the claimant being provided with full support, auxiliary aids and

the opportunity of adapting her working style in accordance with the advice of Access to Work by late April 2016 or at the latest, early summer of 2016.

466. We conclude that the respondent would have paused their own internal process of capability, as they did subsequently, and that there would have been greater understanding, at an earlier stage tht the claimant had a disability which impacted her work.

467. This did not happen and during that period of time from October 2015 until the summer of 2016 the claimant was instead observed as failing in a number of respects. We accept that the respondent did make adjustments for the claimant, aimed at assisting her to succeed, and we conclude that those adjustments did assist the claimant to some extent.

468. We have considered how the claimant performed at the start of her employment , and we have looked carefully at the points at which the claimant has either improved the performance or has been seen to be improving . We conclude that once reasonable adjustments were made for the claimant and auxiliary aids provided, and when she was working in a supported and supportive environment on the new Timber ward, her work confidence and her performance improved.

469. We conclude, on balance of probabilities, that the claimant was at a substantial disadvantage compared to other employees when carrying out the various elements of her work , and in doing so in a busy and demanding environment because of her dyslexia. Without the benefit of reasonable adjustments provided both by changes to policy and work practices and by the provision of auxiliary aids, she found it harder to deal with quantities of written information ; she found it harder to process information quickly ; she became easily confused and muddled which caused her stress and anxiety

when having to carry out tasks quickly , and this in turn led to a loss in confidence and poor performance.

470. We also find that the Irlen syndrome affected her ability to read documents or to record information in writing quickly or accurately.

471. We conclude that the respondents had sufficient information about the claimant and her abilities and the fact that she had dyslexia, to make it necessary for them to make further enquiries, and we conclude that with or without further enquiries, the information was sufficient that they (being senior managers and staff dealing with the claimant) could reasonably have been expected to know that the claimant had a disability from early 2016, when they considered the capability policy.

The claimants first claim.

472. The claimant complained of three matters in her first claim:

a. A failure to seek occupational health advice before or during the informal and then formal capability proceedings.

b. Taking the claimant through the formal and then informal capability proceedings and

c. Writing reports relying upon the informal and formal capability proceedings.

473. the claimant puts these three allegations as act complaints of harassment, on grounds of race and of disability; she puts them as direct discrimination and as discrimination for a reason arising from disability and as failures to make reasonable adjustments.

474. The respondents took no steps during the course of the claimant's employment to try to identify whether or not any of the difficulties she had with any particular part of her work were anything to do with her dyslexia.

475. We have found that they ought to have done so at various stages. Their own employment policies and they duty to the claimant coupled with their own knowledge of the claimant's impairment and her difficulties in the workplace all made it imperative that the employer carry out further investigations. In the absence of reasonable investigations, the employer cannot rely upon its own ignorance of disability of as excusing a failure to make a reasonable adjustment.

476. We accept that the respondents did not know that the claimant had Irlen syndrome until the claimants diagnosis, but by August 2017 they knew that the claimant was awaiting special glasses, and that the condition, or impairment impacted on her ability to easily read documents. They must have realised that this key ability was something which had affected her past ability to do her work quickly and to the required level of accuracy. They could reasonably have been expected to know that the claimant was disabled by reason of Irlens syndrome by August 2017 latest.

477. The Trust could reasonably have been expected to know that the claimant was disabled by the combination of her two impairments by August 2017.

478. Whilst we all agree that all the mistakes made and errors recorded are serious and have implications for patient safety and that it was right of R to record them and take action, and whilst we all agree that the claimant did need to improve her performance , we conclude that her capability and ability to practice were impaired and we conclude that the respondent was under a duty to make reasonable adjustments, and that this duty took effect from January 2016 at the latest. This was the point at which the respondents knew that the claimant was having difficulties at work and also knew or ought to have known, as we have found that the claimant was dyslexic.

479. We accept that some of the claimants shortcomings and errors are less likely to be a result of any substantial disadvantage she is placed under because of dyslexia , and these are things like her failure to follow instructions in respect of the dress code and in respect of wearing gel nails for example , but taking into account the Access to Work counselling sessions, and the dyslexia guidance, the respondents own internal guidance on reasonable adjustments and the claimants own subsequent report prepared in 2019 , we conclude that there was at all material times a causative link between the claimants performance issues and her disability.

Direct discrimination

480. The Claimant alleges that by failing to refer her to OH before starting the capability proceedings; by instituting capability proceedings and by relying on reports during that process, that she was directly discriminated against on grounds of disability.

481. We have found that the respondent failed to refer the claimant to occupational health, and that a referral would have been appropriate, and was something that ought to have been considered by them. We find that the respondents own policy suggests that a referral should be considered before commencing the capability proceedings at the informal or the formal stage .

482. We also accept that the institution of the capability proceedings and reliance on reports was unwanted conduct as far as the claimant was concerned.

483. We have considered whether it was different treatment and whether any of it was on grounds of disability, or race.

484. We have then considered whether in respect of either there are facts from which we could conclude in the absence of a non-discriminatory explanation that the reason or cause or grounds for the actor omissions with the fact of the claimants disability.

485. Starting with the failure to make a referral to occupational health, we do consider that the claimant has been treated differently to how others might expect to be treated, if the policy was followed.

486. Despite this, we have no evidence that the claimant has been treated differently to the way others who are not disabled might have been treated in the same circumstances.

487. We have considered whether there are any grounds on which we could find that the omission in respect of occupational health was anything to do with the claimant being disabled.

488. The reality is that the need for a referral to occupational health only arises where there is a question about the cause of the difficulties an employee is suffering. That is of key importance to disabled employees. In that respect, her need for the referral is related to the fact of her disability. This is not however the reason or grounds for her not being referred.

489. We conclude that the real reason why the claimant was not referred to occupational health was that the respondent managers who were dealing with her work were unaware of the requirements of policy and were also not thinking about the claimant as having a disability which impacted upon her ability to do work.

