EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case Number: 4114473/2019**

Hearing held at Glasgow on 16 – 20 August 2021
Deliberations 23, 24 and 25 August 2021

10 **Employment Judge D Hoey**
Tribunal member J Lindsay
Tribunal member S Singh

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X — **Claimant**
Represented by:
Mr Edward
(Counsel)
20 **Instructed by**
Livingston Brown

Greater Glasgow Health Board — **Respondent**
25 **Represented by:**
Ms Stobart
(Counsel)
Instructed by
Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The claimant was fairly dismissed. Her claim for unfair dismissal fails.

35 (2) The claims for unlawful disability discrimination (comprising claims for harassment due to discrimination by association, harassment related to the claimant's disability and discrimination arising from disability) are ill founded.

(3) The claim for maternity discrimination is ill founded.

(4) Each of the claims is therefore dismissed.

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REASONS

1. On 15 December 2019 the claimant presented her claim for unfair dismissal, disability and maternity discrimination. ACAS Conciliation had run from 3 October 2019 to 5 November 2019. The claims were disputed. An anonymisation order had made been at an earlier preliminary hearing (such 10 that the claimant was X and her son Y) and the parties had worked together to progress matters such that the hearing could proceed.

2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimant's agent, the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to be seen and 15 heard, as well as being able themselves to see and hear. While there were some connection issues, these were overcome. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

20 3. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. One of the days fixed for the hearing was used to work on submissions. A statement of agreed facts and a list of issues had been 25 produced which assisted the Tribunal and the parties in focussing the issues in this case.

Issues to be determined

4. The issues to be determined are as follows (which is based on the agreed list which was finalised upon conclusion of the case):

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Jurisdiction:

1. Are claims of disability discrimination, associative disability discrimination and maternity leave discrimination in relation to alleged events before 4 July 2019, time barred in terms of section 123(1) Equality Act 2010?

2. If so, is it just and equitable to extend time?

3. The alleged acts of discrimination that took place before 4 July 2019 and are therefore potentially time barred are under the headings below: harassment due to discrimination by association, section 26 harassment (a) to (d), s 15 discrimination arising from disability (a) to (e).

Unfair dismissal

1. Was the claimant dismissed for a potentially fair reason, namely capability within the meaning of section 98(1)(b) Employments Right Act 1996? The claimant accepts that the reason for dismissal was capability.

2. Did the respondent follow a fair procedure? The claimant disputes this, focussing on the fact that the claimant was not warned in writing that the meeting of 4 July 2019 may result in her dismissal and that the decision to dismiss was predetermined. The respondent also refused to allow the claimant a formal meeting with Mr McCormack.

3. Did the respondent act reasonably in treating capability as a sufficient reason for dismissal within the meaning of section 98(4) Employment Rights Act 1996? The claimant disputes this. Alternatives to dismissal were not investigated or considered.

4. If the dismissal was unfair, should compensation be reduced on the basis that the claimant would have been fairly dismissed if a fair procedure had been followed? If so by how much?

Disability discrimination

1. It is agreed between the parties that the claimant was disabled within the definition of section 6 of the Equality Act 2010 from Spring 2018.

2. Did the respondent know or could reasonably have been expected to know that the claimant had a disability and was likely to be at a substantial disadvantage compared with persons who were not disabled, prior to receipt of the Occupational Health report indicating likely disability status on 3 June 2019?

3. It is accepted that Y was disabled from birth and that the respondent knew, or could reasonably have been expected to know, that she had a disability in around April/May 2017.

Harassment due to discrimination by association

1. Did the following acts happen as alleged by the claimant?

   (a) Did Ms Fitzpatrick make comments to the claimant during a telephone call on 26 October 2017 stating that Ms Fitzpatrick felt the claimant would not be returning to work due to her son's disability? The respondent disputes this.

   (b) Did Ms Fitzpatrick give repeated advice to the claimant in October 2017 by phone call regarding her registration with the Nursing and Midwifery Council? In particular, did Ms Fitzpatrick tell the claimant that she would not be able to maintain registration with the Nursing and Midwifery Council? Further did Ms Fitzpatrick tell the claimant that she required her line manager to sign off on her revalidation? The respondent disputes this.

2. If so, did the conduct above amount to unwanted conduct related to the claimant's son's disability which had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or

offensive environment for her within the meaning of section 26 Equality Act 2010?

Maternity discrimination

5 1. Did the respondent take into account the claimant's absence for maternity leave when coming to a decision to dismiss the claimant on grounds of capability? The respondent disputes this.

