EMPLOYMENT TRIBUNALS

Claimant: **Mrs Nkechi Leeks**

Respondents: **1) King's College London Hospital NHS Foundation Trust**
2) Ms P Barnett
3) Mr D Paterson
4) Mr G Knowles
5) Mr J MacLeod

Heard at: London South Croydon
(originally in person and by CVP for the resumed hearing)

On: **1, 2, 3, 4, 5, 8, 9, 10, 11 & 12 July 2019**
2, 3, 6, 9 & 10 August 2021
& in chambers on 29 & 30 July and 24 & 25 August 2021

Before: Employment Judge Tsamados
Members:
Mr M Taj
Ms J Forecast

Representation

Claimant: In person
Respondent: Mr L Harris, Counsel

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

1) The Claimant's complaints of direct disability discrimination, failure to make reasonable adjustments, discrimination arising from disability, harassment related to religion or belief, direct religion or belief discrimination, direct age discrimination, direct race discrimination, harassment related to sex, detriment because she had made protected disclosures, entitlement to notice pay, entitlement to holiday pay and post-termination victimisation are unfounded;

2) Her claims are therefore dismissed.

REASONS

The Claims

1. This is the hearing of three claims brought by the Claimant, Mrs Leeks, against King's College London Hospital NHS Foundation Trust ("the Trust") and four individuals who were employed by the Trust.

2. The Claimant was employed by the First Respondent from 15 February 2016 until 20 July 2017 as a Health Care Assistant ("HCA") Band 2 in the Cardiac Catheter Insertion Lab ("the Cath Lab") at King's College Hospital ("the Hospital").

3. Her first claim, in case number 2302989/2017 is brought against all five of the above named Respondents. It raises complaints of age, race, disability, sex and religion or belief discrimination, as well as whistle-blowing and monetary complaints in respect of notice pay, holiday pay and other payments. It was received by the Employment Tribunal on 19 October 2017.

4. Her second claim, in case number 2300701/2017 is brought against the First Respondent alone and raises a complaint of post-termination victimisation in respect of a reference that the First Respondent provided to Cambridge University Hospitals NHS Foundation Trust. It was received by the Employment Tribunal on 25 February 2018.

5. Her third claim, in case number 2300721/2018 is brought against the First Respondent and makes a further complaint of post-termination victimisation but in respect of a reference that the First Respondent provided to Brighton & Sussex University NHS Trust. It was received by the Employment Tribunal on 26 February 2018.

6. The Respondents submitted responses to all three claims which were received by the Employment Tribunal on 13 December 2017 in respect of the first claim and 28 June 2018 in respect of the second and third claims. In each response, the Respondents deny the Claimant's complaints in their entirety.

7. The Claimant has also brought a fourth claim, in case number 2304009/2018, against the First and Third Respondents. This makes complaints of whistle-blowing detriments, age discrimination and victimisation. This was received by the Employment Tribunal on 7 November 2018. The Respondents have denied the claim in its entirety in a response received by the Employment Tribunal on 20 December 2018. Rather belatedly in our hearing, the Respondents brought this claim to our attention and their application for it to be struck out. In view of the delay in raising the matter and the magnitude of the task already before us, we declined to deal with it. We indicated that we would return to the matter at the end of our hearing of the first three claims. However, at that stage we did not anticipate going beyond the original 10 days listed for the hearing.

Preliminary hearings

8. There have been a number of preliminary hearings in relation to these claims.

9. The first of these was conducted by Employment Judge ("EJ") Andrews on 24 January 2018 in respect of the first claim. At that hearing the Claimant was represented by Mr T Perry of Counsel and the Respondents were represented by Mrs S Ramadan, Solicitor. EJ Andrews identified that the Claimant had 3 physical impairments: fibromyalgia, chronic fatigue and chronic back pain caused at least in part by spondylosis. The Respondents were required to prepare a clean copy of the agreed list of issues containing the amendments discussed and agreed that day. In addition the Claimant was required to provide a disability impact statement and medical evidence in support. Further case management orders were made as to provision of a schedule of loss, disclosure of documents, preparation of the bundle of documents and exchange of witness statements. The hearing was listed for 10 days commencing 1 July 2019.

10. A further preliminary hearing was conducted by EJ Crosfill on 31 July 2018 at which the Claimant appeared in person and the Respondents were represented by Ms R Owusu-Agyei of Counsel. At that hearing, the Claimant was required to provide further information and medical records in support of her disability, which, from what she had provided, she had extended to include other impairments, with limited medical evidence in support. In addition, EJ Crosfill ordered that the first, second and third claims be heard together. We note from the record of that hearing that EJ Crosfill spent much time explaining Tribunal procedure and case management to the Claimant and at one point stated that he was concerned about her attitude and said that "she seemed remarkably unwilling to progress her case".

11. We note in particular paragraph 12 of EJ Crosfill's record of that hearing, which we set out below:

> *"Whilst I understand that the Claimant has physical difficulties that may have the effect of causing her fatigue and affect her concentration I do not accept that this explains her reluctance to progress matters. The Claimant appears to be mired in a raft of other litigation. She has brought a large number of claims in the past. The Claimant should do her very best to progress, what is after all, her claim in a sensible and timely manner."*

12. The resultant case management orders set out in clear detail what the Claimant was required to do and when.

13. A further preliminary hearing was conducted by the Acting Regional Employment Judge ("AREJ") Davies on 19 June 2019. We did not have a copy of the record of that hearing until late during the first day of our hearing. But we understood that by the date of that hearing exchange of witness statements had still not taken place and AREJ Davies directed mutual exchange on 28 June 2019.

Case preparation

14. On the first day of our hearing it was evident that the case was still not fully prepared.

15. We were provided with a document headed Agreed List of Issues which is at pages 170-180 of the bundle and is attached as an appendix to our Judgment.

16. We did not have an agreed bundle, there were additional documents from the Claimant and outstanding requests for further documents.

17. The Claimant had not prepared a witness statement. The Respondents had only belatedly provided her with copies of their statements.

18. In addition, the Claimant arrived with a trainee barrister who she wanted to represent her, but who was not going to be available until 8 July for medical reasons.

Adjustments

19. The following adjustments were made to the Employment Tribunal procedure and hearing, many of which were at the Claimant's behest in view of her medical conditions: that she could wear extra layers of clothing, a coat and a hat; that we turned up the heating if required; that we sat from 11 am until 4 pm with an hour for lunch each day; that she could take regular toilet breaks as required; that the order of the Respondents' witnesses was provided; and, in as far as was possible, cross examination by Mr Harris would be non-confrontational.

20. Further adjustments were made at the Claimant's behest in respect of the resumed hearing (which ultimately was heard by CVP): sitting from 12 pm to 4 pm with an hour for lunch; regular breaks; sitting a maximum of two days hearing with a break of at least two days in between; and submissions to be made in writing.

Documents

21. We were provided with a bundle of documents (initially a paper bundle but for the part-heard hearing an electronic pdf version), which with the addition of further documents during the course of the hearing contained 801 pages. Where necessary we refer to this as "B" followed by the relevant page number(s) in the paper bundle and after an oblique stroke, the relevant page number(s) in the electronic pdf version. We also received a draft chronology from the Respondents.

22. We heard evidence from the Claimant by way of written evidence and in oral testimony. The Claimant had not prepared a witness statement but I indicated that we would take her evidence in chief by way of the particulars of each of her three claims and a short supplemental statement if she wished to provide one. The Claimant subsequently provided a witness statement amalgamating the particulars of the three claims and a short

document entitled "Claimant's Supplemental Statements Concerning Claimant's Comparators".

23. We heard evidence from and on behalf of the Respondents from Mr John MacLeod, Mr Guy Knowles, Mr Denny Paterson, Reverend ("Rev") Phyllis Barrett, Mr Noel Cleary, Ms Marie Lawrence and Ms Emma Wilson by way of written statements and in oral testimony.

Conduct of the hearing

24. The hearing was originally listed for 10 days commencing 1 July 2019. It is fair to state that on almost a daily basis and sometimes more than once a day, the Claimant made applications in which she sought to either adjourn or postpone the hearing. To a lesser extent, the Respondents also made applications. The Claimant's applications considerably delayed and disrupted the proceedings and led to the case going part heard. To a much lesser extent the Respondents' applications contributed to this. It also did not help that despite the revised start time of 11 am during the original hearing, the Claimant arrived late and some days not until approximately 12 pm.

25. The applications are set out below.

<u>1 July 2019</u>

26. The Claimant made an application to adjourn the hearing until 8 July 2021 for a number of reasons: she had not been able to prepare her witness statement because the Respondents had not disclosed documents; she had belatedly obtained representation from Ms Okoria, a trainee barrister, but she was not available straight away. Ms Okoria was present on 1 July but only spoke to explain when she would be available to represent the Claimant.

27. This application emerged gradually along with other matters which we deal with later on and so took up the entire day. We were not able to give our decision until 4.40 pm. This was as follows:

    a. We have taken into account all that we have heard and have considered the overriding objective in reaching our decision.

    b. This hearing was set for 1-10 July 2019 at a preliminary hearing held on 24 January 2018. The claims relate to matters which occurred in 2016 and 2017. Case Management Orders were set including exchange of witness statements on 12 September 2018. A further preliminary hearing was held on 31 July 2018 at which exchange of witness statements was put back to 15 January 2019. In the context of non-compliance with other orders, EJ Crosfill expressed concerns about the Claimant's reluctance to progress her case (at paragraph 6 of his record of that hearing). By the time that a third preliminary hearing was held on 19 June 2019, exchange of witness statements had still not taken place and AREJ Davies directed mutual exchange on 28 June 2019.

c. The Claimant did not provide her witness statement and indeed still has not even prepared one. The Respondents were ready to exchange on 28 June as directed but did not provide their witness statements because of the Claimant's failure to do so. The Claimant's position is that she could not draft her witness statement because of the Respondents' failure to disclose all its documents. However, she has provided lengthy particulars of her claims, for example in her first claim which runs to 118 paragraphs over 13 pages.

d. We were not convinced that any failure to disclose documents put the Claimant at a substantial disadvantage in the preparation of her witness statement. She could have produced her statement using the previously prepared particulars of claim and the Agreed List of Issues which focused and fleshed out the allegations she has made. Any continued failure to disclose documents as she asserts can be dealt with in cross examination and/or submissions.

e. Whilst the Claimant has not prepared a witness statement we take the view that her particulars of claim in respect of her three claims can stand as her evidence in chief. If she chooses, she can provide a short witness statement to supplement those particulars.

f. There is clearly a dispute or perhaps a misunderstanding by the Claimant as to whether all of her documents have been included in the bundle prepared by the Respondents and also whether there are additional documents which she states that the Respondents have but have not disclosed. The Claimant had requested an order seeking the First Respondent to comply with a Subject Access Request under the Data Protection Act in her email to the Employment Tribunal dated 7 March 2018. This was too wide a request although it is clear from what we read in the record of the preliminary hearing held on 19 June 2019 (which we only belatedly obtained a copy of) and from what the Claimant said to us today, that she had in mind very specific documents. These were to a great extent identified today and they are documents which the First Respondent has indicated that it would look for and provide or confirm that it did not have. These are matters that can be ironed out without losing the entire 10 day hearing. With regard to the documents that the Claimant has provided but were not included in the bundle, the Respondent has stated that it would make sure that they are included in a revised bundle.

g. We appreciate that the Claimant has obtained legal representation from Ms Okoria at the last moment and that her representative is not able to attend for much of the hearing due to a hospital procedure. However, Ms Okoria has confirmed that she is available on 3 July and possibly for part of the following week. Whilst we also appreciate that it is desirable to be represented, we have to balance out the prejudice to each party. The Claimant will have some assistance from Ms Okoria this week and part of next week and this could include preparation of cross examination questions and submissions. The Claimant will be provided with or should now have the Respondents' bundle of witness statements.

h. It is of course unfortunate that she had not arranged legal representation much sooner and from someone who is able to attend the full hearing. We note that this matter was not brought up in front of AREJ Davies on 19 June 2019. Further in her email to the Employment Tribunal dated 28 June 2019, the Claimant signs off with the words "litigant in person".

i. The Employment Tribunal can of course offer assistance to her as an unrepresented party (in order to achieve equality of arms).

j. The prejudice to the Respondents in not proceeding with this hearing is that they have seven witnesses present, are represented by Counsel and Solicitors, there are the resultant costs involved and the simple fact that the Employment Tribunal would not be able to accommodate another 10 day hearing slot until the end of 2020, possibly into 2021. Indeed that would cause prejudice to both parties.

k. On balance we unanimously find that the overriding objective is best served by proceeding with this hearing. We will use tomorrow as a reading day without the need for the parties to attend. The hearing with the parties will commence at 2 pm on Wednesday 3rd July 2019, the Claimant to give evidence first. This will allow the Claimant time to provide the Respondents with a supplementary witness statement if she so wishes, to allow her to read the Respondents' witness statements and to prepare cross examination questions with her representative's assistance this week, to provide copies or identify any documents which she believes the Respondents have not included in the bundles. Any supplementary witness statements and revised bundles should be provided to each other and to the Employment Tribunal no later than the morning of 3rd July 2019.

28. The Respondents belatedly raised the issue of the fourth claim, their strike out application and, in the alternative, to join that claim to the three before us. This only emerged in the late afternoon and only after we obtained the record of the last preliminary hearing and discovered that in fact AREJ Davies had directed that today would be an open preliminary hearing to determine the Respondents' applications, deal with resultant case management and then commence hearing the claims tomorrow. I expressed my disappointment that neither party had told us this. The Claimant objected to both applications. We heard submissions from both parties.

29. After an adjournment, we indicated that we were not in a position to deal with either the strike out application or indeed the application to join the fourth claim given the time available to us (taking into account the start times of 11 am and finish times of 4 pm each day and the need for regular breaks). We stated that the matter would have to be dealt with at some future point.

2nd July 2019

30. We spent the day in chambers reading the witness statements and referenced documents.

3rd July 2019

31. The Claimant made further applications to adjourn and for disclosure of documents by emails timed at 11.21 and 11.22 am that morning. She also provided us with a witness statement in which she had combined all three particulars of claim and a supplemental witness statement said to be a list of the comparators she relied upon. In reality this was a list of the claims against various individuals within the First Respondent's organisation.

32. We continued reading and indicated to the parties that we would start the hearing at 2 pm.

33. On commencement the Claimant indicated she was waiting on the arrival of Ms Okoria who had been delayed. We continued dealing with mundane matters until Ms Okoria arrived at 2.25 pm.

34. On arrival, Ms Okoria told us that the Claimant's medical practitioners had advised that the Claimant was not fit to attend the hearing at all, due to anxiety and inability to assimilate the lengthy witness statements that she had only received on Monday. She added that the Claimant was in pain at Monday's hearing and was due to commence pain management on 5 August 2019. She left it to our discretion as to how to proceed.

35. I asked if the medical advice was in writing. The Claimant indicated no and that one doctor said she was fit to attend and the other said she could not. So on Monday she went with the advice to attend.

36. It was unclear whether the Claimant was in fact seeking an adjournment or not, but I indicated that without medical evidence I would have to refuse it, particularly given that she said that one doctor said one thing and another said the opposite.

37. I said it was a matter for her if she wished to renew her application with medical evidence. However, I suggested it would be better to get on with the hearing rather than having it hanging over her if, as she said, it was causing her anxiety. The Claimant replied that her anxiety was from not having enough time to read the Respondents' witness statements.

38. I explained to her that she should have exchanged witness statements in mid 2018, then in late 2018 and then last Friday. However, I told her that she will give evidence today and tomorrow and then the Respondents' witnesses start on Friday. She will know the order of the witnesses. She can read the first witness statement by Friday and work out with assistance from Ms Okoria what questions to ask, then read the next one over the weekend. This would make it a more manageable task. In addition, Mr Harris had indicated that he would keep the cross examination as gentle as possible and I said I would intervene if necessary.