490. Whilst a number of the respondents managers ought to have realised that the claimant was disabled and suffering because of her disability, their failure to do so was because of a lack of training; a lack of understanding of dyslexia and a failure in communication as well as a failure by anyone to take clear responsibility in respect of the claimant.

491. The people who knew that the claimant was dyslexic did not inform Ms Hooper of this fact and Miss Hooper, who had overall management control of the claimants performance for much of the early part of the claimants employment, did not ask the right questions.

492. This was not a conscious refusal to refer the claimant, but was a failure because no one thought about it. Other than the policy itself, we have no evidence from which we can conclude the difference in treatment and a difference in disability.

493. We conclude that it is most likely that any failing employee who was not disabled, or of a different race but failing for some other reason so that a referral may be appropriate, would have experienced the same poor and unreasonable management.

494. We conclude that there is no less favourable treatment and no evidence that the failing was on grounds of disability or race.

495. The decision to commence capability proceedings was not, we conclude different treatment of the claimant. We have made no findings of fact that any other employee who was performing as the claimant was performing would have been treated differently. We conclude that any employee who failed to meet the performance requirements would have

been subjected to the capability proceedings. There was no less favourable treatment.

496. Whilst we have been critical of the respondents for not following their own procedures and ensuring that there was a referral to occupational health, and whilst we have recognised that there was a failure by the respondents to identify and accept that the claimant was a disabled person at an early stage , we find that the omission in referring the claimant to occupational health and the decision to refer her under the capability process and continue to use the capability procedures throughout the claimants employment were both decisions taken because of genuine and well-founded concerns about the claimant's ability to practice as a band five nurse. Whilst the claimant's failings may have arisen from her disability, we conclude that the act and omissions in the context of direct discrimination, were not on grounds of disability.

497. We have also considered whether or not the respondents reliance upon the reports about the claimant and her performance were different treatment and conclude they were not.

498. The reports about the claimants shortcomings were produced because the respondents were concerned, and would have been produced in respect of any employee performing as poorly as the claimant.

499. The reports were relied upon, because they set out the genuine concerns reflecting genuine shortcomings and their production and used during the capability proceedings was standard practice.

500. The burden of proof does not pass to the respondents in this case, but if it did, we conclude that the respondents have a full and non-discriminatory reason for producing and relying on those reports, which is the obligation to ensure that band five nurses are capable of doing the job, and the necessity of having objective clear evidence of any shortcomings or failings, so that these can be discussed with the claimant and so that performance and improvements in performance can be measured.

501. In addition, we do conclude in any event that the motivation, conscious and unconscious of those involved in the management of the claimant was to assist her to improve whilst ensuring that she was safe practice.

502. We dismiss the claimant's claim of direct disability discrimination. We have asked the same questions in respect of race. We have made no findings of fact from which we could conclude that the claimant's treatment was different treatment on grounds of race. The burden of proof does not pass, and we dismiss the claim of direct race discrimination in this respect.

503. We reject the claimant's claims of direct discrimination

Harassment

504. We conclude that the implementation of the informal and formal proceedings were unwanted conduct by the claimant .

505. We conclude that the claimant did not want reports to be written about her, and therefore that conduct was unwanted in that respect.

506. We conclude that the failure to refer to occupational health was only conduct which the claimant complained about at the end of her employment. At no point in the chronology, did the claimant herself suggest that the respondent should have made a referral to occupational health. When a referral was made in respect of other matters, the claimant did not raise the fact of her dyslexia.

507. We have therefore asked whether or not any unwanted conduct was related either to her race or to her disability. We conclude on the basis of our findings that it was not. The unwanted conduct was related solely to the claimant's performance. Whilst her difficulties may have arisen from the fact that she is disabled, the writing of reports, and the institution of the proceedings were not related to race or disability.

508. In any event, we do not consider that the institution of the proceedings, or the writing of the report had the statutory adverse effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

509. We accept that she found the process stressful and difficult, but we have made no findings from which we could conclude that she found the process, hostile, degrading, humiliating or offensive.

510. We conclude from our findings that the institution of and continuation of the capability proceedings were not hostile or intimidating or otherwise offensive within the meaning of the Equality Act. We accept that the claimant did not find the process to be a pleasant one, but we also note that she was supported and encouraged by many different members of staff, including being allocated mentors, and that she never raised concerns about the fact of the support provided, but only the fact that the process was

continuing. Whilst going through the process she did make a number of improvements and we find that despite some managers being focussed on possible termination of her contract, that those who worked with her day to day were supportive of her, even though they were observing her and were critical of her errors and shortcomings.

511. We conclude, taking into account the circumstances of the case and the claimants own perceptions that it would not be reasonable for the application of the capability process, where there were such widespread and genuine concerns about the claimants ability to practice safely, to be treated as harassment, in the absence of specific evidence. We take into account that in a busy hospital environment it is vital that managers are able to use a capability process where there are concerns about a member of staff's ability to perform safely.

512. We consider that this was the case throughout the claimants employment, despite the fact that things did deteriorate later in the chronology, and in spite of our findings in respect of constructive unfair dismissal.

513. We dismiss the claimants claim for harassment related to disability and to race.

Discrimination for a reason arising from disability

514. We accept that the failure to refer the claimant to occupational health and the institution and continuation of the capability proceedings and the reliance within on reports were written about the claimant were unfavourable treatment of the claimant, in the broad sense.

515. We have therefore considered whether the treatment was because of something arising in consequence of the claimants disability .

516. We conclude that the reports were produced and relied upon, and the claimant was taken through the capability process, because of her poor performance and we conclude that her poor performance arose at least in part from the fact of her disability.

517. The claimant has described the thing arising from her disability as being that her managers perceived her as incompetent, instead of acknowledging that capability issues were being induced or escalated by failures to handle the disability appropriately.

518. We conclude that the claimants disability, being a hidden or learning disability did lead to the managers forming adverse views about her capability , and that they did not handle her disability appropriately. We all agree that this was something which arose from the particular disability nature of the disability.