2. If so, did the respondent discriminate against the claimant by treating her unfavourably because she exercised the right to take maternity
10 leave under section 18(4) Equality Act 2010?

Harassment related to the claimant's disability (section 26, Equality Act 2010)

1. Did any of the following acts happen?:

(a) Was there an exchange of text messages and emails between Ms
15 Fitzpatrick and the claimant regarding the claimant's return to work? This is accepted by the respondent.

(b) Was pressure placed upon the claimant by Ms Fitzpatrick to return to the workplace on 21 May 2019? The respondent disputes this.

(c) Was the claimant advised that she was being dismissed prior to
20 fully establishing the impact of her disability? The respondent disputes this.

(d) Did Ms Fitzpatrick attend at the claimant's home on 4 July 2019 with the clear intention of terminating her contract? The respondent disputes this.

25 2. If found to have happened, did any of the above acts amount to unwanted conduct related to the claimant's protected characteristic, namely disability, and if so did said conduct have the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading,

humiliating or offensive environment for her within the meaning of section 26 Equality Act 2010?

Discrimination arising from disability (section 15, Equality Act 2010):

5 1. Did any of the following acts happen?

(a) Was pressure placed upon the claimant by Ms Fitzpatrick to return to the workplace on 21 May 2019? The respondent disputes this.

(b) Was the claimant's sick pay reduced? It is accepted that the claimant's sick pay was reduced and that incorrect information was
10 originally sent to the claimant.

(c) Did Ms Fitzpatrick record information relating to the claimant moving to nil pay in the Occupational Health referral? The respondent accepts this.

(d) Was there a unilateral change to the claimant's work shifts? The
15 respondent disputes this.

2. If so, did the respondent treat the claimant unfavourably? If so, did the respondent treat the claimant unfavourably for a reason arising from the claimant's disability? If so, was that treatment a proportionate means of
20 achieving a legitimate aim?

3. Did the claimant's dismissal amount to discrimination arising from her disability within the meaning of section 15 Equality Act 2010?

Evidence

5. The parties had agreed a bundle of 254 pages.

25 6. The Tribunal heard from the claimant, her mother, Ms Fitzpatrick (who managed the claimant's absence and recommended her dismissal), Ms Adam (HR Adviser), Mr McCormack (who dismissed the claimant upon Ms Fitzpatrick's recommendation), Dr Haldane (occupational health physician)

and Mr Roy-McLeod (the claimant's line manager). A witness statement from Mr Ostasz (payroll team manager) was also produced by the respondent which the claimant accepted without challenge (and there were no matters arising from that evidence) The witnesses had each provided a written witness statement and they were cross examined and asked further relevant questions.

Facts

7. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what position was more likely than not to be the case.

Background

8. The respondent is a health board. The hospital in which the claimant worked was one of the largest psychiatric hospitals in Scotland. While there was no dedicated HR support, the respondent had access to a centralised HR function from which advice could be sought.

9. The claimant was employed as a Staff Nurse from 29 December 2008 until 7 July 2019.

Attendance Management Policy

10. The claimant were subject to an Attendance Management Policy (which was not suggested to be contractual) which stated that "promoting attendance is crucial in the development of an efficient service". The Policy stated that the respondent sought to create and maintain a working culture in which maximum attendance at work is the expectation, managing absence efficiently and sympathetically. Both the employer and employee had responsibilities in terms of the Policy.

11. Long term sickness absence was defined as absence of 28 or more calendar days.

12. The Policy set out an absence reporting procedure which required employees to make regular contact with their line manager during absence and to ensure certificates covering absence were provided.

13. Under the heading “Phased return and Adjustments” it was stated that “when an employee is fit to return to work but cannot carry out their full range of duties (either in the short or longer term) every effort should be made to give them the opportunity for an earlier return to work”.

14. The Policy also recognised that line managers can refer employees to Occupational Health to provide assistance and advice. The Policy also stated that employees can self refer to Occupational Health for any health related matter.

15. Regular contact was to be maintained with absent employees. The Policy stated that “in certain circumstances line managers may be required to contact employees by telephone”.

16. Under the heading “redeployment” the Policy stated that if an employee had been identified as unfit to return to their current post every effort would be made to find suitable alternative employment. The line manager should fully discuss with the employee and Human Resources all potential options.

17. Under the heading “Ending employment and retirement” termination on grounds of incapacity should only be considered when all options for reasonable adjustment or redeployment have been fully investigated and exhausted and normally within the timescale of occupational sick pay.