39. We spent the remaining afternoon clarifying the claims and issues and documents that had been provided.

4th July 2019

40. The Claimant made a further application for an adjournment on medical grounds. This took all day to deal with and after hearing submissions and adjourning to deliberate, we gave our decision at 3.35 pm as follows:

    a. The Claimant has made a further application for a postponement of this hearing through her husband, Mr Leeks. The Claimant was outside the hearing room, sitting in the Tribunal's reception/waiting room.

    b. The application is made on the grounds that she is medically unfit to take part in the Tribunal hearing. This is said to be supported by a letter from her GP, Dr Hughes, dated 12 June 2019, a copy of which was provided to us this morning. It is also made on grounds that she is simply unfit to participate in the hearing because of anxiety, lack of concentration and her other health problems. We also heard that she had not eaten today.

    c. Mr Leeks stated that the Claimant would benefit greatly from having Ms Okoria present who was more familiar with her case. He said that Ms Okoria was expected to be available to attend the hearing on Monday 8 July 2019. However, she had already told us on 1 July that she was to undergo a hospital procedure on Friday 5 July and she anticipated being able to attend on Wednesday 10 July, not Monday 8. But she had said she was not certain of this.

    d. Mr Harris resisted the application on the grounds that the medical evidence did not support the Claimant's unfitness to attend the hearing because it was ambiguous. One interpretation was that the Claimant could attend future hearings if certain adjustments were made, and, in fact, the Tribunal had already agreed these. The other interpretation, flowing from the last paragraph of the letter, was that the Claimant was unfit to attend and it was impossible to give a date on which she would be. Indeed, Mr Leeks did say to us that the Claimant's ability to participate could vary from day to day and that today was a bad day.

    e. Mr Harris also said that there were concerns that the longer the matter went on the more that the witnesses' memories would fade, which would increase if the case went part heard or even had to be relisted. He also stated that there were the costs involved in repeatedly attending the hearing both for the lawyers and the witnesses particularly when the case was not advancing.

    f. Yesterday, the Claimant had mentioned that she had a second medical opinion which stated that she was fit to attend. We had made it clear that if she made this application she had to provide that opinion as well as the one we now have.

g. After several further adjournments we obtained a copy of this from her. It is also dated 12 June 2019, from a Dr Al-Najjar of the same surgery but states that the Claimant is fit to attend an Employment Tribunal but may require more frequent comfort breaks. Mr Leeks stated that Dr Al-Najjar was not the Claimant's regular doctor, had written the letter in the Claimant's presence and given it to her and that later that day her regular doctor, Dr Hughes, who has known the Claimant for a number of years, had subsequently drafted the second letter. He went to the practice a few days later to collect it.

h. Mr Harris made the point that if the Claimant had these letters why had she waited until today to provide them. I did explain that it did appear that she had sent the letter from Dr Al-Najjar to the Tribunal nearer the time, but for some reason it had not been linked to her file. It was not clear whether the Dr Hughes' letter had ever been sent and certainly the Respondents were unaware of it until today. Indeed, we were first aware of these medical opinions when they were raised yesterday.

i. We would note that despite having the Dr Hughes' letter the Claimant had participated in the preliminary hearing on 19 June, had continued to send detailed correspondence to the Employment Tribunal seeking her first adjournment and making requests for further disclosure, had attended and participated fully in the hearing on 1 and 3 July 2019 and had drafted a supplemental witness statement and amalgamated her three grounds of claim into one statement, as well as collating additional documents.

j. The first mention of the need to adjourn for health issues was raised by Ms Okoria yesterday at which the two differing medical views were mentioned but without production of the documents we have today.

k. We find that these letters are not specific to this hearing nor sufficiently up to date, particularly given the Claimant's engagement in the process in the intervening period. In addition, on one level they contradict each other, but on another they say that with adjustments the Claimant is able to participate. Indeed, we have gone much further than simply offering the Claimant frequent rest/comfort breaks. The hearing day has been shortened to an 11 am start and a 4 pm finish with a guaranteed hour for lunch. Mr Harris has indicated that he will keep his questions of the Claimant to a minimum and avoid a confrontational stance. I have indicated that in furtherance of the Tribunal's overriding objective I would assist the Claimant as an unrepresented party (subject to her trainee barrister's availability), I would be controlling the proceedings and made it clear in terms that I would intervene if I thought that any questions were not relevant, not clearly put or confrontational. I also told the Claimant that she could take breaks whenever she needed them.

l. The Claimant said yesterday that she had not been able to read the Respondents' witness statements which were given to her on Monday 1 July. I told her that she only needed to read the first one, Mr Harris having provided the order in which witnesses would give evidence,

then she could read the further statements over the weekend and at some point next week hopefully her trainee barrister would be available to assist. However, it has occurred to us since that her representative has those witness statements in any event and so she should be able to consider them and assist the Claimant.

m. We therefore find that the medical evidence does not provide grounds on which to allow the application.

n. We are of course concerned about the Claimant's condition as described to us today but we were not able to observe or speak to her directly, and Mr Leeks could only provide his opinion based on his own observations of his wife. We do not seek to discount this at all. We accept that the Claimant might be feeling very anxious, and to an extent that is a natural consequence of participating in legal proceedings, although we accept that her other medical conditions may also have an impact. In the absence of anything more and having observed her in the past, whilst we accept that she might have good days and bad days, it is of course impossible to predict and very hard to make reasonable arrangements for the hearing on this basis.

o. We therefore believe it would be better to proceed with the hearing on the basis that this is in the interests of both parties.

p. We did offer a number of further suggestions to alleviate her anxiety: giving evidence from the Claimant's table instead of the witness table with her husband and/or her trainee barrister sitting along side her. Mr Harris agreed to this. We did make it clear to Mr Leeks that his wife would have to give evidence herself and he could not answer on her behalf. We also reiterated to Mr Leeks the other adjustments that had already been made.

q. On this basis we refuse the application to postpone and adjourn for the day to give the Claimant further rest time. We direct that the hearing will resume tomorrow morning at 11 am and the Claimant will be expected to attend and we will hear her evidence. It is likely that this will take all of the day and resume on Monday. This will give her time to read the Respondents' witness statements and to further prepare. We would advise the Claimant that if she does not attend then the Tribunal will consider whether either to dismiss her claims or to proceed in her absence.

41. The Respondents had made an application that the claims be struck out on the basis that the Claimant has not actively pursued her case or that her claims have no reasonable prospect of success without the Claimant herself giving evidence.

42. Whilst the Claimant has made repeated applications to adjourn and has not followed the Case Management Orders in the past, we felt we were at a stage where we had made arrangements for witness evidence to be provided and for witness statements to be exchanged and matters as to

documents had been concluded to the extent that was possible. We therefore did not see that the Claimant was not actively pursuing her claims.

43. With regard to reasonable prospects of success, this is always difficult with discrimination claims where it is of course necessary to hear live evidence in most cases, although we do acknowledge that the burden of proof lies with the Claimant, certainly in the first instance. We have directed the Claimant to attend tomorrow to commence the hearing and we expect her to do so. The appropriate way to determine this case is by hearing the evidence which we hope to do starting tomorrow.

44. We therefore found that it not appropriate to grant a strike out.

45. We finished sitting at 3.45 pm.

5th July 2019

46. The Claimant did not arrive until 12.20 pm. She adduced additional documents and went over matters that had taken place in her absence yesterday. There were some without prejudice discussions between the parties outside the Tribunal hearing room. On return, the Claimant then refused to continue with the hearing because she said that she felt "threatened and frightened" by the Respondents' offer not to seek costs if she withdrew her claims today. Whilst these were without prejudice matters, I tried to reassure her that I was sure that this was not the intention of the discussions. She continued in her refusal to participate and it was only at the point that I told her that we were considering striking out her claims for unreasonable conduct that she said that if that was so she would have to participate.

47. We finally started the Claimant's evidence at 3 pm and sat until 4.10 pm.

8th July 2019

48. The Claimant made a further application for disclosure and to adjourn the hearing so as to see her GP. We note that the GP surgery is in central London and we do not know where the Claimant lives; she has only provided a Post Office and a PO Box number as her address for these proceedings.

49. After hearing submissions from both parties we gave our decision at 11.40 am, as follows:

    a. We are not prepared to allow the loss of a further day of this hearing. The Claimant is fit enough to be here today. She may well be fit enough to attend tomorrow and the rest of the week. She should have made arrangements to see her GP on Saturday morning or this morning at 8 am;

    b. From what the Claimant has said she has a condition that she has had before and she has been prescribed medication for it, so it is not clear why she would need a face to face appointment. In any event, she

must endeavour to see her GP outside the hours that the Tribunal is sitting given that we start at 11 am and finish at 4 pm;

c. The Claimant has made paper applications for disclosure and adduced further documents but only raised this matter after we had dealt with them during the hearing, which is at odds with the stated pressing nature of the issue. We note that she left the bundles including the Respondents' witness statement bundle in the Tribunal hearing room over the weekend. We are concerned given the number of attempts to adjourn and postpone this hearing either completely or until the availability of her trainee barrister.

50. We then recommenced hearing her evidence at 11.45 am and sat until 4.20 pm.

9th July 2019

51. We resumed the Claimant's evidence at 11.05 am. We adjourned from 1pm for lunch. At 2 pm our clerk advised us that the Claimant had reported that she was feeling feverish and unwell and had an appointment to see her doctor at 5 pm. She sought a further application to adjourn the hearing so as to attend that medical appointment and she also made an application to adduce further documents. On considering the matter, we gave the following decision:

a. The Claimant has presented us with a fait accompli and we have no choice given that she says she as an appointment at 5 pm and needs travelling time to get there. We have no choice but to allow her to leave to attend her GP. But tomorrow morning before starting at 11 am she must produce evidence of the appointment, when it was booked, when she was told of the appointment, her GPs' surgery opening hours for each day of the week, the address of where the appointment took place and medical evidence that specifically describes her health condition at the time of the appointment, any diagnosis made and any treatment recommended or provided.

b. As to the documents we queried why she did not hand them to the Respondents this morning if she had them. We directed her to provide the Respondents with all final documents she wishes to rely upon before 11 am tomorrow morning.

52. We adjourned at 3.02 pm.

10th July 2019

53. We commenced the hearing at 11.05 am. The Claimant made an application to adjourn the hearing to attend a medical appointment to have a colonoscopy. The Respondents in turn made a further strike out application.

54. The Claimant allowed us to listen to a voicemail received at 8.24 am this morning from her GPs' surgery as evidence of the medical appointment.

However, this was purely a message for her to ring them back. She also produced an email received at 21:42 pm on 9 July 2019 attaching a letter from her GP dated 9 July 2019 in support. She said that she had called the GPs' surgery back (at 10.26 am from her phone record) and was told that the hospital had responded and expects to have her colonoscopy done in the next two days and that if she missed it, that was it, and there are papers for her to collect at the surgery.

55. This was not consistent with what the GP had said in the letter. In that letter the GP stated that the Claimant had an appointment on 9 July, complaining of diarrhoea for two weeks, and that the GP had agreed to investigate by stool analysis and a referral for a colonoscopy. Indeed, yesterday the Claimant complained of fever and this is not mentioned in that letter. It seems unlikely that between 5 pm yesterday and this morning that such a referral would already have been made and processed. The circumstances, including her not knowing at which hospital make it more unlikely.

56. In any event, there is no reason why her husband cannot collect the papers that she says need collecting from the GPs' surgery, for us to continue and if she receives a call to attend the hospital she can let us know and make a further application to leave at that point. We have to take into account her repeated applications to adjourn for a number of reasons including medical grounds on insufficient evidence.

57. We then dealt with the Respondents' strike out application and stated that we felt it is better to use the time to continue with the hearing rather than their application.

58. The Claimant then attempted to argue her application further, stating that the hospital referral was electronic and she wants to go. I told her that was a matter for her but we are going to continue with the hearing with or without her.

59. The Claimant attempted to argue the point further. I told her that I am not prepared to further debate it. We have given a decision and a practical solution. You need to ask your husband to collect the papers, we can continue, you can leave your phone on and if you get a call then you can answer it.

60. The Claimant said she would speak to her husband and ask him if he is prepared to go.

61. We then took a break during which Mr Leeks burst into the hearing room and started shouting at us. I asked him to leave and told him that whatever he wants to say had to be in front of both parties. He continued to shout, ignoring me and I had to press the security alarm. He said that he was prepared to go to the GP surgery but they will not give him the papers in the absence of his wife. He said did we not know how doctors work and called me a "stupid man" as he left the room. The Claimant was outside the room in the corridor and I heard her say "don't call him that". We resumed the hearing and I related this incident to the Respondents. We then adjourned

to allow the Claimant to telephone her GPs' surgery to arrange for her husband to collect the papers.

62. During our break, our clerk informed us that Mr Leeks had told him that he cannot collect the documents because he is not the patient. Our clerk also told us that the Claimant had told him that she had spoken to the surgery's receptionist who could not confirm whether her husband could collect the documents or not.

63. On resuming the hearing, the Claimant advised us that she had spoken to her GP and was on standby for a colonoscopy appointment which could involve her preparing for the procedure (by cleansing her bowels) and she had to physically go to the surgery to collect a letter containing details of the procedure and that it sounded to her like she needed to collect a cleansing pack.

64. Mr Harris expressed his concerns about the credibility of what the Claimant was now saying, which was at odds with what she had said previously and that we had seen a previous email to her GP surgery that indicated that she had arranged for her husband to collect records on her behalf in the past. He referred us to Employment Appeal Tribunal ("EAT") authorities in other claims involving the Claimant and her previous attempts to adjourn proceedings on medical grounds.

65. After conferring, we refused the Claimant's further application and I gave the following reasons. Each time her position changes. First it was documents. Now it is documents and possibly a cleansing pack and that she needs to leave because she might have to start cleansing her bowels for a colonoscopy appointment that has not even been fixed. It was simply not credible. There is no reason why your husband cannot collect these documents for you or report back later in the day if there is an issue arising or they will not give them to him. You have authorised him to do so before and you can even email the surgery to say "I am in a court hearing, I cannot leave until 4 pm but my husband can come and collect them for me".

66. The Claimant attempted to make further points and I said to her that she has been to the EAT a number of times, she knows the procedure, she cannot keep making applications without sufficient supporting evidence. I adjourned for five minutes to allow her to arrange for her husband to go to the GPs' surgery. The Claimant said that she would not return when the hearing recommenced. I told her that was a matter for her but we would continue in her absence although I would prefer her to be here. I told her that Mr Harris may well renew his strike out application. She said that if he did she cannot do anything about that. I repeated that it was a matter for her whether she stays or goes but we will continue the hearing in five minutes.

67. After ten minutes the Claimant came into the hearing room on her own with her mobile phone to her ear. I could hear someone speaking. She asked the caller to repeat what they had said. I asked the Claimant to leave. She further opened the door and came in. I again asked her to leave and said did she want me to call security. She then left.

68. We then resumed the hearing after a further five minutes. I advised the Respondents of the Claimant coming into the room. The Claimant explained that she had just had a telephone call from the Colorectal Nurse at UCLH to advise that she has a colonoscopy appointment today at 2.30 pm. I asked to see her phone but this only indicated a call received at 12.37 pm but with no caller identification. I sought clarification as to whether the Claimant was seeking to adjourn for today and report back or to vacate the entire hearing. She said it was better to vacate rather than to all come back tomorrow and go away. Mr Harris objected and indicated that he would be renewing his strike out application either today or tomorrow. He further indicated that the Claimant's behaviour was unreasonable, that we had got to day 8 and had not even finished her evidence.

69. We considered the matter and gave the following decision. We are put in a difficult situation again with no supporting evidence. We do not want to stop someone attending a hospital appointment. We will take it on face value and let the Claimant leave and adjourn for the rest of the day. But tomorrow she needs to inform us in advance of the position and provide evidence that she attended the appointment. A parking receipt, evidence for travel by public transport, something from the hospital, get the nurse to confirm the appointment on a compliment slip, tell the hospital she is in a court case and the Judge is being difficult and wants some proof. But we have concerns about her failure to provide the evidence I ordered yesterday and we still have not dealt with that, and Mr Harris may well renew his strike out application tomorrow morning in any event.

70. We adjourned the hearing at 1.30 pm.

11th July 2019

71. That morning the Claimant sent two emails to the Employment Tribunal and to the Respondents' solicitors. One attached a letter dated 10 July 2019 indicating that a colorectal referral had been made by her GP surgery to UCLH. The other set out the Claimant's overview of her medical consultation with the Colorectal Nurse on 10 July 2019 which indicated that the colonoscopy was pencilled in for 18 July 2019.

72. The Claimant arrived at 11.10 am and we commenced the hearing. Mr Harris made a further strike out application. He provided two authorities in support (Rolls Royce v Riddle and Bolch v Chapman). We heard submissions from both parties until 12.45 pm and after an adjournment gave the following decision:

    a. The application is refused. The threshold necessary on each of the grounds is not met.

    b. With rule 62 (4) in mind we do not propose to give full reasons now but will provide short bullet point reasons. We feel that this is proportionate given the need to make further progress in the time available.

c. The Claimant is here and willing to proceed.

d. We have concluded her evidence (and I am not now proposing to ask her questions). It is in the public interest for cases of discrimination to be heard and for us to hear the evidence of the Respondents.

e. We do not agree that striking out is the proportionate way of dealing with this situation.

f. There is still the prospect of a fair hearing although we recognise that it will require an additional number of days and further cost and time to the Respondents.

g. The Employment Tribunal will do its upmost to ensure that the further dates for hearing are as soon as possible around the parties' availability.

h. We will proceed with the Respondents' case.

i. Given that the Claimant has not provided the 150 pages of documents she previously alluded to by the date and time required by the Tribunal we are not prepared to lose a further day of the case by allowing her to adduce them. The Claimant was required to disclose documents generally and specifically by this Employment Tribunal by Wednesday of last week and that was a concession, given the previous case management of the hearing.

73. We then started to hear evidence from the Respondents' first witness and continued on 12th July 2019.

12th July 2019

74. By the end of that day we had only heard evidence from one of the Respondents' witnesses, Mr Paterson, who is also one of the Respondents, and so the case went part heard. In discussion with the parties, I determined that a further 5 days was required to complete the Respondents' evidence and submissions, spread out so as to allow, as requested by the Claimant, a break of 1 day after 2 days of hearing.