519. We conclude that the failure to refer her to occupational health did arise as a consequence of her managers failing to recognise that she was or might be disabled at all. They did not take into account her dyslexia at all, until it was raised by the claimant in late 2016.

520. We have therefore asked whether the respondents can show a proportionate means of achieving a legitimate aim, in respect of the three matters relied upon.

521. The list of issues does not record the legitimate aim relied upon in respect any of the three matters.

522. We conclude that there is no legitimate aim relevant to the failure to refer the claimant to the OH. It is a recommendation of their own process. This is an act of discrimination for a reason arising from disability

523. In respect of the commencement and continuation of the capability proceeding and the reliance on reports in the process, we find that the policy its self, and the safety of patients and maintenance of the standards of nurses is an obvious aim and is legitimate. This was set out in the evidence of the respondent witnesses.

524. We conclude that reliance on reports of the employees conduct is proportionate during the course of such a process because it is necessary.

525. We dismiss the claim of discrimination arising from disability in this respect.

526. We have considered whether or not the commencement and continuation of the capability proceedings was a proportionate means of achieving the aim of patient safety and nursing standards.

527. We conclude that it was not proportionate to start them or continue them in January 2016, because there had been no referral to OH at that point.

528. Because the claimant was not assisted through an occupational health report and the early intervention that would then have followed with Access to Work, two things happened. Firstly, there was a period of time at the outset of her employment when she was not able to perform to the required standard and lost confidence. Secondly, those people managing her and supporting her also formed negative views of her abilities and her performance. We observe that there have been a significant number of people within the trust involved in the claimants management over her employment, and that although the number of moves between wards were intended as supportive, it has meant that the claimants difficulties have become known to a number of people, most of whom have had no understanding of the claimant's impairment and none of whom, from the evidence we have heard, have been trained in any way in managing or assisting or supporting a dyslexic employee.

529. We conclude that without the necessary information about the extent to which the claimants disability was impacting on her performance, and the extent to which she may benefit from adjustments to policies or practices, or the provisions of auxiliary aids, that the respondents did not have the correct information and that the claim had not been allowed a fair opportunity to achieve the standards.

530. We do conclude that there would have been a point at which it may have been necessary to start the informal stage of the capability proceedings, because the claimant did continue to have some difficulties after she had been provided with adjustments, and because it is not obvious that all her difficulties were ones that arose from her disability.

531. We conclude that the proceedings should have been delayed in January 2016. We find that on balance it is likely that some capability issues would have remained and that the informal process would have been

started at some point in the claimant's employment, but we can draw no conclusions as to when.

532. We do accept that, in the context of this part of the claim, once the proceedings were started, and the concerns identified, that it was proportionate for the respondents to continue with the process. They could not ignore the problems. The respondents ensured that the claimant had time to be able to receive the various auxiliary aids to receive the training and support and to learn to use the auxiliary aids within the workplace before restarting the capability process.

533. This was proportionate, and we also conclude that it was proportionate for the process to be recommenced at some point.

Failure to make reasonable adjustments – claim 1

534. The claimant alleges that there was a failure to make reasonable adjustments and relies on two policy, criterion or practices of

a. requiring the claimant to carry out work in a constantly turbulent *environment without predictability or stability and*

b. attending work consistently the specified minimum duration represented by trigger without competent consultation with or advice from an appropriate expert for disability professional.

535. We accept that by the first the claimant is referring to the necessity of working as a band five nurse within a busy and unpredictable ward environment and the expectation that she would do so without the need for any expert input. We find that these are criteria that were applied to the supernumerary band five nurse.

536. Secondly, we accept that the claimant was expected to attend work consistently and that the respondent did apply a sickness absence process.

537. We have already found that the respondent knew or could reasonably have been expected to know that the claimant had the disability and we also conclude from our findings that the respondent could reasonably be expected to know that the claimant was unable to work satisfactorily in the environment as it was without adjustments.

538. We conclude that the claimant was at a disadvantage and the disadvantage was substantial. She was at a disadvantage because as a person with dyslexia, she found it harder to work in a turbulent environment which did not have predictability; stability and certainty, than a person without her disability would have done.

539. We have therefore considered whether or not the adjustments suggested by the claimant were reasonable adjustments to make.

540. Firstly, it is suggested that the claimant should have been referred to occupational health and/or a disability expert to advise on the steps necessary to support her before commencing or during informal and then the formal capability process.

541. We conclude that the respondent should as a matter of best practice have made a referral of the claimant to occupational health for advice at an early stage and we have found that the failure was discrimination for a reason arising from the claimants disability.

542. The respondent did, at later stage receive advice from access to work, but they never made a referral to occupational health in respect of the claimants dyslexia, which was acted upon.

543. We have asked whether or not the referral to occupational health its self would have removed the disadvantage, and of conclude it would not. It may have led to a referral on to Access to work, but that is a consequence of the action. We conclude that the failure to refer itself is not an adjustment to the policies or practices that placed the claimant at a disadvantage but a step required in order to obtain recommendations as to what potential adjustments may be made.

544. Nor is it the provision of auxiliary aid, which the claimant required. It was part of the policy which the claimant wanted to be used.

545. The second adjustments suggested is that the sickness absence trigger should not be applied to the claimant.

546. We have considered whether the sickness absence trigger itself, placed the claimant at a substantial disadvantage, compared to people who are not disabled . We conclude that it did not.

547. On the facts we have found we conclude that the reason the claimant was initially referred through the sickness absence processes was in respect of sickness absence that had nothing to do with her disability.

548. We conclude that some of the claimants later sickness absence was related to stress at work, and that in part, the reason why the claimant was stressed was that she was being taken through the capability process and

that this was related to or arising from her disability, there were also many other matters that caused the claimant stress.

549. We conclude that the variation or amendment of the sickness absence triggers would not have been a reasonable adjustment. In this case because they would not have removed any proven disadvantage to the claimant.

550. The claimant also suggests that neither the informal or formal capability proceedings should have been commenced or pursued.