18. In considering termination on grounds of ill health advice should be taken from Occupational Health, consultation should take place with the employee, a

thorough investigation of the medical and other facts should take place and other employment options should be explored.

19. If termination of employment was being considered, this should be on medical factors and should follow an employee being invited to a formal meeting to discuss the termination of their employment in writing. Employees are entitled to be represented by their trade union and the meeting should be handled in a sympathetic and understanding way to ensure the employee has a clear understanding of the outcome. The employee should be given the opportunity to meet again if they would find it helpful.

Sick pay

20. The respondent’s sick pay policy is that staff receive 6 month’s full pay and then 6 month’s half pay. This is calculated on a rolling basis.

Maternity leave

21. On 27 February 2017 the claimant commenced a period of maternity leave. The claimant’s son, Y, was born on 13 March 2017 with a life limiting condition. The claimant remained on maternity leave until 26 November 2017.

Supporting the claimant

22. Ms Fitzpatrick, Inpatient Management Team Support Nurse was part of the senior management team. A part of her role required her to manage staff sickness. In around April/May 2017 the claimant’s senior charge nurse at the time, Ms Swan, informed Ms Fitzpatrick that the claimant had advised her that her son had been born with a life limiting condition. Ms Swan, who was due to retire, had advised Ms Fitzpatrick that there was some uncertainty about the claimant’s return to work in light of her son’s illness. Ms Fitzpatrick told Ms Swan to ask the claimant to telephone Ms Fitzpatrick to allow relevant support to be given.

23. While there was some uncertainty as to who called whom, we find that the claimant called Ms Fitzpatrick upon being asked to do so by Ms Swan. That was initially done by the claimant to Ms Fitzpatrick’s office phone. Once Ms

Fitzpatrick had the claimant's mobile number she contacted the claimant by text message, which was a way that suited the claimant. At no stage during the claimant's employment did she ever raise any concern about the method of communication by Ms Fitzpatrick.

5 24. Ms Fitzpatrick maintained contact with the claimant regarding her ongoing maternity leave. As the discussion had been via text message and there had been no issue with such a form of communication, that continued. The claimant had not given any indication to Ms Fitzpatrick that she did not want to communicate in that way. Ms Fitzpatrick believed text message was a 10 useful form of communication for the claimant since she was spending time caring for her son (and was not always at home) and could respond to any messages at a time that suited her.

25. The first message was on 20 July 2017 and the text messages continued. They were informal and chatty in nature with Ms Fitzpatrick keeping in touch 15 with the claimant and ensuring she was kept up to date with relevant matters, such as ensuring she lodged appropriate fit notes or about arranging meetings. The claimant fully engaged in the text discussions, sometimes herself sending messages to Ms Fitzpatrick unprompted about work related matters.

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Nursing validation

26. The claimant's Nursing and Midwifery Council registration became due for revalidation. This was a new process and a senior manager within the respondent had taken control as to how the respondent would ensure its 25 nurses maintained appropriate regulatory validations. Ms Fitzpatrick had been instructed by a manager to contact the claimant to remind her that her revalidation documentation had to be completed. That would allow her to continue to work as a nurse. As the process was relatively new the local policy was for line managers to sign revalidation documentation (as they knew of the 30 nurse and their competence).

27. The claimant had intended to ask one her colleagues (and new manager Mr Roy-Macleod) to complete the documentation but as that colleague had not known the claimant professionally he indicated that he was unable to do so.

28. Ms Fitzpatrick took advice from the respondent's Professional Nurse Adviser who advised that the claimant should contact the regulator and explain the position and an exemption may be granted. The claimant did so and on 2 November 2017, the (NMC) confirmed that her registration had been renewed.

Ongoing discussions

29. Ms Fitzpatrick maintained contact with the claimant and assisted with her return to work.

30. The claimant's then line manager, Ms Swan, was due to retire in September 2017 and Mr Roy-McLeod was taking over. The claimant had advised Ms Fitzpatrick that it was unlikely she would return to work immediately following her maternity leave and may take accrued annual leave. She said she wanted to spend as much time as she could with her son.

31. The claimant had advised Ms Fitzpatrick that she was unsure when (and possibly if) she would return to work given the ongoing issues in her life.

32. When staff go on leave, they are paid as if they had been at work in accordance with the applicable terms and conditions. That meant it was necessary to work out what shift pattern staff would be working (to ensure all enhancements were included) when an individual went on leave.