20th April 2020

75. In liaison with the parties, the hearing was listed for 5 days from 20 April 2020. However, due to the COVID-19 pandemic the first day of the hearing was converted to a telephone preliminary hearing in line with the then Presidential Guidance, so as to determine how best to proceed. A record of that hearing is contained in a separate document.

76. In essence and with the parties' agreement I directed that the hearing would be listed for a further 5 days, and in view of the Claimant's health issues, there would be 1 day break between every 2 days, we would start at 12 pm each day and end between 4 and 4.30 pm, the Respondents would provide the order in which it will call its remaining witnesses, and there would be

sequential written submissions. It was not possible to agree the hearing dates there and then because the members were not present or available to liaise with (the hearing having been listed before me sitting alone).

77. Unfortunately due to delays in obtaining availability dates from the parties, the non-availability of the Respondents' Counsel and the Tribunal panel, it was not possible to re-list the hearing until the dates in July and August 2021 as indicated above.

78. We had initially directed that the hearing would be in person, but subsequently converted it to a CVP hearing in view of our concerns as to COVID-19, the Claimant's health conditions and the Respondents' witnesses who work within an NHS Trust. Indeed, the Claimant had also requested a CVP hearing due to her and her husband's health conditions.

Resumed hearing

79. We spent 29 and 30 July 2021 in Chambers re-reading the witness statements, the documents provided and our notes. We then resumed the evidence on 2, 3, 6, 9 & 10 August 2021 by which time we had electronic versions of the documents and witness statements.

80. During the hearing I had to impose an increasingly strict timetable on the Claimant's cross examination each day, so as to keep the hearing on course to finish within the allotted 5 days. I had to repeatedly direct her to ask relevant questions, some of which were completely irrelevant and at times impertinent. I repeatedly gave her guidance on what to ask by reference to the list of issues and by way of examples. I had to increasingly remind her of the time remaining, particularly when her questions were either irrelevant or she had simply not advanced very far. Ultimately, as she by and large took no notice of what I directed, I allowed her questions as far as they were not inappropriate or impertinent, and simply curtailed her questioning at lunch time and at 4.30 pm each day. Even then she attempted to continue asking questions. We formed the impression that the Claimant simply kept asking questions, relevant or not, until she ran out of time and I stopped her each day.

81. It also appeared that the Claimant had not prepared for the resumed hearing, despite the intervening two years, had no obvious plan as to what questions she was going to ask, or as to their relevance; certainly not at first until directed to the list of issues, and as I have said above would simply talk for as long as she was allowed to do so.

82. Indeed, I found myself telling her on numerous occasions both during the original hearing and more so at the resumed hearing that this was not a game, as it did appear to me that she thought it was.

83. I would add that despite the adjustments made at the Claimant's behest, I had to continually remind her of the need to take breaks, which invariably she said she did not require, as to the need to take one hour for lunch which she readily said she would forego, and as to the finish time each day which she regularly exceeded.

84. At the end of the evidence at 4.21 pm on 10 August 2021, I reminded the parties as to the arrangements for provision of written submissions. The Respondents were required to provide written submissions to the Claimant and to the Tribunal by 17 August 2021, the Claimant to provide written submissions to the Respondents and to the Tribunal by 24 August 2021, in time for us to meet in Chambers on 24 & 25 August 2021 to deliberate and reach our Judgment. I told the Claimant that with this in mind she would need to get her submissions to us by 10 am on 24 August 2021. She said that that was too early and that her husband is a cancer patient and has various appointments. I said I was sorry to hear that, but these dates were set a long time ago and were structured around her requirements and her convenience. After some further discussion, we agreed that submissions had to be provided by 12 noon on 17 and 24 August 2021.

85. We subsequently met in Chambers on 24 & 25 August 2021. On 24 August we had before us both parties' submissions, the Claimant's having arrived at 11:59 am that day. We met again the following day and were provided with updated submissions from the Claimant which had been sent by email on 24 August 2021 at 23:54 pm. Her original submissions consisted of 16 pages and the updated submissions consisted of 22.

86. Having considered the position we decided not to take into account the contents of the Claimant's updated submissions. We were very clear about the deadline and even extended it to 12 noon to assist the Claimant. The Respondents submitted their submissions on time. The Claimant's updated and unsolicited submissions arrived late and we only saw her email during our second day in Chambers, by which time our deliberations were well underway. The Claimant gave no reason why we should accept her further submissions out of time, and her original submissions did not indicate that a further version would be submitted.

87. We concluded our deliberations on 25 August 2021. I would apologise to the parties for the length of time it has taken to perfect our Judgment and Reasons but this has been due to the pressure of work and my sitting schedule.

Findings

Introduction

88. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal has, however, considered all the evidence provided and has borne it all in mind.

89. The Claimant identifies herself for the purposes of her complaint of race discrimination as Black or Black British African. For the purposes of her complaint of religion or belief discrimination she defines her religion or belief as the customary and traditional spiritual beliefs of the Ibo people. In her witness statement the Claimant further defines herself as non-Christian and

non-Muslim. At the time of the events in question she was aged between 57 and 58 having been born on 14 December 1958.

Disability

90. The Claimant has a number of medical conditions. She relies on the impairments of Fibromyalgia, chronic fatigue, chronic back pain and Spondylosis at the relevant times of her various complaints.

91. In submissions the Respondents disputed disability and knowledge of disability. This perplexed us, given the concessions made at our hearing on 3 July 2019. On that day Mr Harris stated that the Respondents accepted that the Claimant was disabled by reason of Fibromyalgia and knowledge of it at the relevant times. Further, he stated that the Respondents accepted that temperature sensitivity, aches and pains, and fatigue are all symptoms of Fibromyalgia. However, Mr Harris did state that the Respondents did not accept that the Claimant had the disability of Spondylosis or knowledge. Further, whilst he admitted that perhaps it was pedantic, the Respondents did not accept chronic back pain or knowledge or of chronic fatigue as separate conditions.

92. With this in mind and having considered the medical evidence and impact statement (B794-795) as well as the First Respondent's pre-employment Occupational Health ("OH") assessment of the Claimant at B206B-D/219-221, we find that at the relevant times the Claimant was a disabled person by virtue of the impairment of Fibromyalgia which included symptoms of temperature sensitivity, aches and pains and fatigue. We also accept that the Claimant suffered from chronic low back pain and Spondylosis and specifically refer to the letter from her doctor dated 31 January 2018 at B405/524. That letter indicates that all of the Claimant's conditions can vary in severity and are worse during flare-ups.

93. We also note that the Claimant has other medical conditions which were not relied upon for the purposes of these claims. We further note the Claimant states in her impact statement that other symptoms of her Fibromyalgia were irritable bowel and bladder.

Job application

94. On 12 November 2015, the Claimant submitted an application to the First Respondent for the post of HCA at the Hospital. We were referred to what appears to be an online application form at B207-225/222-240).

95. This sets out her extensive experience of working within a number of roles within the NHS, including more senior roles.

96. There is a section headed Monitoring Information at B224/239 in which the Claimant sets out her ethnic origin as Black or Black British – African and her religion or belief as other. The Claimant also indicates that she has a disability as follows:

"I have foot muscle problems, consequently I am unable to wear trendy smart interview shoes hence, if invited for interview, I would require a compassionate understanding of my footwear appearance by the Interview Panel."

97. The Claimant undertook a pre-employment OH assessment on 12 January 2016. The OH report is at B206B-C/219-221 and was sent to Mr Paterson, the Cardiac Catheter Suite Ward Manager (her line manager to be). The report indicates that the Claimant could work in the role she applied for with certain restrictions/adjustments and has a condition that may be considered a disability under the Equality Act 2010. In particular, the report says as follows:

"More information on phased return or work restrictions/ adjustments:

Mrs Leeks is applying to work as a full time Health Care Assistant. She is fit for the role provided the below adjustments are put in place."

"Clinical Assessment Outcome and General Comments:

Mrs Leeks declared a medical condition which is covered by the Equality Act 2010. She had treatment and provided me with medical reports confirming that she is discharged from active treatment regarding this condition.

She declared fibromyalgia. This affects her in having pain which she describes as cramps. She has good and bad days. She takes occasional pain killers for this condition which is under control at present.

Mrs Leeks declared skin reaction to soap in the past; however this should be well controlled by adhering to local policy regarding the use of skin sensitizers at work.

She declared back pain which is currently under control. She will need to adhere to Trust manual handling training and policies.

Please let us know if you would like to discuss this."

98. We note that as to her availability to work, the Claimant said in the Supporting Information within her application form as follows (at B223/238):

"18) I believe that if I am appointed, I would make invaluable contributions towards the achievement of daily workloads.

19) I am willing to work flexible hours and I also have experience of out of hour's work which included weekends, extended days, evenings, standbys, emergency call outs, and night duties.

20) I am willing to work at any other affiliated site(s) and or affiliated departments if required by the needs of the service."

99. Whilst the Claimant has provided a number of documents relating to her medical conditions for the purposes of these proceedings, some of which go back a number of years, we note that she only disclosed a limited amount of information to the Respondents as to her disability when she first applied for her position with the First Respondent and during the course of her employment.

100. The Claimant attended an interview with Mr Paterson and Ward Sister Rose Ntege, the Claimant states on 3 December 2015, Mr Paterson on or around the beginning of early 2016. We do not believe that anything turns on the actual date that this took place.

101. Mr Paterson had undertaken equality and diversity training as part of induction with the First Respondent and subsequently as part of mandatory training which took place on a periodic basis.

102. The Claimant had applied for a generic position as HCA but the interview was for the full time HCA role working in the Cardiac Catheter Suite ("the Cath Lab") at the Hospital in Denmark Hill, London. During the interview the Claimant confirmed her availability to work full time. Mr Paterson said in evidence that she came across well and was successful in being appointed to the position.

The Cath Lab

103. The First Respondent is an NHS Foundation Trust. The Claimant was employed at the Denmark Hill site working in the Cath Lab.

104. The Cath Lab treats patients suffering from a variety of heart conditions and carries out procedures such as performing angiograms, inserting stents and pacemakers. The Cath Lab takes elective patients (outpatients) and inpatients to be treated for heart conditions and additionally patients referred by other hospitals, such as patient suffering from heart attacks. Given the nature of the conditions suffered by patients, the Cath Lab operates in a very fast paced and busy environment and often has to respond quickly to emergency situations.

105. At the time of the events in question, there were 2 full-time and 1 part-time HCAs, in addition to around 11 Band 5 Nurses and 6 Band 6 Nurses. Mr Paterson together with Ms Albertine Gouldbourne and Ms Ann Wollaston, both Lab Managers, shared equal management responsibility for all of the staff within the Cath Lab.

106. The duties and responsibilities of an HCA include carrying out observations on patients, carrying out other equipment checks, oxygen checks and routine checks. They also have responsibility for taking elective patients' sandwich orders, caring for patients, attending to their needs and taking them to the toilet as well as tidying up the ward. As patients in the ward can suffer from acute heart conditions, they require a great deal of assistance, such as assistance with walking, toilet needs and feeding.

Appointment

107. Following the Claimant's interview, Mr Paterson received an email from OH stating that she would need minor adjustments for her condition of Fibromyalgia. He was happy to make the adjustments and so the First Respondent appointed her to the position of HCA in the Cath Lab.

Contractual and other documents

108. The Claimant was issued with a statement of main terms and conditions of employment on 15 February 2016 to commence her duties at the beginning of March 2016. We were referred to this at B181-182/191-192. From this we note the following: the Claimant was employed as an HCA Band 2; her

hours of work were 37.5 per week (excluding meal breaks); and she was entitled to annual leave of 29 days per annum, plus bank holidays (although subsequently the First Respondent accepted that this should have been 33 days taking into account her past NHS service).

109. We were also referred to the following policy or procedural documents: the disciplinary policy, procedure and conduct standards at B183-205/193-215; dress code and uniform policy and procedure at BA70-105/650-684; code of conduct for clinical support workers/healthcare assistants at BAA15/779.

Commencement of employment

110. The Claimant attended a two week induction from 15 to 26 February 2016. This included a talk from a member of the First Respondent's Chaplaincy staff about the spiritual resources available within the Hospital. At the time the Claimant was handed a document entitled "A Guide to Spiritual Resources for Staff" (which is at BAA12-13/776-777). This includes reference to The Sanctuary, which we understand to be located near to the Cath Lab and described as open "for people who wish to access a place of quiet".

111. The Claimant commenced work in the Cath Lab on 1 March 2016 and in effect Mr Paterson was her line manager.

The uniform issue

112. The Claimant was required to wear the designated HCA uniform in accordance with the First Respondent's uniform policy, specifically with her arms bare beneath the elbows for infection control reasons. All staff were required to wear an ID badge.

113. We refer to the Claimant's email to Mr Paterson dated 26 February 2016 at B225c-d/242-243. In that email, the Claimant stated that she has been issued with her uniforms, the blouses fit, but the trousers are too long. In reply, Mr Paterson advised her to take the trousers back to the Linen Room to swop them or to order new ones and to wear scrubs (which we understood to be sanitary clothing worn in surgical areas) until these arrived (at B225B/242).

114. Whilst we understand that the Claimant was unable to wear the designated uniform trousers in the size provided because she needed to wear a number of layers of undergarments as a result of her sensitivity to the cold and the need to wear incontinence pads, she did not say this to the First Respondent or to Mr Paterson at the outset.

115. Subsequently, when the Claimant started on the ward, Mr Paterson became aware that the Claimant was still wearing scrubs, both top and bottom, and that her difficulty with the uniform trousers not fitting was because she was wearing layers of clothes underneath due to feeling cold. He was concerned because by wearing scrubs, both top and bottom, the Claimant was not distinguishable as an HCA and because of her under garments her arms were covered below the elbow.

116. On 6 September 2016, Mr Paterson had a meeting with the Claimant to discuss adjustments she wanted to make to her working hours. He requested that the Claimant was referred to OH for assessment. The Claimant attended an OH assessment on 1 November 2016. Mr Paterson received the report the same day. This is at B239-241/281-283. It recommended that if feasible, the Claimant should be allowed to wear additional layers of clothing underneath her uniform to enable her to maintain her body temperature, provided it met with infection control standards. It also recommended that a stress risk assessment be undertaken to investigate whether it would be reasonable to reduce the Claimant's hours to part-time levels as she requested. The Claimant was subsequently permitted to wear theatre scrubs so long as these complied with infection control policies by being bare below the elbows. This was so the Claimant could wash her arms properly to reduce the risk of cross infection.

117. Mr Paterson denies that he refused any request from the Claimant to modify her uniform.

118. Mr Cleary, who was the Cath Lab Matron until September 2017 (and Mr Paterson's and Ms Gouldbourne's line manager) was also aware of this. He was concerned that the Claimant was rarely bare below the elbow due to her undergarments and of her needing to have a clean and tidy appearance. He advised her to visit the Laundry Room to find any uniforms that were baggy and could be accommodated to suit her needs.

119. It would appear from the evidence that both Mr Paterson and Mr Cleary advised the Claimant to attend the Laundry Room to try on various sizes of uniforms. In addition, Ms Gouldbourne ordered various different sizes of trousers for her to try on which would enable the Claimant to wear layers of clothes underneath.

120. However, the Claimant was unhappy with all of the options and insisted that none of the uniforms fitted her and that she remained cold. At this point, the Claimant also complained that the uniform tops did not fit her either, despite what she had previously said in her email of 6 February 2017. We refer to her email and Mr Paterson's letter as to their subsequent meeting on 7 February 2017 at B246K-Q/307-312.

121. Mr Paterson raised the Claimant's lack of adherence to the uniform policy on a number of occasions but she continued to wear scrubs.

122. Mr Paterson's evidence was that he was concerned that when the Claimant tried on various sizes of trousers, she always insisted on wearing two pairs of outdoor trousers underneath and that this was why the uniform trousers did not fit her. His further evidence was that he thought this unnecessary because when the Claimant wore scrubs she did not wear two pairs of outdoor trousers underneath. In addition, his evidence was that when the Claimant changed into her normal clothes at the end of her shift, she did not wear multiple layers of clothing. These were matters that Mr Paterson queried with the Claimant at the time.

123. Mr Paterson's major concern in doing so was that the Claimant was not engaging with his requests that she adhere to the uniform policy and that it seemed to him more of a case that she simply did not want to wear the HCA uniform even though she was permitted to wear layers of clothes underneath. He said in evidence that anyone else in the department would have faced disciplinary proceedings after only a few months of refusing to wear a uniform. It was only after almost seven months that he emailed the Claimant on 15 September 2016 warning her that any continued failure to adhere to the policy would result in a disciplinary procedure (at B231F/272).

124. The Claimant alleges that Mr Paterson informed her on or around 29 September 2016 that he would commence disciplinary proceedings against her in the week beginning 3 October 2016 for not wearing the correct HCA uniform. We note that Mr Paterson had already written to her on 15 September 2016 as to the prospect of disciplinary proceedings and he wrote to her again on 7 February 2017 stating the same thing.