551. In order to consider whether the respondent should have started the informal capability process when it did in January 2016, or whether to delay it would have been a reasonable adjustment, we have reminded ourselves that our conclusion is that by January 2016 the respondent could reasonably have been expected to know both the claimant was disabled and that their own policies and criteria and practices were placing the claimant at a substantial disadvantage.

552. Would the delay in starting the process have removed the disadvantage to the claimant that she relies upon of being unable to work in the environment without adjustments?

553. We have considered the actions which the respondent did take prior to starting the informal capability process and we have also considered the respondents failure to make a referral to occupational health, at that stage.

554. We conclude that the respondent made a number of appropriate adjustments for the claimant. We consider that the provision of extra time

and extra opportunities to take the maths test and the drugs tests for example were appropriate adjustments. Similarly, the provision of mentors and additional training were appropriate. The claimant was moved to different wards where she could be supervised, and we consider these were all appropriate adjustments to make for the claimant .

555. We also accept that the capability process itself was a supportive process which meant that there was an opportunity to identify additional support for the claimant. This did happen. The claimant was supported and provided with mentors and was moved on several occasions so that she could work in a ward with more staff.

556. We conclude that the process was aimed at removing the disadvantage, and not starting it would have meant that nothing was done in any formal or structured way.

557. We consider that whilst it would have been reasonable to delay the commencement of the informal stage of proceedings to obtain an OH report, since this did not happen, delay on its self would was not reasonable because it would not have removed the disadvantage that the claimant relies upon.

558. Were there reasonable adjustments which could have been made and did the respondents take such steps as were reasonably necessary to avoid the disadvantage to the claimant.

559. We find that there were reasonable adjustments that could have been made, in the form of the auxiliary aids and support provided by access to work, and that the respondent should have taken steps to such as

identifying the adjustments, so as to avoid the disadvantage. Since the respondents own procedure required some further consideration of what might be causing the shortcomings difficulties. We think that this inevitably involved discussing the claimant's dyslexia with her and seeking further advice internally or externally from an expert about whether and to what extent the claimant's dyslexia may be impacting upon her abilities to carry out certain tasks at work. We consider that at this point it would have been appropriate to have asked whether or not there was any specific adjustments that needed to be made.

560. This would have required the referral to OH. The respondents did fail to make these adjustments until 2017 and it would have been reasonable to make them in 2016.

What would have happened if OH referral had been made in 2016

561. We conclude that had the respondent consulted their own occupational health services in early 2016 when it became clear that the claimant was struggling in the ward environment, that they would have received advice or recommendations that Access to Work should be involved. We conclude that the advice and support provided by Access to Work to the claimant as a result of the meeting that took place on the 30 September 2016, would have been provided to her in spring 2016.

562. We note that contact with Access to Work took some time, and that even once they were contacted and once the sources of support had been identified that there was some delay in putting in place the various supports for the claimant for a variety of reasons including a lack of knowledge of where funding would come from.

563. However once Access to Work had identified the support the claimant required the respondent paused the capability process that they were engaged in, and took no further steps until the claimant had not only

received the benefits of the various auxiliary aids and the benefits of counselling sessions, but also allowed an extra period of time for the claimant to become accustomed to using the aids and the techniques that she had been provided with. We note that the respondents specifically provided that a period of six weeks would be allowed before any further assessment took place of the claimant.

564. We have therefore asked ourselves what would have happened had the respondents made enquiries in respect of dyslexia with Access to Work in January or February 2016? We conclude that it would have taken between three and five months for the claimant to have received the recommendation and to have been provided with the aids and undertaken the counselling and support sessions that were subsequently put in place.

565. We conclude that therefore, by the autumn 2016 the claimant would have been in possession of all reasonable adjustments.

566. We conclude that the failure of the respondent deprived the claimant of those adjustments at that time.

567. We cannot say with any certainty that the claimant would have had no further issues at work, or that her capability and performance would have reached the required standard , had that those adjustments been put in place, but we conclude that had the reasonable adjustments been put in place at an early stage it is more likely than not that the claimants performance would have improved.

568. We conclude that the failure to make adjustments had a continuing effect up until the point when the Access to Work adjustments and advice

took effect and were implemented, and the claimant had time to adjust and learn to work with the aids.

569. We conclude that this was the point when the respondent decided to restart the capability process.

570. We conclude that the continuation of the process at that point was wholly justified and proportionate. It would not have been a reasonable adjustment to not continue with the process, as the respond needed to know that the claimant could perform to the required level, with the benefit of the adjustments in place, having had time to become used to using them.

571. The respondent did have a variety of fairly serious concerns about the claimant, and whilst we think that some of her difficulties would be alleviated to some extent by the adjustments, we have no evidence that they all would have been, or in fact were all alleviated.

572. The respondent had evidence from a variety of sources of errors and mistakes that could pose risks for patient safety, even after the claimant was provided with her aids and support, and we conclude that it was proportionate and even necessary for them to continue the supervision and the process because of those concerns.

573. We reach this conclusion having carefully considered the findings we have made about the negative attitude that some members of the respondent staff had about the claimant, in particular Linda Hooper. We have found that she ceased to have any direct input into the management of the claimant , and that the motivation for continuing to performance manage the claimant was not one arising from a negative view of the

claimant, but from a genuine concern that the claimant should be able to safely care for patients, once the reasonable adjustments were in place.

574. In the context of the claimants discrimination for a reason arising from disability claim, whilst we all agree that it would have been better to have allowed more time, we find, on balance that in this case it was proportionate to continue with the process, after time had been provided for adjustments to have an effect.

575. The respondent did make adjustments and act proportionately, by stopping capability proceedings, and by building in additional time for the claimant to adapt to her aids and put her learning into practice, and only then did they restart the process.

Conclusions on Adjustments

576. We do consider that the respondent should not have started the capability process until they had taken proper advice but, since there were numerous concerns about the claimant, we consider that the respondent acted appropriately in using the capability procedure and in ensuring that it was delayed and paused at various stages in order to enable the claimant time just to the use of the various equipment provided by Access to Work for example.