33. The claimant had asked Ms Fitzpatrick if she could contact Mr Roy-McLeod as he was to become her line manager. Ms Fitzpatrick advised her that he had not taken up the role as yet and was due to go on annual leave. He was still ward manager of an acute admissions ward. Ms Fitzpatrick explained that the claimant could contact him if she wished but he may be difficult to contact given his other commitments. Ms Fitzpatrick did not refuse to allow the claimant to meet with her new line manager to allow her to establish rapport with him (as alleged by the claimant). The claimant did not make such a

request of Ms Fitzpatrick and the claimant did contact and maintain contact with her new line manager, with whom she had previous contact with.

34. As Ms Fitzpatrick was dealing with the claimant's maternity leave and return to work it was necessary for her to work out relevant dates for holiday and annual leave purposes. As the claimant's former line manager was retiring, Ms Fitzpatrick continued to manage the situation, in the interests of consistency.

35. We do not find that Ms Fitzpatrick ever said to the claimant that she would not be returning to work due to her son's disability.

Call on or around 31 October 2017

36. The claimant had a discussion with Ms Fitzpatrick about her return to work and she advised Ms Fitzpatrick that she wanted to spend as much time with her son as possible. Her maternity leave was due to end around November 2017 and the claimant advised Ms Fitzpatrick that she wanted to take her accrued leave following the ending of her maternity leave to spend time with her son. There was no pressure placed upon the claimant as to a return to work and Ms Fitzpatrick was working with the claimant to assist her when the claimant was ready to return to work. The claimant did not ask at that stage to use parental leave. This was a matter for the claimant to determine. She subsequently asked for parental leave in January 2018 (and was given it). Parental leave was not refused by Ms Fitzpatrick.

Ending of maternity leave

37. There was a discussion as to the position following the expiry of the claimant's accrued annual leave and the claimant indicated that she may utilise sick leave. Dates had to be confirmed for payroll purposes and the claimant would confirm the position.

38. The claimant's maternity leave ended on 26 November 2017 and she then went on a period of annual leave from 27 November 2017 until 24 December

2017. At no stage did the claimant ask for extended maternity leave (which was a matter for her to determine).

Claimant's son passes away

5 39. Sadly, the claimant's son passed away on 19 December 2017.

40. Ms Fitzpatrick learned of the passing of the claimant's son during December and on 3 January 2018 texted the claimant to say how sorry she was upon hearing the sad news.

41. On 4 January 2018 Ms Fitzpatrick explained to the claimant that she had 10 provided the claimant with special leave from 18 December 2017 to 7 January 2018. Special leave covered bereavement leave. Ms Fitzpatrick also told the claimant that she would re-classify the claimant's annual leave from 27 November 2017 until 17 December 2017 as parental leave. Ms Fitzpatrick understood the internal system had been changed but realised (in May 2018) 15 that the change had not gone through in the system properly and arranged for the error to be fixed.

Sickness absence

42. On 8 January 2018, the claimant began a period of sick leave by reason of bereavement. She remained on sickness absence until 5 February 2019.

20 43. The claimant met with her new line manager occasionally. Ms Fitzpatrick continued to manage the claimant's absence, as this was part of her role. Ms Fitzpatrick continued to maintain contact with the claimant and did so by text as she understood that form of communication was preferable to letter.

44. In terms of the Attendance Management Policy meetings with those on long 25 term sickness should take place every 4 to 6 weeks but given the sensitivity of the situation pertaining to the claimant the meetings took place less regularly. Ms Fitzpatrick wanted to give the claimant space.

Formal absence review meetings take place and medical input sought

45. The first formal absence review meeting was to take place on 15 February 2018 but the claimant did not attend and a further meeting was scheduled for 27 February. The meeting was postponed as the claimant felt unwell. It was rearranged for April.

5 46. Ms Fitzpatrick and the claimant communicated with each other via text. In the course of these messages the claimant has asked about her sick pay position and Ms Fitzpatrick told the claimant that her half pay would commence on 10 July 2018 and nil pay would commence on 8 January 2019.

47. The first formal Absence Review Meeting took place on 17 May 2018. The 10 attendees were the claimant, Ms Harvey Unison union representative, MS Adam HR Adviser, and Ms Fitzpatrick.

48. The claimant updated Ms Fitzpatrick as to her health position and Ms Fitzpatrick made it clear that there was no pressure on her to return to work. To assist the claimant, she was advised that her annual leave from the 15 previous year would be carried forward. The claimant was advised that her annual leave could be used to facilitate a phased return to work which could be discussed when the claimant felt fit to return.

49. The claimant was advised that a referral would be made to the occupational health service to understand the position and identify any further support 20 needed.