125. In between these two dates, Mr Paterson did refer the Claimant to OH in respect of the uniform issue and her request to work less than full time, as we have set out above. The OH report dated 1 November 2016 is at B239/282. This confirmed that the Claimant advised that she needed to wear additional layers because of her Fibromyalgia.

126. No disciplinary action was taken against the Claimant in respect of the uniform issue and it would appear to have gone unresolved or was superseded by events.

<u>The Sanctuary incident</u>

127. Within the Hospital is St Luke's Chapel. This is situated on the first floor of the Hospital. It is a Christian chapel available for everyone to make use of. A section of the Chapel is cordoned off as a separate room, with a separate entrance, as well as a connecting entrance to the Chapel. This space is known as The Sanctuary and it is available for those of all faiths and none to come for quiet reflection or prayer. The Sanctuary has a sofa, 2 armchairs and a cupboard, and is carpeted, unlike the Chapel which is a much larger space with wooden pews and cushioned kneelers. The Sanctuary is one of three rooms available to patients, staff and visitors of the hospital, the other two being for Christians and Muslims.

128. We were referred to a notice outside The Sanctuary and headed "Welcome to The Sanctuary" at B235/279. The Claimant placed great significance on this and so we reproduce the salient content in full:

"Welcome to The Sanctuary

it is always available for your use".

"The Sanctuary

Open every day for patients, visitors & staff

This room is set aside as a place of quiet and contemplation

St Luke's Chapel and Chaplaincy Office are located on the opposite side of the stairs

The Muslim prayer room is located on the lower ground floor"

129. At the bottom of the notice are a series of objects within circles with a line across them, indicating no mobile phones, photography, smoking or food and drink.

130. On 6 October 2016, the Claimant, as she had done on previous occasions, visited The Sanctuary as part of her lunch break. Rev Barnett, the Chaplain of St Luke's Chapel and The Sanctuary, often saw the Claimant in The Sanctuary and whilst having not been formally introduced to her, greeted her, as she did with others, with a "hello". Rev Barnett had no awareness of whether the Claimant had a faith, the Claimant was always dressed in scrubs, so there was no indication from her appearance of what religion, if any, she adhered to.

131. During the Claimant's induction Rev Stanley Njoka spoke to the inductees about the spiritual resources available to those not of Christian Muslim faiths, he advised that The Sanctuary was set aside for silent reflective non-priest led meditation. He provided the inductees with a pamphlet entitled "Spiritual Resources Available to Staff".

132. The Claimant's evidence is that she visited The Sanctuary to find solace, tranquillity and energising restorative temporary relief from the exhausting fatigue effect of her disabilities during her break times.

133. Her position as to what happened on 6 October 2016 is as follows. She was sitting in one of the armchairs in The Sanctuary and was roused from her meditation by a voice that simply said "I want to speak to someone here for 5 minutes". The speaker did not identify herself or show any form of identification. The Claimant opened her eyes and looked in the direction of the voice she heard and could see a Black woman (which unbeknown to the Claimant at the time was Rev Barnett) accompanied by a White woman. The Claimant left The Sanctuary without uttering a word, went to the staff restaurant, bought a vegetable dish, ate it and then returned to The Sanctuary. Upon re-entering The Sanctuary from the main door entrance, she was again asked to leave by the same person who spoke to her in a curt tone of voice, without any explanation other than the words "I am still talking to someone here". The Claimant again complied and left The Sanctuary. On this occasion, she was aware that the speaker was The Black woman, who was dressed in black skirt and black tights. After waiting outside for 5 minutes behind the side door located in the wall petitioning The Sanctuary and The Chapel, the Claimant re-entered The Sanctuary and was told by the speaker in "very stern and authoritative bullying tones" that staff are not allowed to meditate in The Sanctuary. The Claimant refused to leave on the basis that she was entitled to be there in accordance with the First Respondent's policy set out in the notice outside the main entrance door and the leaflet that had been provided to her at her induction. The speaker left the room, the Claimant shut her eyes and meditated for about 5 minutes and when she opened her eyes in response to her "time up" vibrating alert, she saw 2 men, one of who asked her to leave The Sanctuary by reason that somebody wanted to speak to someone in there.

134. In cross examination the Claimant said the following:

    a. She was sitting in The Sanctuary with her eyes closed and her hand partially over her eyes;

    b. She did not recognise Rev Barnett or know that she was a Reverend. She saw "a woman in a short skirt, her two knees and black hose, there was nothing Reverend about her, they (the Rev and the other person) were sitting there like two lovers";

    c. She did not expect to see a priest (as she put it) in The Sanctuary which was for the use of those who were not Christian or Muslim. She did not recognise Rev Barnett as being a priest and did not appreciate that from the clothes that she wore (we established that the Rev was wearing a "dog collar" as it is colloquially known). She did not even know that the Church of England had women priests;

    d. She has no knowledge of how religious ministers dressed not even from films, television programmes or photographs. She had seen the Pope, Mother Teresa and nuns, but not Reverends or dog collars. She has no knowledge of Christianity and has never followed it;

    e. She believed that Rev Barnett would have been aware that she was not a Christian because she was in a room she was unlikely to meet any Christians. Whilst the Rev would not have known that she was Ibo she would have known that she was not a Christian;

    f. She believed that Rev Barnett harassed her and treated her badly because she did not like all non-Christians and non-believers. Further she believed that Rev Barnett treated her badly because knowing she was a non-Christian, the Claimant should have known that she was a priest and that if she did not then: "if you do not know me you will never work again in this country";

    g. She did not accept that she was asked to leave The Sanctuary so that Rev Barnett could give pastoral care to a patient. She said that she did not know what this word meant. When I explained in terms of counselling a patient, the Claimant responded that this might have been her intention but that is not what she said;

    h. In response to Mr Harris' retort that she was not telling the truth, she responded that the Reverend "is the one who is lying, she is lying to the back of her teeth. I do not need to tell a lie. A lie detector will determine this". I advised her of the standard of proof applied and told her that a lie detector is not determinative or necessary.

135. We took from the above and from further evidence that the Claimant's position is that: she went to The Sanctuary to meditate; she did not know who Rev Barnett was; she did not know what a Christian minister dressed in and that the person with her was neither distressed nor upset, but the Rev was having a "chit chat" with an outside person; she had an absolute right

to be in The Sanctuary at any time due to the notice outside; and the Rev had no right to remove her.

136. Rev Barnett's evidence was as follows. She encountered an outpatient in the Chapel who became emotional. She considered it was better to speak privately with her, to provide pastoral support, and so they entered The Sanctuary. On entering The Sanctuary, she saw the Claimant, dressed in hospital scrubs, seated alone with her eyes closed. She politely asked the Claimant if she could leave so that she could provide the patient with pastoral care. The Claimant agreed to leave and said she would go to get something to eat. Around 15 to 20 minutes later and whilst she was still providing pastoral support to the patient, the Claimant returned. She knew that the patient required more time and so she asked the Claimant to give them 5 more minutes. The Claimant replied along the lines of "I'm allowed to be in here", but she did leave. The Claimant waited outside the glass door of The Sanctuary for 5 minutes and then re-entered even though it was obvious that the Rev had not finished with the patient, who was still very upset. She told the Claimant that she would need to leave again because the pastoral session had not finished. The Claimant refused to leave, told her she had a right to be in The Sanctuary, pointed to the sign and said that one of her Chaplain colleagues had told her that she was allowed to use The Sanctuary. Rev Barnett replied that she would be welcome to use the Chapel whilst she was conducting her conversation with the patient. The Claimant replied that the Chapel was uncomfortable and Rev Barnett told her that The Sanctuary was not a restroom. She reiterated that the Claimant would need to leave and again the Claimant refused stating that she was allowed to be in there. The Claimant asked to be provided with her name and badge so that she could report her to her manager. Rev Barnett gave this information to the Claimant and asked for the Claimant's name. The Claimant refused to provide this and her identification badge was hidden not visible. As the Claimant refused to leave and sat down in one of the armchairs, she told her that she would be contacting Security. The Claimant responded "go ahead". She apologised to the patient and left The Sanctuary to alert Security. Upon her return, the Claimant was still sitting in The Sanctuary and there was also another member of staff in there but they left shortly after being asked to leave. The Security team arrived and escorted the Claimant from The Sanctuary. After she had finished her pastoral work with the patient and was leaving The Sanctuary, she noticed that the Claimant was still outside with the Security Officers. She understands from the Officers that the Claimant refused to give her name and had removed her identification badge and was trying to conceal it. After the Claimant had left, she said to one of the Officers that it was a shame they did not know the Claimant's name or where she worked. Another member of staff came along the corridor and confirmed that recognised the Claimant and that she worked in the Cath Lab. On returning to her office, on the advice of one of the Security Officers, she typed an account of the incident. This is at B232/274.

137. Rev Barnett found the incident upsetting for all involved, particularly the patient. She felt very uncomfortable that a member of the Hospital's staff would behave with such disregard for the well-being of a patient in need of support and without respecting patient confidentiality.

138. Having considered the evidence, on balance of probability we reach the following conclusions. We found the Claimant's position as to what happened on 6 October 2016 to be an unreasonable and disingenuous interpretation of the incident. We found her evidence simply not plausible and not credible. Indeed in cross examination her questioning of Rev Barnett was at times inappropriate and she became argumentative. This included questions about the symbols at the bottom of the sign on the door, as to her experience of dealing with patients, as to her role being to provide clinical services and not an evangelist preacher, as to the 10 Commandments, which she attempted to lead the Rev through, as to what the Rev was discussing with the patient, as to her evidence being "duplicitous", as to the meaning of confidentiality, clapping her hands in response to an answer and saying "that's the word, you do have common sense", by analogy referring to the Rev having a gun and saying "your chair or your life" and when the Rev said she did not have a gun, reposting "you robbed me of my life, what more could a gun do", and asking the Rev to define Christian Scientists and sectarian violence in Northern Ireland.

139. I would add that I had to continually intervene to stop questions being put and move the Claimant on. I also had to warn her that she was becoming argumentative, that she had asked all the questions she needed to and she did not have to keep asking questions simply because we had not got to the cut off point I set her. I also warned her that I did not want to hear any more inflammatory language.

140. On balance of probability we accept Rev Barnett's evidence as to what happened on 6 October 2016. We found her to be a measured and reliable witness and that she responded calmly and politely even in the face of what at times were both inappropriate and impertinent questions.

<u>The Adverse Incident Report</u>

141. The Claimant placed great emphasis on what she describes as a procedural irregularity, in that the incident in The Sanctuary had been reported in an Adverse Incident Report compiled by one of the Security Officers involved when it records "no harm", but yet had become a disciplinary matter. She viewed this as evidence of discrimination. She referred to the Policy for the Management, Reporting, & Investigation of Adverse Incidents (including Serious Incidents) which is at BA17-A69/597-649. She submitted during her evidence that as an adverse incident, it was at most a minor security incident resulting in "no harm" as classified under the adverse incident scoring system and thereby required no further action. It should never have been investigated as a matter of alleged gross misconduct.

142. We were referred to the Adverse Incident Report at B234-235/275/276. This sets out a description of the incident and action taken and records the outcome as "no harm".

143. Of course, this report is written from a security point of view and whilst it might record no harm it does state the following: that the Claimant refused to leave The Sanctuary when requested, that she had to be escorted out by

Security, continued to argue she was allowed to be in The Sanctuary and refused to give her name or any information. It further records that she was advised to return to her department and that the matter would be reported to her line manager because she refused to give any details.

144. We have to say that either the Claimant has taken a naïve or disingenuous point here. Whilst she might believe that she did nothing wrong on 6 October 2016, the evidence and our findings do not support that view. To suggest that a security report saying no harm somehow closed the matter off is clearly an unreasonable conclusion to reach. It is perfectly legitimate and reasonable in view of the report for an employer to investigate the matter under its disciplinary policy.

Disciplinary investigation

145. Guy Knowles, the Ward Manager, was asked by Noel Cleary to investigate two allegations against the Claimant. Mr Knowles had undertaken training in equality and diversity matters as part of his mandatory training with the First Respondent.

146. The first allegation was her failure to adhere to the uniform policy and the second relating to her conduct in respect of The Sanctuary incident on 6 October 2016.

147. Mr Knowles was provided with a copy of the Adverse Incident Report by email from Mr Paterson on 21 October 2016 in respect of the incident on 6 October. Mr Paterson also emailed him a copy of the Claimant's account of the incident on 25 October 2016. This is at B235-238/277-280 and includes copies of the notices outside The Sanctuary entrance.

148. Mr Knowles also received a statement from Tracey Griffiths, a Clinical Nurse Specialist in Cardiology, who had witnessed part of the incident, on 29 November 2016 (which is at B242/281). In essence, Ms Griffiths had witnessed what she describes as a loud conversation between 2 security guards, a female chaplain and a member of staff who was not wearing visible ID but she recognised as working in the Cath Lab. She states that the chaplain appeared shocked by the interaction, saying that she had never experienced behaviour like this from a staff member in relation to lack of consideration for others and obstinacy. She further states that she directed the security guard, who did not know who the staff member was, to contact Mr Paterson the Ward Manager.

149. Mr Knowles interviewed the Claimant on two occasions. The first interview took place on 6 December 2016. In evidence he described this as a lengthy interview, lasting for over 2 hours, in which he found it impossible to obtain any information from her as to the incident. He described the interview as very challenging due to her combative behaviour and unwillingness to engage, that she was evasive seeking to deflect his questions or by refusing to answer them outright, she would not answer a direct question and did not allow him to ask questions that he believed to be relevant to the incident. He said that as a result there are no notes of the interview and he had to hold a further interview with her on 23 December 2016. We were

referred to notes of this interview at B253-257/328-332. During this interview, he made it clear that it would be time limited to one hour, but he found her manner similar to that encountered at the first interview. She was evasive and seemed reluctant to respond to straightforward questions with equally straightforward answers. However he believed he was able to piece together her version of events.

150. Whilst the meeting dealt with both the allegation regarding non-adherence to the uniform policy and allegations regarding The Sanctuary incident, the first allegation was ultimately not pursued by the Claimant's managers as there was apparent progress in her willingness to adhere to the policy.

151. We would comment that whilst we do recognise that participation in proceedings in the Employment Tribunal is to an extent outside of normal events and that the Claimant speaks English as a second language, although she is clearly very fluent, we very much found the Claimant to have conducted herself over the course of 15 or so days that we spent with her, in much the same manner as described by Mr Knowles, even when asked the most straightforward of questions.

152. Mr Knowles also interviewed Rev Barnett on 9 January 2017. A summary of his interview with her can be found at B259-260/334-335.

153. About 2 weeks after the incident on 6 October 2016, the Claimant telephoned Rev Barnett. During that call the Claimant asked Rev Barnett what information she had provided to the First Respondent about the incident. Rev Barnett read out the account of the incident that she had submitted because the Claimant said that she had not seen a copy. The Claimant explained that she did not know that she was a Chaplain and she denied her account of the incident. Rev Barnett said to her why would she think she had made it up? The Claimant told her that she needed to take back what she said. Rev Barnett asked if she wanted her to lie and said that she could only say what had happened.

154. Rev Barnett received a further telephone call from the Claimant approximately a week later and they spoke for almost an hour. During the conversation, the Claimant said she could lose her job because of what Rev Barnett had said. Rev Barnett responded that the Claimant would not lose her job because of her (the Rev's) actions. The Claimant stated that she had not been well on the day and that she had been informed that she could rest in The Sanctuary. Rev Barnett responded that The Sanctuary was not a restroom but a place for prayer and reflection. She told the Claimant that it did not need to come to this.

155. On 17 July 2017, the Claimant emailed Rev Barnett in which she raised 146 questions that she required her to answer. This email and Rev Barnett's response is at B308-316/426-434.

156. The Claimant's email is headed "N. Leeks Fact Finding Questions to Phyllis Barnett: re: N. Leeks- Phyllis Barnett 06 October 2016 Century Encounter subject of 1100 BST Disciplinary hearing: Thursday, 20 July 2017". It requires that the Rev Barnett provide the answers to the questions within

the next 48 hours and/or latest by 0900 BST Thursday 20 July 2017 Disciplinary Hearing. Her email was sent to not only Rev Barnett but a number of different people within the First Respondent Trust, including Mr MacLeod, Mr Knowles, Marie Lawrence, the Senior HR Adviser and the Employee Relations Team.

157. Rev Barnett was advised by the First Respondent's HR department not to respond and to refer any correspondence back to them.

158. In the resultant email exchange, the Rev Barnett explained that she simply did not have time to respond, the Claimant asked to provide a timeframe in which she could and then added that most of the questions only require a simple yes or no response.

159. We would comment that having considered the questions raised, the vast majority of them are onerous as well as irrelevant. Indeed, by and large they reflect the way in which the Claimant questioned Rev Barnett in cross examination in our proceedings.