577. We do find that there was a failure to make a reasonable adjustment for the claimant in the period between October 2015 and September 2016 when the respondent knew or ought to have known that the claimant was disabled and ought to have known that the claimant's disability was having an impact on her performance. The adjustments were those which were subsequently recommended by Access to Work.

The Claimants second Claim

578. The claimants second claim is a claim of harassment; discrimination arising from disability and victimisation in the alternative. The claimant alleges that having filed her first claim to the employment tribunal and alleging disability discrimination, the respondent engaged in unwanted conduct or unfavourable treatment by failing or refusing to recognise that the claimant was a disabled person within the meaning of the Equality Act 2010 from the date of diagnosis; she alleges that the respondents failed to carry out any diagnosis and/or blinkered itself to the claimants disability, and that they denied her the benefits and protection that would flow from the respondent recognising her impairment as a disability.

579. The cause of this, was that in its response to the claim, the respondent had denied that the claimant was disabled and also denied that they knew or ought to have known of the claimants disability.

Denial of disability – Claim 2

580. We recognise that in litigation it is often not unreasonable for a respondent to deny that a person is disabled or to deny that they necessarily knew that a person is disabled, where there is an issue about the impact on a person's ability to carry out ordinary day-to-day activities. We recognise that this can be part and parcel of ordinary litigation, but we also recognise that such a stance will only be a reasonable stance where the employer has a genuine basis for it. Legal advisors can only act on the information that they are provided with, and that respondents are not required to disclose the advice given to them.

581. The denial that the claimant was a disabled person at all, and the denial of knowledge of the disability was first stated by the respondents following the claimant issuing proceedings.

582. The denial of disability at the point that the claimant raised her claims to the Employment Tribunal caused the claimant, who was still an employee of the respondent at that point, and who was still seeking support and reasonable adjustments, upset and distress. It also meant that the claimant was put to the cost of obtaining her own disability report. We observe that this is something that the respondent could have done as an employer at any time during the previous three years, but chose not to do or failed to do.

583. From the facts we have found, we conclude that the respondents knew or ought to have known that the claimant was disabled from October 2015 at the latest. We conclude that they knew or ought to have known of significant adverse impact of the claimants condition upon her ability to carry out ordinary day-to-day activities, from January 2016, when significant difficulties at work doing ordinary things had been identified, or at the very latest, at the point at which Access to Work made recommendations for support.

584. In this case, there has been no explanation provided by anyone who gave evidence for the respondents, of why there was a denial of disability initially, and the continued denials of disability and knowledge of disability. We have heard no evidence at all from the respondent witnesses at all as to why the decision was taken to deny disability and knowledge.

585. We conclude that it would have been obvious to the respondents from an early stage that the impact of the claimant's impairment upon her and her ability to carry out day-to-day tasks was significant. The claimant became confused and muddled in a busy environment; became easily distracted and had difficulty recording matters accurately in writing she also

had difficulty processing and with remembering words that she was unfamiliar with.

586. In this case the respondent had numerous opportunities to identify the precise impact of the claimants impairment upon her, and did not to take them. We were told by a number of the respondent witnesses that it was accepted by them that the claimant was disabled and that they recognised that the occupational health reports that they did receive stated that the claimant was likely to have been covered by the Equality Act 2010. At no point, until the claimant raised a claim to the Employment Tribunal, was it suggested by anybody that the claimant was not a disabled person within the meaning of the Equality Act.

587. We consider that the respondents were disingenuous in denying that the claimant was a disabled person and that in fact they were or ought to have been well aware that the impairment she suffered of dyslexia in combination with the Irlens syndrome amounted to a disability within the meaning of the Equality Act.

588. We have therefore considered whether or not , from the facts we have found, and from these conclusions we could conclude, in the absence of an explanation, that that discrimination has taken place.

Harassment

589. We find that several members of the respondents senior staff did know that the claimant was dyslexic at an early stage in her employment and that the question of whether or not this impacted on her was raised. This information would also have been available to the respondents and their legal advisers from the outset. The claimant knew, by the time she filed her claim, that her managers knew she was dyslexic, and knew that she

needed auxiliary aids to assist her, and that OH had stated that her dyslexia would probably satisfy the definition of disability in the Equality Act 2010.

590. We have made findings of fact that some senior members of the respondent's staff, including Linda Hooper, were unwilling to accept the claimants impairment or its impact upon her, and did appear hostile to her from an early stage in the process. We were all struck by Miss Hopers evidence that the trust had "done enough for that young lady".

591. The documents and evidence, which ought to have been available to the respondent at the outset, are the basis for our conclusions on knowledge of the impairment and its effects on the claimant, and we have not heard any evidence at all as to why this information was either not available or was not considered or taken into account by the respondent when responding to the claim.

592. We have concluded that the respondents had no reasonable basis on which to deny to deny either that the claimant was disabled or to deny that they had constructive knowledge of her disability when defending the claimant's first claim.

593. As well as being relied upon as an act of harassment, it is alleged that the failure to admit the disability or knowledge was part of the breach of mutual trust and confidence. We have considered it in that context at this point .

594. We find that the effect of the denial on the claimant was to undermine her confidence and trust in the respondent and that it also created an intimidating hostile or humiliating environment for the claimant. It was also unwanted conduct. The claimant remained at work and continued to seek support for the disability which she was now being told the respondents

denied existed and also denied that they had knowledge of, despite the occupational health reports having stated on several occasions that the impairment would be covered by the Equality Act.

595. Was the denial without reasonable or proper cause? We find that it was. Other than a statement in the pleaded case, we have no evidential explanation for it. We would not expect the respondent to explain the advice given to them, but we do expect some explanation from the respondents as to why they took the litigation stance they did. It would be sufficient to say, that, having provided all the relevant information, the decision was made on advice. We do not have that evidence. We conclude that in the absence of that explanation, and on the basis of our analysis of the information that ought to have been available to the respondents, that there is no reasonable or proper cause.

596. In considering harassment, and having found a hostile environment, we have asked whether or not the decision was related to the claimants disability. This was an omission about disability in the course of a claim of disability discrimination. We conclude it was related to the claimants disability.