160. The Claimant also contacted one of the Security Officers involved in the incident on 16 December 2016. A copy of his statement provided as part of the disciplinary investigation is at B243/291. From this it is apparent that the Claimant approached him when he was attending to an alarm call in the Cath Lab and attempted to discuss the incident in The Sanctuary. He said it was not appropriate because she was stopping him from carrying out his duties.

161. Mr Knowles completed his investigation report on 21 February 2017. This is at B261-267/336-342. We note in particular the Conclusion at B267/342:

"NLs (the Claimant) version of what occurred in The Sanctuary does not match with that offered by Phyllis Barnet (PB) nor by the Security staff involved. NL states that she was not asked to leave and that she was not questioned regarding her name and ID badge. However, there seems to be sufficient evidence that this is not the case. With reference to the failure to wear a KCH ID badge, this contravenes both the Dress Code & Uniform Policy and Procedure point 3.1: "All employees are supplied with a Trust identity badge that must be worn and visible [my italics] at alltime when on duty or acting in an official capacity representing the Trust" (Appendix 10, page 6) and the KCH Behavioural Standards "Wear an identification badge that is visible to the public" (appendix 11, page 10). Taking the evidence supplied by Phyllis Barnet, Robert Clarke and Tracey Griffiths, it could also be asserted that NLs conduct during The Sanctuary incident constitutes gross misconduct, specifically "bringing Kings into disrepute through behaviour incompatible with role or profession" (appendix 11, page 13).

Ultimately, there is reasonable evidence to suggest the following: that NL was aware of what Chaplain Barnett was doing and understood the reason for being asked to leave the Sanctuary at this time, that she refused to identify herself by name or role when asked to do so by the Security staff and removed her ID badge to further frustrate their attempts to identify her. Furthermore, that the incident took place in the Sanctuary in the presence of patient X, which was not only unprofessional, but also prevented Chaplain Barnett from delivering the support that patient X required. NL therefore placed her own needs over and above those of a vulnerable and distressed Trust patient"

162. Given his conclusions and the serious nature of the allegation, Mr Knowles recommended that the matter should be considered at a disciplinary hearing.

Disciplinary hearing

163. The disciplinary hearing was conducted by Mr John MacLeod, the Modern Matron for Cardiology. Mr MacLeod had undertaken training in equality and diversity matters as part of his mandatory training with the First Respondent, his last training taking place in or around 2017.

164. There were some difficulties in arranging a disciplinary hearing and it had to be rescheduled on a number of occasions. The first date of 3 April 2017 had to be rescheduled because the Claimant said that she had mislaid the disciplinary pack. The second date of 5 May 2017 was postponed because of the Claimant's ill-health. The third date was scheduled for 20 July 2017.

165. We were referred to the third disciplinary invite letter dated 5 July 2017 at B296-297/406/407. The letter set out the following:

    a. That the hearing would take place at 11 am on 20 July 2017;

    b. That the allegation under consideration would be:

        "On 6 October 2016, you were involved in an incident in The Sanctuary on the 1st Floor Cheyne Wing culminating in your removal by Trust security officers."

    c. That Mr MacLeod would be chairing the hearing and would be supported by Ms Lawrence, the Senior Human Resources Advisor;

    d. That the Claimant had the right of accompaniment, by a work colleague or a friend not acting in a legal capacity;

    e. That Mr Knowles would be in attendance to present the investigation report, a copy of which was enclosed with the letter, and that he did not intend to call witnesses;

    f. If the Claimant intended to call any witnesses she should inform Mr MacLeod as soon as possible or by 14 July 2017 at the latest stating the reason for their attendance;

    g. That the allegations may constitute gross misconduct and result in disciplinary action being taken against her up to and including summary dismissal;

    h. That the Claimant had the right to submit a written reply to the allegations prior to the hearing by 14 July 2017 at the latest and that if she did not attend the hearing, any statement she submitted would be relied upon;

    i. That if she failed to attend the meeting it may result in a decision being taken in her absence. If she was unable to attend she should contact Mr MacLeod as soon as possible to discuss the reasons for.

166. Mr MacLeod conducted the hearing and was supported by Ms Lawrence with Mr Knowles in attendance to present the management case. They

waited for approximately 10 to 15 minutes for the Claimant to attend before taking the decision to proceed in her absence. Whilst Mr MacLeod was disinclined to hold the hearing without the Claimant there, the incident which triggered the hearing had by that point occurred over 9 months previously and he wanted to ensure that the disciplinary process reached a conclusion without any further delay. He also had in mind that this was the third time that the disciplinary hearing had been rescheduled. With reluctance he made the decision to proceed in her absence.

167. Mr Knowles presented the management case and called Rev Barnett as a witness.

168. On consideration of the evidence presented at the hearing and the witness accounts provided as part of the investigation, Mr MacLeod concluded that the Claimant's actions on 6 October 2016 amounted to serious misconduct. He found that the witness accounts provided by Rev Barnett, Ms Griffiths and the Security Officer were consistent and credible in comparison with the Claimant's account which was misleading. He felt that the Claimant's behaviour fell well below the standards expected of her, particularly the expectation that she should treat everyone with respect and dignity.

169. In addition, Mr MacLeod also considered the Claimant's actions during the course of the investigation. He found that this amounted to gross misconduct. He found that her behaviour during the investigatory interview with Mr Knowles on 23 December 2016 was obstructive and abrupt. He found that it was evident that the Claimant regularly tried to deflect questions put to her rather than to cooperate with the investigation.

170. He also heard evidence that the Claimant sought to pressurise Rev Barnett into withdrawing her statement, that she relentlessly harassed Rev Barnett by bombarding her with demanding emails, including providing her with a list of 146 questions that she wished her to answer, which were mostly irrelevant. He found this behaviour grossly inappropriate.

171. Furthermore, he found that it was plain from the witness account of the incidents that the Claimant had sought to actively conceal her identity and attempt to avoid being reported to management.

172. He found that these actions constituted gross misconduct warranting summary dismissal.

173. Mr MacLeod wrote to the Claimant by letter dated 25 July 2017 setting out his decision that she was dismissed with immediate effect. This letter is at B317-321/435-439. The letter records that the Claimant's dismissal was with effect from 20 July 2017 being the date on which he notified her of his decision. This is clearly incorrect given that the Claimant was not present at the hearing on 20 July and was only notified of the outcome on receipt of this letter. The letter also advised the Claimant of her right of appeal within 7 days of receipt of the letter.

174. We were concerned that whilst the invite letter indicated that no witnesses would be called to the disciplinary hearing, in fact Rev Barnett gave

evidence. This matter was not raised by the Claimant in cross examination. The closest we got to it was in Tribunal questions to Mr MacLeod. He did not know why a decision was taken to call Rev Barnett, accepted that it would have been prudent to have told the Claimant that she was attending to give evidence, but was not able to recall whether the First Respondent did contact her or not, although he could not find anything in the bundle to say that they did. However, we acknowledge that this is not an unfair dismissal complaint where such an issue could be of significance.

Appeal

175. By email dated 2 August 2017, the Claimant appealed against her dismissal. This is at B322-329/440-447.

176. We were referred to the Management Response to the Appeal prepared by Mr MacLeod which is at B336-341/454-459.

177. The appeal hearing took place on 21 August 2017. It was conducted by Ms Tania Massey, the Head of Nursing for Cardiovascular Sciences supported by Mr Jason Port, Senior HR Advisor. The Claimant was accompanied by her husband. Mr MacLeod, attended to present the management response and was supported by Ms Lawrence.

178. By a letter dated 25 August 2017, Ms Massey wrote to the Claimant advising her of the outcome of her appeal, which in essence was unsuccessful. This letter is at B342-346/460-464.

179. Given that the Agreed List of Issues includes no complaint as to the conduct or outcome of the appeal process we did not believe it necessary to go into any further detail than this.

Other allegations

180. In her written statement, the Claimant alleges that in March, April, June and July 2016 and February, March, June and July 2017 she requested to work part-time on the grounds of the continuing afflictions with fatigue arising from her impairments. She further alleges that on each occasion she was rebuffed by Mr Paterson and Mr Cleary, who mocked her requests and said to her “Our Cath Lab work is very simple. If you cannot do our work, then you can’t do any other work anywhere else in the NHS”. We would note that in the Agreed List of Issues the Claimant alleges that only on 2 occasions was she mocked and these words used, in July 2017 by Mr Paterson, and in August 2017 by Mr Cleary. It therefore appears that her written evidence (taken from her particulars of claim) goes further than that set out in the Agreed List of Issues and this was not something that was put to the Respondents’ witnesses.

181. Mr Paterson denies the allegation attributed to him in July 2017.

182. The sequence of events relevant to this matter are as follows.

183. On 6 January 2017, Mr Paterson wrote to the Claimant (at B245-246/295-296. He explained that due to the current levels of staffing within the Department he was not able to grant her request to work part-time, although this would be reviewed in July. That letter also set out the adjustments that had been granted to her day off, a 30 minute reduction to her weekly work hours, allowing her to take the discretionary 15 minute daily afternoon break as a matter of course and as to her uniform. We note further that the letter expressly stated that it had been agreed that the Claimant should be able to wear undergarments under her uniform, provided they adhere to infection control and uniform policy. The letter specifically noted that the Claimant must however wear her uniform which currently she does not. The letter also notified the Claimant of her right of appeal against his refusal of her part-time working request. As far as we are aware, the Claimant did not appeal.

184. There were ongoing concerns about the Claimant's timekeeping. On 7 January 2017, Mr Paterson met with the Claimant to discuss his concerns about her failure to arrive at work on time meaning that she was not available at the handover and which was not acceptable due to its effect on the Department. He advised the Claimant that if her timekeeping remained a cause for concern, it could result in disciplinary action.

185. We were referred to his letter to the Claimant dated 7 February 2017 at B246P-Q/311-312 confirming their discussion. We note that the letter indicates that part of the Claimant's difficulties in arriving for work on time was stated to be transport issues and part of it to be the length of time that it took her to change in the morning due to her Fibromyalgia. We also note that there was a discussion about the Claimant's uniform, indicating that it was under weekly review until the Claimant was wearing the correct uniform under the First Respondent's policy. The letter makes it clear that any continued failure to comply could result in formal action under the disciplinary procedure.

186. In evidence, Mr Paterson stated that he and Mr Cleary met with the Claimant in July 2017 to review her request to work part-time. He denied that he mocked the Claimant's request to change her working patterns. He further denied saying the words she attributed to him and Mr Cleary. His evidence is that both he and Mr Cleary were frustrated by the Claimant's lack of engagement with anything that they had tried to do to support her, that they explained the reasons why they could not accommodate her request at that time. Further, his evidence is that Mr Cleary made it clear to the Claimant that she needed to attend work on time and carry out her duties and told her that wherever she went to work full-time she was going to have the same difficulties.

187. In evidence, Mr Cleary denied that he mocked the Claimant or used the words that she attributed to him in a meeting in August 2017. His evidence was that she had requested to transfer to Cardiac Outpatients. He informed her that it would be better for her to remain in the Cath Lab because there were fewer registered nurses in Outpatients and therefore less opportunity for supervision. In addition his evidence was that the Claimant had yet to

pass her clinical competences and so it was not possible to grant her request at that time.

188. On balance of probability we prefer the evidence of Mr Paterson and Mr Cleary and find that there was a discussion of her request and there was no mocking. We were concerned as to the disparity between her written evidence and the Agreed List of Issues, and that she attributed the same behaviour and words used to both Mr Paterson and Mr Cleary on different occasions. This affected the credibility of what she alleged.

189. The Claimant further alleges that in April and June 2016, and January and July 2017, Mr Paterson told her that she had deceived him into employing her because she could not work full-time. In evidence, Mr Paterson stated that in discussion with the Claimant about her request, he asked her to clarify why she was requesting to work part-time when she had informed him at interview only a few months before that she was willing and able to work full-time. His further evidence was that they also discussed the need for a full-time member of staff within the Cath Lab. He categorically denied telling the Claimant that she had deceived the Hospital into employing her.

190. On balance of probability, we do not find this happened as the Claimant alleges and prefer Mr Paterson's evidence. He did question why she requested to work part-time when only a few months before she said she was willing to work full-time.

191. The Claimant further alleges that in September and November 2016, Mr Paterson accused her of being dishonest about the effects of her disability. Doing the best we could from the evidence we heard, this appeared to relate to discussions between the Claimant and Mr Paterson about her uniform.

192. In evidence, Mr Paterson recalled having a discussion with the Claimant in which he queried whether she required so many layers of clothing under her uniform, as it appeared that she did not have the same amount of layers of clothing when she was wearing theatre scrubs. Further, he queried why, when the Claimant changed to go home to her normal clothes at the end of her shift, she did not wear multiple layers of clothes. However, he denied accusing the Claimant of being dishonest at any stage. We have in any event dealt with this in our findings as to the uniform issues set out above.

193. On balance of probability, we do not find this happened as the Claimant alleges, it was a question about why she had to wear two pairs of trousers under her uniform but only one pair under scrubs and none under her normal clothes.

194. The Claimant also alleges that on 1 March 2016, Mr Knowles informed her that she had committed an act of gross misconduct. In evidence, Mr Knowles could not recall this incident. In evidence, Mr Cleary referred to an incident which occurred when the Claimant first started work in the Cath Lab, in March 2016, in which an allegation was reported by the Practice Education Team that the Claimant was found to be asleep on duty during

her orientation around the different departments. His further evidence was that being asleep on duty is potential gross misconduct.

195. On balance of probability, we are unable to find that the Claimant's allegation is made out. Mr Knowles denies any knowledge and in any event Mr Cleary's evidence is more probably the matter that the Claimant is referring to albeit not as she alleges it happened.

196. There was a separate incident in early 2017 in which the Claimant was alleged to have been found asleep on duty. Mr Cleary was concerned about this issue and he spoke to the Claimant about it. She denied being asleep and said that she was just resting her eyes. He considered it a serious matter and so he requested that it be investigated further, although he does not know the outcome of the investigation.

197. The Claimant also alleges that on 13 December 2016, in March and April 2017, and each time she was due to take annual leave, as well as in June 2017 when she was due to attend medical appointments, Mr Paterson arranged for her to be "interrogated" for alleged misconduct issues. In evidence Mr Paterson denied these allegations.

198. The Claimant presented no evidence in support of these allegations and so it was simply not possible for us to make a finding that this occurred. We do not even know if the medical appointments were in relation to the Claimant's disabilities.

199. The Claimant further alleges that on 14 March 2017, Ms Lawrence breached her confidentiality by circulating her medical report to Mr Knowles, Mr Cleary and Mr Paterson, amongst others.

200. In evidence, Ms Lawrence explained her involvement at the time of this allegation. There were 2 disciplinary allegations against the Claimant, one relating to the incident in The Sanctuary on 6 October 2016 and the other relating to her sleeping on duty on 31 January 2017. The Claimant requested time away from work on 13 March 2017, so that she could prepare a statement as part of the disciplinary process relating to the second allegation. In support of her request, the Claimant emailed Ms Lawrence on 14 March 2017 enclosing a copy of her GP's letter dated 17 February 2015. Whilst we were referred to the email at B268/343, we were not provided with a copy of the GP's letter. This email stated that the letter was disclosed to Ms Lawrence in confidence, as follows:

"Please find being disclosed to you in confidence,attached GP letter of 17/02/15 that I referred to in the email that I sent to you at about 1555 GMT on Monday 13 March 2017. Please note that ALL other of my medical reports containing more detailed clinical information about ALL my disability conditions has ALL been disclosed to King's College Occupational Health Doctors/physicians/consultants and OH Nurses."

201. Ms Lawrence's further evidence is that she spoke to Mr Cleary about the issue of whether the First Respondent should consider postponing the Claimant's disciplinary hearing. They discussed the GP letter but because it dated back to 2015, they concluded that it was not relevant to the current circumstances and provided no basis on which to postpone the hearing.

202. Ms Lawrence emailed the Claimant on 14 March 2017, copying her email to Mr Paterson, Ms Gouldbourne and Mr Moule, who were persons all involved in the Claimant's management (at B269-270/344-345). She informed the Claimant that they were unable to accede to her request and she referred to the last OH report where it had been stated that her functional capacity is reasonable and there appeared to be no difficulties with job task completion. She also informed the Claimant that if she were seeking further reasonable adjustments to be made, then they would need to refer back to OH. Ms Lawrence also reminded the Claimant that they did not require a lengthy statement from her regarding the incident on 31 January 2017 but merely an account of the alleged incident and they did not see this to be an onerous task. Ms Lawrence also suggested that they would consider giving her time at work to complete her statement or alternatively she could dictate her statement to a trusted colleague/friend/trade union representative to write up on her behalf or she could attend the investigatory interview at which Mr Moule would ask her questions and she would have the opportunity to give her account of the alleged incident.

203. Ms Lawrence's further evidence is that she did not disclose the GP's letter to anyone and while she referred to the OH report in her email, this was a document which was already in the possession of the Claimant's managers and so she did not consider this to be any breach of confidentiality.

204. On balance of probability, we find that Ms Lawrence did not breach the Claimant's confidentiality. The Claimant provided no evidence to show that she did, either in respect of the GP's letter or the OH report. The email we were referred to had no attachment and was to selected individuals involved in the Claimant's management and referred to an OH report that was already within their possession.