597. We have then asked whether or not it is reasonable to treat this as an act of harassment.

598. Denial of disability puts a claimant to additional stress and effort in defending a claim, and is an important step in any disability discrimination claim. In this case the clamant remained at work, and was being taken through capability process, and was asking for further adjustments. Not only her allegations before the ET, but her ability to perform at work were affected. She incurred extra expense in obtaining a report, and also had to

prepare her case on the basis of disability and knowledge not being admitted.

599. In this case, on the facts we have found and particularly because the claimant remained at work, although unusual, we conclude that it is reasonable to treat this as unlawful harassment.

Discrimination for a reason arising from disability

600. The denial of disability by the respondents was unwanted conduct as far as the claimant was concerned. The claimant suggests that the respondents sought to avoid her receiving benefits or protections that would flow from the respondent recognising the disability, whether under its own policies or a matter of law, and that this arose from her disability.

601. We think that what this means is that the claimants protections and benefits in law and under the respondents own policies, arose in consequence of the claimant being disabled , and that the failure to recognise that the claimant was disabled or to carry out their own investigation was unwanted conduct which had the consequence that she was denied the benefits . The claimant's case has been pleaded in an unusual way, and we have had to interpret the meaning of a number of the allegations before being able to draw conclusions.

602. If this is right, then we agree that the claimants protections under the Equality Act and under some of the respondents policies arise from the fact that she is disabled.

603. We also accept that by denying that she was disabled during the course of litigation and denying knowledge of disability, the claimant was put to strict proof of matters, and that she would not benefit from the

protections of the Equality Act at the earlier stage. This is unfavourable treatment in this case because of the matters et out above on knowledge.

604. We have therefore asked whether or not the respondents can show that the treatment, that is the denial of disability, was a proportionate means of achieving a legitimate aim.

605. We have taken into account the chronology of the respondents and the fact that they did admit that the claimant was disabled once they received the claimant's own report .

606. We have already accepted that the litigation defence can be a legitimate aim .

607. However, because a disabled employee will only be protected if they can prove, or if the employer admits disability , we all agree that it is appropriate for the tribunal to interrogate the basis on which the denial of disability is made.

608. We have found that had the respondents made any proper enquiries at any stage of the claimants employment, that they would have been bound to become aware of the essential factors which would point to finding that the claimant was indeed is disabled by reason of dyslexia . We do not consider that it is appropriate for proportionate to deny disability where there is ample evidence to the contrary available to the respondents .

609. In this case the denial and the failure to admit disability until the claimant provided her own report was we think disproportionate.

610. We conclude that the denial was for a reason arising from the disability by the respondents denial of disability, in this case.

611. We recognise that this is an unusual set of circumstances we have considered whether there are reasons to do with litigation privilege which might point to this being proportionate. But we had no such evidence or submission before us.

Victimisation

612. The claimant has done a protected act in filing her first claim to the ET and in raising her grievance , and the reason for the respondent denying that the claimant was disabled, was that she had made an allegation of disability and they sought to defend this claim. The main reason or cause, was the fact that the claimant was bringing a claim of disability discrimination, not any evidence based view, on the facts we have found, of a valid reason for disputing the fact of disability.

613. On the basis of the facts we have found about the respondents knowledge we find that this was unfavourable treatment of the claimant. We also find that the primary reason for expressing denial that she was disabled was the fact of her claim to the tribunal. We note that at no point prior to her issuing proceedings , had the respondents suggested that the claimant was *not* disabled.

614. Whilst this is an unusual conclusion, on the facts we have found, and on the basis of the explanations from the respondent, we find that there are facts from which we could conclude in the absence of an explanation that this was victimisation, and we find that we have no valid explanation. We have considered whether, in such a case, a respondent may be able to defend a case by reliance upon confidential advice covered by litigation

privilege. Again, it may be in some case that there would be such a defence, but in this case no evidence and no argument was put to us.

615. We conclude that this was unlawful victimisation.

The claimants third claim

616. The claimant's third claim is a claim of constructive and unfair dismissal and also a claim that the claimant has been discriminated against for a reason arising from her disability that she has been victimised and harassed .

617. This claim was issued following the claimant being told that she was been placed on the final stage of the capability proceedings and following the claimant receiving a letter from occupational health, suggesting that her employment had ended.

618. The claimant relies on the series of events throughout her employment, as well as the later incidents, including denial of disability as amounting to fundamental breaches of contract.

619. We have concluded, as set out above, that at the point of her resignation the claimant had been subject to disability discrimination in several respects. Each of these acts of discrimination had an ongoing impact on the claimant and each of them was a fundamental breach of the implied term of mutual trust and confidence.

620. We find that the claimant did not at any point waive any of breaches of contract.

621. We conclude that the failure of the respondent to refer the claimant to occupational health in respect of dyslexia and that failure to seek expert guidance from either an equality and diversity adviser or otherwise when advised to do so by occupational health, and their failure to do so prior to moving the claimant to the final stage of the capability procedure was conduct that was likely to and did seriously damage the relationship of trust between the employee and employer.

622. From our findings, we conclude that there were no reasonable grounds for doing so. We draw this conclusion despite finding that the respondent managers were primarily motivated by concerns about safety and the claimants poor performance. The failure to follow key steps in their own process, or the steps that any reasonable employer of this size ought to have followed, when dealing with capability of a disabled employee, are without reasonable excuse. We have made finding about the reasons and explanations given by the respondents for actions, and we find that though honest and genuine, they were not reasonable.

623. We conclude from our findings, that the letter sent to the claimant by occupational health on 25 June 2019 which told her that she was no longer employed by the Trust had the effect of seriously damaging the relationship of trust and confidence between the claimant and her employer. We find that there was no reasonable cause for this letter being sent to the claimant and that it was a fundamental breach of contract by itself.

624. We find that the decision of the respondent to insist that the claimant undertake a four-week period of unsupervised practice before the final referral to occupational health, at which occupational health would have had the benefit of the claimant's own dyslexia report, was an act of the

respondent which was likely to a destroy or seriously damaged the relationship of trust and that it did so because it was contrary to what the respondent had previously agreed with the claimant.

625. We find that there was no reasonable cause for the respondent changing its mind about what had previously been communicated to the claimant, and we conclude that this was a fundamental breach of contract.

626. We find that the claimant did rely on these matters when she made her decision to resign. We find that she did not delay unreasonably but that she did write to her employer raising a concern about the requirement that she practice unsupervised failing which there would be a final capability hearing, but that she received no response.

627. We find that the letter from occupational health was capable of being a final straw and that the claimant's view of it was framed by the respondent's subsequent U-turn in respect of the timing of the referral of the claimant to occupational health. Even if it was not technically a final straw, and we accept the claimants evidence that it was in her mind, we find that the combination of events from the point that the claimant filed her claim to the employment tribunal, which included the denial of disability; the necessity of her obtaining a report; the refusal of the respondents to pay for the report as well as the matters set out above, were individual and cumulative breaches of the claimant's contract and that she was entitled to resign in respect of them and that she did so. We reject the suggestion that the claimant affirmed breaches or that she delayed too long.

Victimisation – claim 3

628. We have considered whether any of these matters were acts of victimisation, being unfavourable because the claimant had filed her claims to the ET.

629. We cannot make any findings of fact as to why the claimant received the letter she did from occupational health because none of the respondent witnesses have been able to explain it to us. We find that it is a breach of contract but we have not made any findings about the cause of it.

630. On the basis of our findings, we conclude that the claimant was treated differently to how others were treated, but we cannot conclude that the unfavourable treatment was anything to do with the fact of the claimants ET1. Whilst it was suggested by the respondents own witness, that the cause *may* have been a misunderstanding of a claim form , which was seen on the file, this is hypothetical, and not evidence that we accept as probative of the claimants claim being the reason or grounds for the letter being sent.

631. We have not made any findings of fact therefore, from which we could conclude in the absence of an explanation, that the cause was the fact of the claimants complaints of discrimination or her grievance. It was, we think an error or mistake which is unexplained. That is not enough, we conclude, in this case, for the burden of proof to shift, so that the lack of an explanation from the respondent would mean this was an act of victimisation.

632. We understand why the claimant was upset, and understand why this was put as a victimisation claim, but despite our concerns about the process and the evidence, our conclusion is that this was not victimisation.

633. Whilst we consider that it was upsetting for the claimant and breached her contract, do we conclude on the facts we have found, that it was related to the claimant's disability.

634. Whilst it was upsetting and may have created a difficult environment for the claimant, we cannot conclude, on the facts we have found, that it was an act of disability -related harassment.

Victimisation by changes in the four week trial period

635. We have made findings in respect of the denial of disability and we make findings in respect of the respondent's decision to proceed with the four-week unsupervised working for a final capability hearing prior to obtaining occupational health advice. We infer from the facts we have found that we could conclude in the absence of an explanation from the respondents that the timing of it, and the fact that it is contrary to the respondents previous expressed intention and agreement with the claimant, that the cause was the claimant having done a protected act. We have had no explanation from the respondent witnesses for the change in their approach and we conclude that in the absence of a non-discriminatory explanation that this was an act of victimisation.

The claimant's fourth claim

Revalidation

636. The claimant's 4th claim to the ET was a claim against Mr Valentine as a named respondent. The claimant withdrew the claim against him as a named respondent during course of this hearing and proceeded against the Trust alone.

637. The claim is that the decision to refer the claimant to the NMC, following her resignation was an act of disability discrimination. Alternatively, it was put as an act of race discrimination.

638. At the relevant time, Mr Valentine was head of nursing for the specialist division. He has now retired.

639. He received the claimant's resignation letter and wrote to her acknowledging it on 2 August 2019 and warned her of a possible referral to the NMC.

640. He states in the letter that the capability hearing will not now go ahead, but states that *given ongoing concerns about her practice which could amount to a patient safety risk, I am obliged to undertake a full review in order to consider whether a referral is necessary*. (P 178 SB)

641. We find that at the point she resigned, the claimant had expressed her own concerns that she was not confident to administer drugs or medication without supervision. The respondent's capability process at that stage was focussed on this part of her practice. It was the key aspect of her practice, and one thing outstanding as a necessity for her to be signed off as a band 5 nurse. All parties agree that the claimant had not, up until then, been able to demonstrate that she could administer medication unsupervised. The claimant had been supernumerary at this point for 4 years.

642. Whatever the causes of the claimant's lack of confidence at this point, we find that there was a valid basis for the respondents to consider whether or not there should be a referral to the NMC. There was an

outstanding concern about her practice that could give rise to a patient safety issue.

643. It is correct that the claimant had filed claims to the tribunal, and had resigned accusing the Trust of discrimination and constructive unfair dismissal. The claimant was disabled and was challenging the process of capability its self as an act of discrimination.

644. Mr Valentine had not been involved at all in any of the day to management of the claimant and had not been involved in any of the decisions or acts or omissions she was complaining of.

645. He told us that he then reviewed the documentation that he was given and met with L Hooper; J Flahey and another and read their documents and background material.

646. He told us, and we accept, that having reviewed the documents, he determined that the claimant was not capable on balance, at that point, of working independently to administer drugs, and that therefore there was an issue about patient safety, should she apply for another band 5 job.

647. Whilst she had worked in the hospital, the Trust could supervise her, but once she left, they had no power to prevent her from working as a band 5 nurse elsewhere if she chose to do so. Even if the claimant was prepared to say that she would not do so, the Trust had no further power to manage or control her work. Only the NMC could do that. Mr Valentine told us and we accept that, in his professional opinion, given his view of the risks, he considered that he was required to make referral to the NMC.

648. We accept that there is a requirement for health Trusts amongst others, to make referrals to the NMC, if there is a genuine concern about patient safety. Here the claimant had resigned part way through a long running and changing capability process, which had not concluded, and which was itself about the claimants ability to administer medication unsupervised.