205. The Claimant also alleges that Mr Knowles circulated photographs of her in which she was shown allegedly sleeping on duty. In her evidence she relates an event early in her employment, which we established from her later allegations occurred on 1 March 2016, in which she states that in the course of her duties she had collided and knocked her sides against a commode in the Sluice Room, began feeling unwell and in pain, and sat down in a visitors/nurse/HCA chair well away from any patient. She further alleges that after about 5 to 10 minutes Mr Knowles called her, told her that she had committed an act of gross misconduct by sleeping in a side cubicle and that "loads of pictures had been taken of (her) sleeping" and that he also had CCTV images of her "sleeping on a chair". In addition she alleges that later on Mr Knowles told her that he had circulated her "sleeping pictures" to managers within the First Respondent Trust.

206. In his evidence, Mr Knowles stated that he recalled that in March 2016 there was an allegation that the Claimant was asleep on duty, this matter was investigated by the Ward Manager, Mr Moule, and that he does not know the outcome of this investigation. He has no recollection of speaking to the Claimant specifically about this incident, although he accepted that he may have mentioned in subsequent conversations that falling asleep on duty was potentially an example of gross misconduct. However he denied

having any knowledge of this specific matter and he certainly did not circulate any photographs of the Claimant asleep as alleged.

207. The Claimant has provided no evidence in support of this allegation. On balance of probability we accept Mr Knowles' evidence.

208. The Claimant further alleges that in December 2016, March, April and June 2017, Mr Knowles did not allow her more time to deal with disciplinary allegations that had been made against her.

209. In his evidence, Mr Knowles strongly denied this allegation and stated that the Claimant was given ample opportunity to provide her response to the allegations against her, particularly at the interview on 23 December 2016. However she refused to engage with this opportunity (as we have indicated above). His further understanding is that the Claimant was offered every reasonable opportunity to present her response at a disciplinary hearing, but did not engage in that process either.

210. As we have already found, the Claimant had several months to prepare for the disciplinary hearing. It had originally been scheduled for 3 April, was postponed until 4 may and then postponed again to 20 July 2017. We further note that it does seem incongruous that the Claimant had ample time to prepare 146 questions for Rev Barnett to answer but insufficient time to prepare for her disciplinary hearing.

211. The Claimant had requested 3 weeks unpaid leave from 24 April to 12 May and 6 days annual leave as replacement for leave taken on 22 to 29 March in order to prepare for the disciplinary hearing which was then scheduled to take place on 4 May 2017. This request was not granted. In an email from Mr Cleary to the Claimant dated 25 April 2017 (at B281A-B/362-363), he set out the reasons why, relating to the exigencies of the service and that any preparation for a disciplinary hearing should be undertaken in her own time. We do not see this to be an unreasonable response and in any event the Claimant failed to establish any connection to any of her disabilities.

212. The Claimant further alleges that on 1 March 2016, Mr Paterson ignored her and failed to introduce and orientate her when she commenced her duties in the Cath Lab. This is set out at paragraph 42 of her witness statement. Mr Patterson stated that he was on annual leave that day as set out at paragraph 11 of his witness statement. The difficulty for the Claimant is that even on her own telling of this incident, Mr Paterson did orientate her in that he sent her to the Nurses Station at Sam Oram Ward to be told what to do. We were not sure why the Claimant believed that it was his role to orientate her in any event or indeed what this had to do with her disabilities.

213. The Claimant also alleges that on 1 March 2016, Mr Knowles failed to give the Claimant any sympathy when she had hurt herself. This is in respect of the alleged collision with the commode in the Sluice Room.

214. Mr Knowles' evidence is that he was not aware that the Claimant had hurt herself at the time but only became aware of it later on during interview with

her in October 2016. His further evidence was that he asked her for further information about the incident but this was not forthcoming.

215. On balance of probability, we accept Mr Knowles' evidence given our previous findings about this matter in respect of the photographs/CCTV stills. Mr Knowles' evidence does not suggest that he was unsympathetic on finding out about the incident in October 2016. In any event we struggled to see any connection to the Claimant's disabilities.

216. The Claimant also alleges that she was denied the opportunity to look after the First Respondent's stockpile of cardiac stents because of her disabilities.

217. These are stored in theatre labs which are purposefully kept cold to ensure that the radiography equipment does not overheat. Further, theatre labs are where x-rays take place and so staff are required to wear a heavy lead coat for protection from radiation.

218. Mr Paterson's evidence was that the reason why he asked the Claimant not to carry out this task was out of concern for her well-being. Firstly because of her difficulties in maintaining her body temperature. Secondly because she experienced fatigue and mobility issues. In addition he recalled an occasion on which the Claimant declined to go into the theatre labs because she was unable to put on the lead coat because of her back injury.

219. The Claimant further alleges that she was refused the opportunity to look after the cardiac stents because of her race. She points to Janet Bailey, another HCA in the Department, who is Black Caribbean as opposed to the Claimant who is Black British of African ethnicity, as being allowed to look after the cardiac stents. Mr Paterson's evidence was that this was absolutely untrue and that the only reason that Mrs Bailey performed the task was because she had no underlying medical condition that would put her at risk through doing so.

220. We have dealt with these allegations in our conclusions below.

221. The Claimant also alleges that she was denied cannulation training between November 2016 and July 2017; theoretical and practical competencies in the first six months of employment; and team training with a Band 5 nurse at any time in her employment because of her race.

222. Cannulation is the process through which a cannula (a thin tube) is placed into a vein in order to administer medication, drain fluid and so on.

223. In his evidence, Mr Paterson explained that this was not part of the HCA's role. It is a delicate procedure carried out by the nursing staff as it is an advanced skill for a nurse. Training was not offered to the Claimant during the course of employment for this reason and she made no request for it. He added that whilst the Claimant had suggested that a Ms Kobesinu was given cannulation training because she is not disabled and because she is younger than her, this was incorrect. Ms Kobesinu had not had that training at the material time.

224. In his evidence, Mr Patterson also explained that HCAs are required to complete theoretical and practical competencies in the first 6 months of their employment. The competencies include taking blood pressure, making beds and taking temperatures, as well as e-learning modules covering safeguarding, fire safety, infection control, confidentiality and mandatory modules. These are part of the Claimant's daily job and so very little extra time was required to complete them. The Claimant was given a substantial amount of time to complete the e-learning modules and competencies when she first joined the Department. However she took much longer than expected notwithstanding that the competencies were very simple and were things that she was doing every day. Mr Paterson further explained that one of the reasons why the First Respondent wanted her to continue working full-time was so that she could complete her competencies.

225. In his evidence, Mr Paterson further explained that whilst he was unsure what the Claimant meant by the term team training with the Band 5 nurse, she had a team leader who attempted to work with and support her. He added that the Claimant was not denied any training at any stage. In any event, the Claimant did not display the degree of competency that would have warranted putting her forward for any optional training.

226. The Claimant's witness statement deals with this at paragraphs 108-112 although much of what she states there was not put to the Respondents' witnesses.

227. On balance of probability, we accept Mr Paterson's evidence. In any event we are unable to see how these allegations were connected to the Claimant's disabilities.

228. The Claimant also alleges in the Agreed List of Issues, that Mr MacLeod denied her promotional opportunities in February 2017, such as trainee nurse positions. In evidence this is put somewhat differently. Her witness statement, taken from her particulars of claim, alleges that she was successful in interview for a Band 3 position within the First Respondent Trust but Mr Paterson denied her the opportunity to take up the position because of The Sanctuary incident.

229. In his evidence, Mr MacLeod denied denying the Claimant access to promotional opportunities as alleged. He had no influence over her promotional opportunities because these would have been managed by her direct line managers. Furthermore, his evidence was that he was never approached by the Claimant about any promotional opportunities. In addition, his evidence was that as an HCA it was incumbent on the Claimant to apply to a university for nurse training and as far as he was aware she never did. Finally, he stated that at the time he was unaware of any health condition that the Claimant suffered from.

230. In the absence of anything further from the Claimant with regard to this allegation against Mr MacLeod, we accepted his evidence.

231. The additional allegations from her witness statement were never put to Mr Paterson and so we make no finding on them.

232. The Claimant also alleges, in the Agreed List of Issues, that the Respondents failed to respond to reference requests from prospective employers in February, May, June and July 2017.

233. In her written evidence, taken from her particulars of claim, she stated that in June and July 2017, Mr Cleary made insinuating remarks about her history of whistleblowing with another NHS Trust and said that he hoped that all the job offers that she had received in February and May 2017 would fall through on references. Her written evidence also refers to several occasions after her dismissal on which she alleges that the Respondents failed to respond to reference requests from prospective employers.

234. Her statement goes on to refer to matters which arose in August 2017 which postdate her dismissal and do not form part of the Agreed List of Issues. However, these do arise in her second and third claims and we will deal with separately below.

235. But with regard to this allegation the Claimant has simply not provided sufficient particulars.

236. In any event, we could not find any evidence beyond assertion that any reference requests were not dealt with by the First Respondent or any of the other Respondents.

237. We could only find two applications for employment during the Claimant's employment with the First Respondent. There is a Request Sterile Services/Endoscopy Decontamination Assistant application dated 26 May 2017 at B282/376, the reference for which was provided by Capita on behalf of the First Respondent at B288/391 on 5 June 2017. The second is a Request Rehabilitation Assistant application dated 9 June 2017 at B286C/383, the reference for which was provided on 11 July 2017 at B286d/384 dated 11 July 2017 after amendment by the First Respondent's HR team.

238. The Claimant also alleges that she was treated unfavourably by the Respondents in June 2017 by being "interrogated" for alleged misconduct when she attended a medical.

239. We did not know what the Claimant was referring to as attending a medical appointment and interrogation in June 2017. Mr Harris submits that the Respondents' belief is that this is about the Claimant's sick notes and Mr Paterson's request to see the original sick notes. This arises in the email exchange at B297A&B/408-409.

240. The Claimant further alleges that during the course of the disciplinary investigation, Mr Knowles referred to her as "a headstrong, obstinate woman".

241. The Claimant never provided any context as to how and when this was said. Mr Knowles denied saying such a thing. Mr Knowles conducted the disciplinary investigation during which it is clear that the Claimant was obstructive during interview and failed to engage in the process. We have made our findings as to what happened at the two interviews. Mr Knowles accepted in evidence that in that context he may well have described her as being difficult and uncooperative. Indeed, the Claimant came across to us in this manner at times during the hearing. However, taking into account the Claimant's general credibility, we preferred the evidence of Mr Knowles.

242. For the purposes of her complaint of whistleblowing, the Claimant relies on two matters. Firstly, that she made a verbal disclosure of information to Mr Paterson that members of staff appeared to be eating patients' food. The Claimant says that she made these disclosures between October 2016 and July 2017 although her witness statement at paragraph 116 indicates that she raised an issue about staff eating patients' sandwiches shortly after commencing duties in the Cath Lab, so this would be around March 2016. Secondly, that she made a verbal disclosure to Ms Gouldbourne and/or to Mr Paterson, that staff members were leaving bloody bandages on patients' food trays. Her witness statement at paragraph 118 indicates that she raised this matter in early August 2016.

243. There were two fridges for storing food within the Department, one for patients and one for staff. The Claimant placed a notice on one of these fridges located in the staff room asking staff members to stop using milk that was meant for the patients. She indicated on the note that it had been issued by department management, including naming Mr Paterson. Mr Paterson had not prepared or approved this note, he removed it and told her that whilst he did not have an issue with her putting a note on the fridge asking others not to use the milk as it was for patients, she should not use his name.

244. Mr Paterson accepted in evidence that the Claimant had mentioned to him that staff were eating the patients' sandwiches.

245. Mr Paterson accepted in evidence that the Claimant did approach him and tell him that on a couple of occasions staff members had left bloody bandages on patients' food trays. This was of concern to him because it is clearly an unhygienic practice, he took the Claimant's concerns seriously and he spoke to Department staff asking them not to do this. He fed this back to the Department staff at the daily staff meeting at 8 am and reminded them not to carry out this practice at the staff meeting around a week later. He later spoke to the Claimant about this as she claimed that he had not spoken to staff about it. Mr Paterson's position was that the Claimant was often late and missed the daily staff meeting and he told her that if she arrived at work on time for the handover she would have known that he had already spoken to the staff about this issue.

246. The Claimant also makes a specific complaint in respect of her allegation that ln June/July 2017 Mr Cleary made insulting remarks about her history of whistleblowing in another NHS Trust and stated that he hoped that the Claimant's job offers would fall through on references.

247. On balance of probability, we find that this did not happen. Given our concerns generally about the Claimant's credibility and the lack of evidence we do not accept that this was said by Mr Cleary.

248. The Claimant also alleges that she was erroneously accused by Mr Paterson of taking unauthorised leave. She refers to this at paragraphs 118-119 of her witness statement and puts the date as being as early as August 2016. However we heard no further evidence on this matter and so the allegation is simply not made out.

Post-termination victimisation

249. The Claimant has raised issues of post-termination victimisation in her second and third claims which are incorporated within her witness statement at paragraphs 128-138 and 139-150 respectively.

250. The second claim raises matters that are clearly without prejudice as they relate to settlement discussions as to the provision of an agreed reference as well as to ACAS Early Conciliation.

251. However, that claim specifically relates to a conditional offer of employment satisfactory to pre-employment checks, including employment references for the position of Band 2 Medical Equipment Library Technician at Cambridge Universities Hospitals NHS Foundation Trust.

252. The Claimant alleges that whilst she was awaiting her start date, she received an email letter from that Trust dated 5 December 2017 notifying her that the offer had been withdrawn on the grounds of an unsatisfactory employment reference from the First Respondent. She alleges that it was negative, sketchy and not a true factual reference, but was malicious, victimisation, that caused her stigma damage and has led to her being blacklisted/barred from applying for jobs with that Trust. She specifically alleges that stating that her reason for leaving was a conduct dismissal was insufficient, was an open ended statement, as there is no such thing as generic misconduct. She asserts that it was maliciously worded this way to stoke fear into prospective employers and that it was victimisation because of her disabilities, age, race, religion or belief and/or on account of her history of being an NHS whistle-blower.

253. The third claim relates to what is described as an unconditional offer of employment as Bank Housekeeping Assistant at Brighton & Sussex University Hospitals NHS Trust but subject to satisfactory pre-employment checks, including an employment reference. This would appear then to be a conditional offer of employment.

254. The Claimant alleges that this was withdrawn by that Trust in an email dated 29 November 2017 as a result of a reference from the First Respondent. She asserts that the reference was sketchy, not a true factual reference but was malicious, victimisation, that caused her stigma damage and has led to her being blacklisted/barred from applying for other roles with that Trust. She specifically alleges that stating the reason for her leaving

her employment with the First Respondent as "dismissal-conduct" was "grossly inadequate, left more questions than answers and was just two words joined together with a hyphen… in addition to my full names, DOB and national insurance number". She believes that the reference was victimisation because of her disabilities, age, race, religion or belief and/or on account of her history of being a whistle-blower.

255. We heard evidence from Emma Wilson, who is employed as a Recruitment and HR Administration Manager for Capita HR Solutions. She was to a large extent providing evidence in place of the person who completed references for the Claimant in respect of these two positions. She explained that it had not been possible to make contact with that person who was made redundant in October 2018.

256. We also heard evidence from Ms Lawrence.

257. Both witnesses explained that the First Respondent contracts out various HR functions to Capita including the provision of reference requests. Reference requests are received via email and are responded to via email. Capita have access to the First Respondent's HR/Payroll system from which they take information in order to populate a reference template. However, this does not provide them with the detailed reason for leaving. The "reason for leaving" options available included: dismissal-capability; dismissal-conduct; dismissal-some other substantial reason; end of a fixed term contract; etc. Capita have no access to any other background information such as staff member files in relation to disciplinaries, warnings, performance ratings or reviews. They therefore do not have access to any previous concerns raised by staff members.

258. We had no reason to doubt their evidence in this regard.

259. Cambridge NHS Trust wrote to the First Respondent on 21 September 2017 requesting a reference in respect of the Claimant. This is at B351/469 and B381/500. The letter asked for the First Respondent's opinion regarding the Claimant's suitability for the post by completing the attached reference request form which was also available for completion online.

260. The First Respondent's Head of Nursing Cardiovascular replied by email dated 21 September 2017 advising that the Trust's policy was that reference requests are submitted via their recruitment and HR partner, Capita, and provided their contact details. A reminder email was sent on 25 September 2017 at B391/510.

261. The handwritten completed request form is at B352-358/471-476. It is signed by a person employed by Capita HRSS and dated 27 September 2017. The completed parts of the reference are as follows: reason for leaving is given as "Dismissal-Conduct"; dates of employment are given as February 2016 to July 2017; dates of absence are recorded. All of the boxes relating to more specific information about suitability are left uncompleted. The completed request form was sent with a pro forma letter which is at B359/477 which states:

"Please note; HR can only provide factual reference is confirming employment. Should you need a competency-based reference, please contact the applicant asking them who their line manager was at the time of their employment and redirect as appropriate."