649. Despite the chronology of events and the possible motivations of others in this case, in respect of Mr Valentine who made the decision, we have no evidence that he was motivated by anything other than his professional obligations.

650. When he made the referral, the documentation was put together by others, but we conclude that he reviewed it fairly, and made a professional and understandable decision on the basis of it. We note that there was reference made to the claimant's dyslexia.

651. We find that Mr Valentine would have made the same decision to refer any one with the profile of the claimant at that point regardless of any claim to the ET , disability or race.

652. We have no evidence before us of any motivation or causation for his decision to refer, other than the paperwork he had before him, and the professional views he formed as a result of reviewing them. We find that he drew his conclusions and made the decision on the basis of information which outlined a series of genuine concerns which had arisen over the years, and that the one outstanding matter in respect of the a safe administration of drugs, was a key concern for him, and for good reason.

653. He made the referral we find, because of his own genuine concerns about patient safety and in his understanding of the NMC rules and guidelines.

Conclusions on the referral to the NMC by Mr Valentine

654. We conclude that the referral to the NMC was not an act of less favourable treatment and had nothing to do with the claimants race or disability in any event.

655. Section 15 - the lack of confidence or unwillingness to work unsupervised may well have arisen from her disability and we find that there is a link (check this back).

656. This is unfavourable treatment in the sense that it is unwanted by the claimant.

657. However, we all agree that the act of referring the claimant to the NMC was a proportionate means of achieving a legitimate aim, of ensuring patient safety. Even if the claimant did not intend to practice as a band 5, the respondents had no mechanism for ensuring that she did not, and had ongoing concerns about her abilities. The only correct course open to them was to abide by NMC guidelines and take the steps of referring, so that the NMC could deal with the issue.

658. Patient safety is the paramount concern and the referral in these circumstances was proportionate.

659. Was it harassment?

660. We agree that it was unwanted, and find that it arguably arose from her disability, because the referral is made because of safety concerns

about her ability to administer medication, but it was not related to her disability in the true sense.

661. This conclusion follows form our findings about the motivation, and the reasoning of Mr Valentine. He would have done the same in any circumstances, and the referral was not related to the claimant's disability, but was related to concerns about her practice, albeit that she was disabled, and this may have impacted on her practice.

662. If we are wrong, and the concerns arising from her loss of confidence in administering drugs, could be said to is arise from or be related to her disability, we find that whilst it upset the claimant, it cannot be said to have created an adverse environment for her, because she was no longer at work in the trust.

663. If we are wrong about that, and it did create an adverse environment for the claimant, that the referral is a necessary part of the professional framework within which nurses work and the trust operates. We conclude that it was not reasonable for the treatment to have that effect on her. She must or ought to have known in reality, that whilst upsetting, this was a necessary step given her lack of confident on administering medication

664. We all agree that it is not reasonable in all the circumstances to treat it as an act of harassment.

665. Was it an act of victimisation? we find that it was not. The reason or cause of the referral, which we accept is adverse treatment of the claimant, or a detriment to her, was not that she had done a protected act, in raising her complaint to the ET, but was because of a genuine concern that she

had resigned before conclusion of capability procedures, and that there was an outstanding concern about her ability to administer drugs unsupervised. This was something which the trust had no control over once she left.

666. This was not an act of victimisation it was a genuine concern about patient safety and compliance with the requirements of the NMC

667. Was this an act of Race discrimination, direct, harassment or victimisation? We have no evidence before us that this decision was anything to do with the claimants race or that she has been treated any less favourably than anyone else, or that the referral was related to her race, or any complaint of race discrimination. Applying the same reasoning as for disability, we conclude that there was no race discrimination at all in the referral to the NMC.

668. We therefore dismiss the claimant's claims made under claim 4 in this respect.

Claim 5 to the ET

669. The claimant alleges that she was discriminated against, following the respondents seeking to challenge her revalidation by the NMC during the course of her employment. She complains that her referral to the NMC at that point, or the attempts to refer her was discriminatory because of her disability.

670. From the fact that we have found we conclude that the treatment of the claimant did not create any intimidating or otherwise unlawful environment. She was not treated less favourably than others and nor was there unwanted treatmetn for a reason arising from her disability.

671. We conclude that there was a genuine concern about patient safety and genuine concerns both about the claimants practice and about the steps she had taken to revalidate. The claimant had made an internal request but had then sought assistance with revalidation from another member of staff without going through her manager. We don't criticise the claimant for doing this, but we do understand why the respondents were concerned. This was a new process and we accept the respondent witnesses' evidence that advice was taken from the NMC as to the correct procedure to follow where there were concerns about a nurse print sided with the need for revalidate. The report that had been written and the facts we been collated were not in fact used as the basis for a referral to the NMC. No referral was made and the claimant has not made out the factual basis for her discrimination claim. We dismiss this claim.

Time limits, continuous conduct and extensions of time

672. In this case we are all agreed that the findings we have made of discrimination had continuing effect upon the claimant. We have considered whether or not they amount to a continuous course of conduct, such that the time limit for filing a claim to the employment tribunal would start with the last act or omission , and we all conclude that there was such a course of conduct . Whilst the respondents acted in the most part from honest motives , there were failures throughout the claimant's employment, and we have found unlawful discrimination at a number of points .

673. We therefore conclude that time. In this case started to run in respect of all matters termination of employment .

674. If we are wrong and in any event, we consider that in this case, given the very long history of events and the responsibilities of the respondent to a disabled employee , and on the basis of the facts that we have found that it would be just and equitable to extend time in respect of each of the acts of unlawful discrimination. We have found . We have taken into account the

claimant's own understanding of matters and the fact that she remained employed throughout and placed significant reliance upon her employers having some understanding of both the fact of her disability and the support that she would require as a result of it .

Employment Judge Rayner
Date: 16 December 2021

Reserved Judgment and Reasons sent to the Parties: 07 January 2022

FOR EMPLOYMENT TRIBUNALS