262. Brighton & Sussex Trust wrote to the First Respondent by email dated 20 September 2017 seeking a reference for the Claimant in respect of the post of Housekeeping Assistant/Food Service Assistant by way of use of an attached form or by completion online (B373&374/492&493).

263. The First Respondent's Head of Nursing Cardiovascular responded by email dated 20 September 2017 at B377/497. This advised that the Trust policy is that reference requests are submitted via their recruitment and HR partner, Capita, and provided an email address for contact.

264. The handwritten completed request form is at B 360-363/478-481. It is signed by the same person employed by Capita HRSS and also dated 27 September 2017. The completed parts of the reference are as follows: employment dates February 2016 to July 2017; job title and grade; reason for leaving "Dismissal-Conduct"; number of days and episodes of sickness over the past 2 years; exact dates of absences; details of DBS check. All of the boxes relating to more specific information about suitability are left uncompleted. It is also sent with the same pro forma letter at B364/482 (as referred to above).

265. The Claimant suggested in evidence that whilst it might have been the case that the First Respondent provided references through Capita as it alleged, she believed that personal references were also being provided about her. However, there was nothing to support this assertion and indeed it did appear that she was confusing this with a reference in relation to an internal application for the post of Endoscopic Technician (at R1454-457/573-576) and other applications that we have referred to above.

266. It appeared to be the Claimant's case that her complaint was that by using the word conduct, the First Respondent was providing a misleading reference to prospective employers and should have gone into more detail. Whilst Mr Harris put to her that surely going into more detail would have made matters worse, the Claimant asserted that it was wrong to simply use the word conduct because that could relate to dishonesty, theft, taking drugs, alcohol, sex offences, abusing the elderly. So in her mind it was much worse. Mr Harris then put to the Claimant so she wanted the First Respondent to say that she was argumentative and rude to a reverend and refused to leave The Sanctuary. In essence the Claimant responded yes and added that conduct is only dismissal if it amounts to gross misconduct. Her rationale for this was that if it was just misconduct then she should simply have been given a warning. I asked what she was suggesting the First Respondent should have put on the reference and her answer was that she was meditating in a multifaith sanctuary and refused to leave for a chaplain. She believed that this would then allow the recipient to use their discretion. I put it to the Claimant that did she accept that the more information is provided about her dismissal the less likely would have been she was offered a job. Her answer was no it was open to their discretion.

Essential relevant law

267. Section 13 Equality Act 2010:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."*

268. Section 15 Equality Act 2010:

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

269. Sections 20 & 21 Equality Act 2010:

> *"Section 20 –*
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
> *(2) The duty comprises the following three requirements.*
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"*

> *"Section 21 –*
> *1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…"*

270. Section 26 Equality Act 2010:

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

271. Section 27 Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act…"*

Conclusions

Time Limits

272. Section 123 governs time limits under the Equality Act 2010. It states as follows:

> *(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable…*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

273. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

274. The factors to take into account (as modified) are these:

    a. the length of, and reasons for, the worker's delay;
    b. the extent to which the strength of the evidence of either party might be affected by the delay;
    c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
    d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
    e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

275. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

276. Alternatively, An act of discrimination which 'extends over a period' shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

277. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96,

the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a "continuing discriminatory state of affairs".

278. On the face of it when considering the dates of each of the three claim forms and the effect of the Early Conciliation period, anything that occurred before 24 May 2017 is out of time.

279. The Claimant did not put forward any evidence on which we could exercise our discretion to extend the time limits.

280. There are a number of allegations that the Claimant makes which she states did take place on or after 24 May 2017, some of which might be construed to be discrete acts or omissions and some of them forming a continuing course of conduct extending over a period of time. However, we were not provided with any specific evidence of a continuing course of conduct extending over a period of time and the Respondents denied that this was the case. We have therefore decided to consider this issue only if the need arises.

The burden of proof

281. We have followed the guidance given as to the burden of proof by the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258.

282. The Employment Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

283. Madarassy also held that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

284. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

285. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and

then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Disability discrimination

Harassment

286. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

287. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

288. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

> *"In deciding whether conduct had that effect, each of the following must be taken into account:*
>
> *a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.*
>
> *b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.*
>
> *c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."*

289. The paragraph references are to paragraphs within the Agreed List of Issues.

290. Dealing with paragraph 4 and the sub-paragraphs which set out the alleged incidents of unwanted conduct:

    a. We are not sure if this is the correct date or not, but clearly Mr Paterson did inform the Claimant that he would commence disciplinary

proceedings against her, as we have dealt with in our findings at paragraphs 123-124 above in the context of the uniform issue. But taking into account the parameters of the legislation and the case law, this is not harassment;

b. We have dealt with this at paragraphs 180-188 of our findings above. We do not find this happened as the Claimant alleges and prefer the evidence of Mr Paterson and Mr Cleary. There was discussion of her request and there was no mocking;

c. We have dealt with this at paragraphs 189-190 of our findings above. We do not find this happened as the Claimant alleges and prefer Mr Paterson's evidence. He did question why she requested to work part-time when only a few months before she said she was willing to work full time. That question in any event does not relate to disability and does not amount to harassment;

d. We have dealt with this at paragraphs 191-193 of our findings above. We do not find this happened as the Claimant alleges, it was a question about why she had to wear two pairs of trousers under her uniform but only one pair under scrubs and none under her normal clothes. There is nothing unreasonable in asking for such an explanation in any event and it does not amount to harassment;

e. We have dealt with this at paragraphs 194-195 of our findings above. Mr Knowles could not recall this event although Mr Cleary refers to an incident when the Claimant first started working in the Cath Lab, which would have been March 2016. But in any event telling someone that falling asleep on duty is gross misconduct is not unreasonable particularly given the nature of the work and does not amount to harassment;

f. We have dealt with this extensively at paragraphs 112-126 of our findings above. There was no refusal of the Claimant's request to modify her uniform, in fact the exact opposite. Substantial efforts were taken to accommodate her. We could not conclude that the period was from June 2016 to July 2017 but it is not unreasonable in the circumstances to raise the possibility of disciplinary action and does not amount to harassment;

g. The Claimant presented no evidence in support of this allegation. The Respondent's evidence indicates the opposite – at B245/296 and Mr Paterson's witness statement and paragraphs 22-23;

h. We have dealt with this at paragraphs 194-195 of our findings above. There was an allegation that the Claimant was sleeping on duty and Mr Cleary requested an investigation. There is nothing unreasonable about this and it does not amount to harassment;

i. We have dealt with this at paragraphs 197-198 of our findings above. No evidence was provided by the Claimant on which we could make a finding that this allegation occurred and in any event Mr Paterson

denied it. We did not even know if the medical appointment was connected to disability;

j. We have dealt with this at paragraphs 199-204 of our findings above. Ms Lawrence did not breach the Claimant's confidentiality and the Claimant provided no evidence to show that she did. The email we were referred to had no attachment and was to selected individuals involved in the Claimant's management;

k. We have dealt with this at paragraphs 205-207 of our findings above. The Claimant has provided no evidence that Mr Knowles circulated photographs of her allegedly sleeping on duty. There is nothing to indicate beyond assertion that this happened;

l. We have dealt with this at paragraphs 208-211 of our findings above. We do not accept this happened as alleged. The disciplinary hearing was postponed twice and then on the third occasion the Claimant did not attend. As we have said she had ample time to prepare 142 questions for Rev Barnett but not to prepare for her disciplinary hearing. It was not unreasonable to refuse her request for unpaid leave as set out in the email at B281A-B/362-363 and in any event the request was not connected to any disability;

m. We have dealt with this at paragraph 212 of our findings above. We do not accept this happened. Mr Paterson says he was on annual leave that day. Even assuming the allegation is made out it has no connection to disability. Further, even on her own telling of the allegation, Mr Paterson referred her to the nurses at Sam Oram Ward and so did orientate her. We are not sure why the Claimant believed it was Mr Paterson's role to orientate her in any event;

n. We have dealt with this at paragraphs 213-215 of our findings above. We do not accept this happened. Mr Knowles was not aware that the Claimant had hurt herself at the time but only became aware in October 2016. There is no evidence that he was unsympathetic. Further, this allegation is not related to the Claimant's disabilities.

291. Turning to paragraphs 5 and 6, was the Claimant subjected to unwanted conduct for reason related to disability and if so did that conduct have the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? We have in effect answered this in response to paragraph 4 and the answer is no.

292. We therefore find that the complaint of harassment related to disability is unfounded and is dismissed.

Direct disability discrimination

293. Under section 13 of the Equality Act 2010, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability,

by reference to an actual or hypothetical comparator in the same or similar circumstances.

294. The Claimant sets out allegations of detriments/treatment she was subjected to in paragraph 7. Dealing with the sub-paragraphs in turn:

a. We have already dealt with this under paragraph 290 e above.

b. We have already dealt with this under paragraph 290 g above.

c. We have already dealt with this under paragraph 290 h above.

d. We have already dealt with this under paragraph 290 i above.

e. We have already dealt with this under paragraph 290 j above.

f. We have already dealt with this under paragraph 290 m above.

g. We have already dealt with this under para 290 n above.

h. We dealt with this allegation in our findings at paragraphs 180-188 above. We accept Mr Paterson's evidence as to why the Claimant's flexible working request was denied and that this had nothing to do with her disability.

i. We dealt with this allegation in our findings at paragraphs 216-219 above. We accept Mr Paterson's evidence as to why the Claimant was not given the opportunity to look after the stock-pile levels of cardiac stents, although the Claimant never identified the date on which this occurred. Whilst Mr Paterson took into account matters relating to the Claimant's disabilities this did not amount to less favourable treatment. He was acting in her best interests.

j. We dealt with these allegations in our findings at paragraphs 221-227 above. We accept Mr Paterson's evidence that an HCA was not required or allowed to undertake cannulation work and so there was no requirement to undertake training. Whilst Mr Paterson referred to the comparison that the Claimant made to Ms Kobesinu, this was not part of the Agreed List of Issues, and in any event we accepted his evidence that she had not received cannulation training at that time. We also accept Mr Paterson's evidence as to theoretical and practical competencies and team training with a Band 5 nurse. Moreover, we were unable to see how these allegations even if made out had anything to do with the Claimant's disabilities.

k. We dealt with this allegation in our findings at paragraphs 228 to 231 above. As indicated we accept Mr MacLeod's evidence. The further allegations that the Claimant raised in her witness statement were never put to Mr Paterson and so we make no finding on them.

l. We have dealt with this allegation in our findings at paragraphs 232 to 239 above. This relates to the period when she was still employed.

As we have indicated above, her evidence was less than clear on this matter and changed between the Agreed List of Issues and her witness statement and the Claimant has provided insufficient particulars. We could only find two applications for employment during the Claimant's employment with the First Respondent as we have indicated and references were provided.

295. Turning then to paragraph 8, if the Claimant was subjected to the treatment set out in paragraph 7, was the Claimant, because of her disability, treated less favourably than others would or would be treated? The Claimant relies on the actual comparator named in the Agreed List of Issues in respect of a., b and h. and on a hypothetical comparator, that is an employee who was in a similar position to the Claimant who is not disabled, in respect of the other sub-paragraphs.

296. The answer to this is no. We heard nothing about the actual comparator in relation to a. and in regards to b. and h. she was not a true comparator.

297. But in any event there is no evidence to support that any other of these things were because of disability.

Failure to make reasonable adjustments

298. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

299. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

300. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

301. The Claimant relies on two PCPs which are set out in paragraph 10 to 19 of the Agreed List of Issues.

302. Dealing with PCP1 at paragraph 10 which is said to be not allowing modifications to uniform by disabled employees. More properly, this should be simply not allowing modifications to the uniform.

303. In terms of knowledge, the First Respondent knew that the Claimant suffered from Fibromyalgia which caused temperature sensitivity and that she suffered discomfort without modifications to her uniform, but only to the extent that the Claimant notified the First Respondent. The First Respondent did not have actual knowledge beyond that and it was not reasonable to have expected the First Respondent to have known any more than that particularly given the muddled message she was giving.

304. There was no evidence that such a PCP was applied, if at all, to anyone other than the Claimant.

305. In any event such a PCP was never applied to the Claimant. She was allowed to find larger trousers and to wear scrubs in the interim and layers under her scrubs/uniform.

306. The issue was that the Claimant gave the First Respondent muddled information about what was wrong with her uniform. She said initially that the trousers were too long and the tops were fine. Later, she said it was to do with needing to wear multiple layers under her uniform, making them too tight, and then it was the tops as well as the trousers. In addition, the First Respondent was confused because the Claimant wore more layers under the HCA uniform than under the scrubs and no layers under her normal clothes.

307. Given our above conclusions, there is no need to consider paragraphs 11-14 of the Agreed List of Issues. But for the sake of completeness, we accept that the Claimant was placed at a substantial disadvantage as compared with non-disabled persons in that she was suffering from discomfort and the adjustment sought of loose-fitting tops and trousers accommodating additional layers underneath was reasonable. However, we do not accept that the First Respondent failed to make that adjustment. In fact the First Respondent went out of its way to help her to the extent that it had knowledge of what she required and why.

308. Turning then to paragraph 15 of the Agreed List of Issues and PCP2, did the First Respondent apply a PCP of requiring employees to respond to disciplinary allegations within a fixed period of time?

309. The Claimant did not raise this matter at the time of the events in question with the First Respondent or identify what impairment placed her at the substantial disadvantage. During the hearing, she stated that she relied upon Chronic Fatigue. Whilst the First Respondent accepted that one of the symptoms of Fibromyalgia was fatigue, it did not accept this as a separate impairment. We were not convinced that in the absence of actual knowledge it was reasonable to impute this knowledge to the Claimant, particularly as she did not advance it as a reason for requiring additional time at the time of the events in question.

310. The closest to this PCP is at the second paragraph of 5.3 of the First Respondent's Disciplinary Policy, Procedure and Conduct Standards at BA112/691. This sets out the formal procedure for notice of disciplinary

hearings usually on 7-10 days' notice. It allows for flexibility and for extension of time in exceptional circumstances.

311. As we have indicated, the Claimant has not provided any evidence of substantial disadvantage at the time although during the hearing she stated that it is to do with chronic fatigue.

312. We therefore find that this complaint fails on both knowledge of the impairment and as to substantial disadvantage.

313. In any event, in response to the Claimant's requests for further time to prepare for the disciplinary hearing on 24 April 2017, the hearing at that time set for 5 May 2017, had been rescheduled from 3 April 2017 and did not go ahead until 20 July 2017. The reason for the delay was due to the Claimant's non-attendance at the previous hearings. So the First Respondent did in effect make a significant adjustment to the normal disciplinary timetable.

Discrimination arising from disability

314. A complaint of discrimination arising from a disability is essentially where a Claimant is alleging that she has been treated unfavourably as a result of something arising from her disability. It is a defence to such a complaint if the Respondent can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

315. At paragraph 20 of the Agreed List of Issues, we are required to address whether the Respondents knew or could they reasonably have been expected to know that the Claimant had the disability or disabilities?

316. Whilst the information provided by the Claimant at the time was muddled or unclear, we accept that Mr Paterson, Mr Knowles and Mr Cleary, knew that the Claimant suffered from proneness to cold linked to her Fibromyalgia at the relevant times.

Modification to uniform

317. At paragraph 21, the first element of the Claimant's complaint is that she was treated unfavourably by those Respondents' refusal to modify her uniform.

318. As a matter of fact, we have found that there was no refusal by the Respondents to modify the Claimant's uniform. The Respondents initially allowed the Claimant to wear scrubs as a temporary solution until a correct fitting uniform was found and withdrew this concession because it was very unclear why the Claimant wanted a modified uniform and what she needed to be modified given her lack of information and her contradictory answers and behaviour and her prevarication in finding a solution. They also allowed her to wear additional layers of clothing under her scrubs and uniform, as long as her arms were bare below the elbows and she appeared tidily dressed.

319. At paragraph 22 we accept that the something arising was her propensity to be cold.

320. At paragraph 23 we have considered the Respondents' submissions at paragraph 40. To the extent that wearing a uniform can be said to be unfavourable treatment, the wearing of a uniform in the circumstances of a Hospital is clearly justified. The legitimate aim being to enable members of the public and other staff to identify employees as performing particular roles. It was clear in evidence that wearing scrubs suggests that the individual is working in an operating theatre and so not available for tasks that are needed to be undertaken by an HCA not working in theatre. We were satisfied that this was both a legitimate aim and insisting on the Claimant wearing the uniform provided was a proportionate means of achieving that aim. Further we took into account the importance for hygienic reasons of not wearing garments with sleeves below the elbows.

Instigation of investigation

321. The second element of this complaint is that the Claimant alleges that she was treated unfavourably by the Respondents' decision on 1 February to instigate an investigation into her sleeping on duty, at paragraph 24 of the Agreed List of Issues.

322. We agreed with the Respondents' submissions at paragraph 41. Simply investigating an allegation of sleeping on duty cannot be said to be unfavourable treatment. The investigation is to establish the facts of what has occurred. That might lead to a finding that the individual was not sleeping on duty. The investigation of the facts is not unfavourable treatment. We have taken into account the guidance given as to unfavourable treatment in Williams and Shamoon in this regard.

323. Whilst we accept that the something arising from the Claimant's disability is fatigue it was never diagnosed as chronic because it was up and down.

324. The Respondents submit that to the extent necessary, the investigation can be justified. The legitimate aim is to ensure that staff working in a healthcare environment do not sleep when they should be working. Investigating allegations of sleeping on duty is a proportionate means of achieving such an aim. We accept both the legitimate aim and the proportionate means of achieving that aim.

Interrogation for misconduct

325. This complaint is set out at paragraph 27 of the Agreed List of Issues. Was the Claimant treated unfavourably by the Respondents in June 2017 by being interrogated for alleged misconduct when attending a medical appointment?

326. We do not know what the Claimant refers to as to attending a medical appointment and interrogation in June 2017. The Respondents believe that this is about the Claimant's sick notes and Mr Paterson's request to see the

originals. There is an exchange of emails at B297A&B/408-409, B297C/410 and B297D/411 dealing with this matter.

327. If this is what the Claimant refers to, we see this as a reasonable request and from our observation of the Claimant we believe it to be more likely than not that she has misconstrued the request to be one of interrogation for alleged misconduct.

328. With regards to whether this treatment is because of something arising from her disability, the Claimant relies on the need to attend medical appointments as being the "something" at paragraph 28. We have not been provided with any evidence of the nature of the medical appointment and so we do not know if the medical appointment related to her disability.
329. The only tangential link to a medical appointment is at B297C/410 and B297D/411 where Mr Paterson refers to an attempt to have sight of her original medical certificates. He wants to see the originals by 30 June 2017 and the Claimant cannot get duplicate copies until she sees her GP and the earliest appointment she can get is 1 July 2017. However, if the Claimant had the originals it does not make sense why she would need to obtain duplicate copies. Further, she told Mr Paterson that she did not have the originals anymore and so that begs the question what has she done with them? The medical certificates dated 1 July 2017 are duplicates issued by the GP for earlier periods, at B297E-F/412-413. They are not signed and, presumably, they have just been printed off by the GP from the system.

330. The difficulty with this complaint is that the Claimant has not made out what exactly she is referring to. Whilst Mr Paterson, at most, was tenacious in his insistence about the need to see the originals of the medical certificates, that is not interrogation and it appears a reasonable request.

331. With regard to the defence at paragraph 29 of the Agreed List of Issues, we accept the Respondents' submissions at paragraph 46. That is, the legitimate aim being to ensure that the reason for an absence is known, so as to ensure that an appropriate return to work can be accommodated but also to ensure that employees are not absent from work without good reason. We believe this must also extend to the need to determine the legitimacy of the absence. The proportionate means of achieving this is by requesting a medical certificate, or more particularly here, the original of a medical certificate.

<u>Religion or belief discrimination</u>

332. The Claimant also raises complaints of religion or belief discrimination, her religion/belief being the customary and traditional spiritual beliefs of the Ibo people (at paragraph 30 of the Agreed List of Issues). The Claimant provided an email to the Employment Tribunal dated 15 March 2018 which sets out a description of Ibo traditional customary spiritual beliefs. This is at B204/792. We are unaware of the reference source of the information but the Respondents raised no issue about this and we have no reason to doubt its veracity.

Harassment relating to religion or belief

333. At paragraph 31 of the Agreed List of Issues, the Claimant sets out the unwanted conduct that she relies upon as amounting to harassment. We deal with each sub-paragraph of this below:

    a. The allegation is that on 6 October 2016, the Claimant was told by Rev Barnett "in very stern terms and authoritative bullying tones that staff are not allowed to meditate in the Sanctuary". We find that Rev Barnett did not speak to the Claimant in very stern and authoritative bullying tones and did not say staff are not allowed to meditate in The Sanctuary. She simply asked the Claimant to come back later when she had finished providing pastoral care to a distressed outpatient who had previously been an inpatient;

    b. The allegation is that Rev Barnett denied the Claimant the right to meditate and use The Sanctuary for spiritual use on that day. We find that Rev Barnett did not deny the Claimant the right to meditate and use The Sanctuary for spiritual use on that day. By her own admission the Claimant was on a break and having a rest. Frankly the evidence indicates that more likely than not she was sleeping. But irrespective of what the Claimant was using The Sanctuary for, and it was not clear to the Rev what the Claimant was doing there, Rev Barnett just asked her to come back later and ultimately called Security when the Claimant refused to;

    c. The allegation is that in or around 20 July 2017, Rev Barnett failed to give an honest account of the incident on 6 October 2016. As we have indicated in our findings, we do not accept that Rev Barnett failed to give an honest account of the incident. We found her to be a measured and reliable witness.

334. As a result the complaint must fail. But for the sake of completeness, we will deal with the remaining issues.

335. Paragraph 32 of the Agreed List of Issues asks us to determine whether the Claimant was subjected to the unwanted conduct for a reason related to religion or belief. We find that the answer is no. The Rev did not know what the Claimant's religion or beliefs were at the time. The Sanctuary was available to people of any belief or none. Indeed, Rev Barnett offered the Claimant the use of the Chapel and she declined on the basis that it was not comfortable.

336. Paragraph 33 of the Agreed List of Issues asks whether the conduct had the purpose or effect of either violating the Claimant's dignity or creating a humiliating, hostile, degrading, humiliating or offensive environment for her. We find the answer is no. What is complained of was not done with that purpose. Further, it was not reasonable in all the circumstances for the Claimant to believe that it had that effect. There was nothing in the request or the way it was delivered or the exchange or its implications that could be reasonably interpreted as having that effect. The Rev was acting in her capacity as a Chaplain offering pastoral support to a distressed patient and

she asked the Claimant to temporarily leave The Sanctuary for her to do so in private and the Claimant ultimately unreasonably refused to do so.

Direct religion/belief discrimination

337. The Claimant alleges that she was dismissed because of her religion/belief (at paragraph 34 of the Agreed List of Issues) in that she was treated less favourably than a hypothetical comparator (as set out at paragraph 35).

338. We find that the Claimant was dismissed because of her conduct. Her behaviour fell below the standards to be expected of the First Respondent's employees. The First Respondent reasonably found this to be gross misconduct.

339. There was no evidence presented and nothing to suggest that anyone of any religion or belief or none would have been treated any differently in the same circumstances to the Claimant.

340. The complaint therefore fails.

Age Discrimination

341. Unlike all other protected characteristics, there is a potential defence to direct age discrimination. Employers can justify direct discrimination if they can prove the less favourable treatment is a proportionate means of achieving a legitimate aim.

342. The Claimant's complaint of direct age discrimination is set out at paragraphs 36-39 of the Agreed List of Issues. She relies on her age group as being late 50s. The unfavourable treatment is alleged to be that she was denied cannulation training, time to complete theoretical and practical competencies and team training with a Band 5.

343. We refer to our findings at paragraphs 221-227 and conclusions at paragraph 294 j in the context of direct disability discrimination.

344. There was no evidence at all to suggest that the Claimant was discriminated against because of her age.

345. The complaint therefore fails.

Race discrimination

346. This complaint is set out at paragraphs 40-42 of the Agreed List of Issues. The Claimant relies on her race as Black British or African ethnicity. The unfavourable treatment is that she was denied the opportunity of looking after the stock-pile levels of cardiac stents. She relies on an actual comparator of Janet Bailey, a Black Caribbean employee.

347. We have dealt with the issue of stents at paragraphs 216-219 of our findings and paragraph 294 i. of our conclusions in the context of direct

disability discrimination. We have found the reason why and this has nothing to do with race.

348. Whilst Mrs Bailey was given the special duty of looking after stents, the Respondents have explained why the Claimant was not given the responsibility, which had nothing to do with race. The Respondents only needed one person to do this duty and whilst Ms Bailey is of a different race, the Claimant has not provided evidence of anything more than a coincidence of the difference in treatment and race. This does not meet the test in Shamoon of something more.

349. The complaint therefore fails.

Sex discrimination

Harassment related to sex

350. This complaint is set out at paragraphs 43-44. The Claimant alleges that during the course of her disciplinary investigation meeting Mr Knowles referred to her as "a headstrong, obstinate woman".

351. The Claimant never provided any context as to how and when this was said. Mr Knowles denied saying such a thing. Mr Knowles conducted the disciplinary investigation during which it is clear that the Claimant was obstructive during interview and failed to engage in the process. We have made our findings as to what happened at the two interviews. Mr Knowles accepted in evidence that in that context he may well have described her as being difficult and uncooperative. Indeed, the Claimant came across to us in this manner at times during the hearing. However, taking into account the Claimant's general credibility, we preferred the evidence of Mr Knowles.

352. As a result we do not accept that these words were used and so the complaint fails.

Protected disclosure detriment

353. Under section 47B Employment Rights Act 1996 a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a "protected disclosure". This is commonly referred to as whistle-blowing".

354. A disclosure must be of information that the worker reasonably believes tends to show one or more of the following has, is, or is likely to have taken place: a criminal offence; breach of a legal obligation; a miscarriage of justice; the health and safety of an individual has, is or is likely to be endangered; or information tending to show any of these has, is or is likely to be concealed.

355. Sections 43C–H set out to whom qualifying disclosures may be made and in what circumstances. This includes disclosures to a worker's employer.

356. The Claimant's complaint is set out at paragraphs 46 to 49 of the Agreed List of Issues.

357. The Respondents admit that the Claimant made the disclosures of information as set out in paragraph 46 and we have already made specific findings at paragraphs 242-245 above.

358. We are asked at paragraph 47 of the Agreed List of Issues to consider whether those disclosure of information, in the Claimant's reasonable belief, tended to show:

    a. In respect of paragraph 47 a, that a criminal offence has been, is, or is likely to be, committed, namely theft, and/or, that a person has, is, or is likely to, fail to comply with a legal obligation, namely safeguarding of vulnerable adults (section 43B(1)(a) and (b) ERA 1996, respectively);

    b. In respect of paragraph 47 b, that the health and safety of any individual has been, is being, or is likely to be endangered (section 43(1)(d) ERA 1996).

359. We accept that eating sandwiches meant for patients could amount to a criminal offence and that the Claimant had a reasonable belief of this but only arising from a question she asked of Ms Lawrence as to whether doing so could amount to theft, rather than from her own evidence.

360. We accept that leaving bloody bandages could endanger the health or safety of vulnerable adults such as patients in a hospital and whilst the Claimant never said as much this would be a reasonable belief for her to hold.

361. We then have to consider whether those disclosures were made in the public interest under paragraph 48 of the Agreed List of Issues.

362. Clearly they are matters that are in the public interest.

363. We are then asked to consider whether the Claimant was subjected to the detriments set out in paragraph 49 of the Agreed List of Issues on the ground that she made one or more protected disclosures. The alleged detriments are as follows:

    a. A decision being made to instigate a disciplinary investigation into the Claimant's conduct in around October/November 2016;

    b. ln June/July 2017 Noel Cleary making insulting remarks about the Claimant's history of whistleblowing in another NHS Trust and stating that he hoped that the Claimant's job offers would fall through on references;

    c. Failing to provide a reference to the Claimant's prospective employers;

    d. Being erroneously accused by Denny Paterson of taking unauthorised leave?

364. In relation to a. we have found that in October/November 2016 the decision to instigate a disciplinary investigation into the Claimant's conduct was purely because of allegations of misconduct.

365. In relation to b. we have dealt with this at paragraphs 233-235 above. Given our concerns generally about the Claimant's credibility and the lack of evidence we do not accept that this was said.

366. In relation to c. we have dealt with this at paragraphs 236-237 and 249-266. The Claimant has not provided any dates or details and we have found that there was no evidence of occasions on which references were not provided but evidence that references were provided during her employment with the First Respondent as well as after she had been dismissed.

367. In relation to d. we have dealt with this at paragraph 248 above. The allegation is simply not made out.

Notice Pay

368. This complaint is brought under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1995 as one of damages for breach of contract. It is also referred to as a wrongful dismissal complaint.

369. In essence it is a contractual right and the question for the Employment Tribunal is has the employee committed a fundamental breach of her contract of employment so radical in its nature that it justified summary dismissal without compensation for notice?

370. In order to justify summary dismissal there as to be a repudiatory breach of contract. In order to amount to a repudiatory breach, an employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract of employment – Laws v London Chronicle (Indicator Newspapers) Ltd (1959) I WLR 698, CA. The employer faced with such a breach can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate, ie summary, dismissal.

371. The degree of misconduct necessary in order for an employee's behaviour to amount to a repudiatory breach of contract is a question of fact for a court or tribunal to decide.

372. In Briscoe v Lubrizol Ltd [2002] IRLR 607, the Court of Appeal approved the test set out in Neary & Anor v Dean of Westminster [1999] IRLR 288, ECJ (Special Commissioner), in which it was found that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in this employment".

373. We recognise that there are no hard and fast rules and that many factors may be relevant, for example, the nature of the employment and the employee's past conduct and whether within the terms of the employee's

contract of employment certain acts have been identified as warranting summary dismissal.

374. We also recognise that certain acts such as dishonesty, serious negligence and wilfully disobeying lawful instructions can justify summary dismissal at common law.

375. The issues are set out at paragraphs 50 and 51 of the Agreed List of Issues.

376. From our findings it is clear that the Claimant did in fact commit an act of gross misconduct such that the First Respondent was entitled to dismiss her without notice or payment in lieu of notice and we find as much. As a result the complaint fails.

Holiday pay

377. Whilst the issues are set out at paragraphs 52-54 of the Agreed List of Issues, the Claimant presented no evidence of her entitlement to annual leave or as to how much leave was outstanding as at the date her employment ended.

378. As a result we were not in a position to determine her complaint and as the burden of proof is upon her, the complaint fails.

Post-termination victimisation

379. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010. Caselaw has extended this protection to cover what is known as post-termination victimisation.

380. The Claimant has not identified the protected act or acts relied upon but we are content to take this to be the bringing of her first and second claims raising complaints of unlawful discrimination in relation to disability, race, sex, age, religion or belief. Whilst the Claimant describes herself as having a history of being an NHS whistle-blower, the only evidence we have of this is the reference in her application form for employment with the First Respondent. However, we are content that the Claimant has done a protected act or acts.

381. The detriments relied upon by the Claimant are clearly the provision of references in the terms set out.

382. Having considered our findings we conclude that the Claimant was not victimised because of the protected acts. The references were provided by a third party Capita and the First Respondent's policy was to provide a factual reference only, unless a personal reference was requested. There is nothing to indicate that personal references were requested. The words "Dismissal-Conduct" were a true statement of the Claimant's reason for leaving. To put more would not have made the Claimant's position any

better as she asserted it would. The recipient could have sought more information if it required it. There was no evidence to suggest that the First Respondent would have applied a different system or responded differently in the case of others dismissed for misconduct who had not done a protected act or acts.

383. We therefore find the complaints unfounded and they are dismissed.

Final conclusion

384. In conclusion, the Claimant's complaints are unfounded in their entirety and her claims are dismissed.

The Claimant's conduct and credibility

385. We have already indicated the extent to which the Claimant disrupted the original 10 day hearing and as a result we had to hold a further 5 day hearing in which to finish the evidence (as well as 2 re-reading days and 2 days for deliberations). We have also indicated on occasions where we did not accept her evidence and as to the reasons why.

386. We felt it appropriate to set these matters out by way of summary:

a. Her lack of preparation for the hearing and failure to comply with case management orders;

b. Her repeated attempts to delay the hearing in July 2019 through a series of applications;

c. The lack of medical evidence or adequate medical evidence in support of her applications;

d. Her repeated failure to follow instructions as to the need to put questions rather than statements, as to the framing of questions to put and as to the relevance of her questions;

e. Her repeated disclosure of documents as the hearing proceeded;

f. Her insistence of modified start and end times and regular breaks which she then proceeded to ignore, to arrive late, to insist on proceeding late, not take the breaks she had asked for and had to be reminded of;

g. The manner of her questioning, particularly of Rev Barnett;

h. Her repeatedly ignoring timetabling on almost a daily basis and when cross examining the Respondents' witnesses;

i. Her own evidence being less than credible: her interpretation of The Sanctuary incident was disingenuous; her evidence about not knowing what a religious minister wore or what a dog collar was; that she did not understand English but in her cross examination she clearly had a

sophisticated knowledge of English; her presenting as a litigant in person, as an excuse for not complying with instruction, direction and orders, when we were aware during the course of the hearing that she has brought a number of cases to the Employment Tribunals as well as to the Employment Appeal Tribunal, which reveal that she in fact had a more than average knowledge of Tribunal procedure.

The Claimant's fourth claim

387. We were not in a position to deal with the Claimant's fourth claim, in case number 2304009/2018, against the First and Third Respondents. This matter has in effect been stayed pending the outcome of the claims before us. We will direct the administration to list the Respondents' strike out application for a one day open preliminary hearing on the first available date.

Attached: Agreed List of Issues

Employment Judge Tsamados
Date: 14 December 2021