50. Following the claimant's attendance at a consultation, an Occupational Health report was issued on 24 May 2018. This stated that the claimant's absence was due to bereavement, low mood and anxiety. The report noted that the claimant had been dealing with an ongoing complaint with another health 25 board which had been a source of stress and anxiety for her. Both the claimant and the occupational health physician were optimistic of a return to work with a phased return to work in due course. At that stage, Occupational Health did not consider the claimant a disabled person in terms of the Equality Act 2010.

51. The format of the occupational health report used by the respondent is the 30 same for each referral. The employee's details are referred to in the first page.

The manager then sets out the background to the referral on page 2 with any specific questions which the manager wishes answered. Under the hearing "details of sickness absence" the line manager sets out the dates, number of days and the reason. In each of the referrals for the claimant Ms Fitzpatrick included each of the claimant's absence (and not just sickness absence). Thus in the report in May 2018 the absences included bereavement and maternity leave absence. These were not sickness absence and the reason for the absence from work was stated. This information was included as background material (although, strictly speaking, the information was not necessary as it was not sickness absence, which is what the form asked for). At no stage during the claimant's employment (nor during any referral) had the claimant raised any concern about the inclusion of this information in the referrals.

52. The document then has space for the occupational health clinician to complete and give comments, including whether the person is likely to be a disabled person in terms of the Equality Act 2010 and the answers to specific questions.

53. The final section of the document has the words: "I confirm I have carried out a face to face consultation and have read and discussed the contents of this report with the above named employee who has provided written consent for copies to be sent to their manager" with a space for the employee to sign and clinician to sign too.

54. Following a postponement of an earlier date, another formal Absence Review Meeting took place briefly on 14 August 2018. The attendees were the claimant, Ms Adam HR Adviser, and Ms Fitzpatrick. The claimant had expected her union representative to attend but she did not appear. The claimant was very anxious during the meeting. The claimant had left the room at one point. Ms Fitzpatrick checked that she was OK. The claimant said she was feeling very anxious and not fit for work at this point. The claimant had signed the parental leave forms but no further discussion took place. It was agreed that due to the claimant's anxiety the next meeting would take place

at the claimant's home. Ms Fitzpatrick offered to arrange a hospital taxi to take the claimant home, but she declined the offer. There was no discussion during this meeting as to the claimant's shifts as the meeting was short given the absence of the claimant's union adviser and her health position.

5 55. Following the meeting, on 20 August 2018, Ms Fitzpatrick contacted the occupational health service and provided them with a copy of her meeting note.

56. The claimant had raised a number of concerns with regard to the accuracy of what Ms Fitzpatrick had said in her letter. On 29 August 2018 Ms Fitzpatrick 10 responded and dealt with the issues. The claimant replied the same day thanking for the communication and asking if it was possible to arrange a sooner meeting to discuss the claimant's health. She had indicated that she hoped she would be less anxious and her union representative would be present. The claimant suggested someone else could deal with the meeting 15 if that would allow a sooner date but Ms Fitzpatrick explained in the interests of consistency the same person should be involved, to avoid fragmentation and involvement of different people. The claimant confirmed that a date of 2 October 2018 was suitable.

57. Following the referral in respect of the claimant to Occupational Health and, 20 following her attendance at a consultation, an Occupational Health report was issued on 11 September 2018.

58. This report stated that the claimant had been receiving support from her GP and counsellor. Progress with regard to her complaint with the other health board needed to be made to facilitate a return to work for the claimant. That 25 was likely to occur within a few weeks. It was agreed that a gradual return to work should be considered over an 8 week period. It was not considered that the claimant had a disability in terms of the Equality Act 2010 at this juncture.

59. Another formal Absence Review Meeting took place on 2 October 2018. The attendees were the claimant, Ms Adam HR Adviser, and Ms Fitzpatrick. The 30 meeting discussed the recent report and the claimant said she continued to

suffer anxiety. She had been making progress with her complaint against the other health board. She understood that she would revert to nil pay on 8 January 2019. It was agreed that dates for a return to work would be discussed at the next meeting as the occupational health report had stated that a return to work in the "near future" could be considered. The claimant understood that if she was unable to return to work and no return was likely consideration would require to be given as to her future employment with the position at that time being considered in detail. The claimant was given options as to the location for the next meeting and agreement was reached.

60. The claimant was unable to attend the meeting that was to take place in November 2018 and the meeting was rearranged. The claimant attended a further occupational health consultation and an Occupational Health report was issued on 24 December 2018. The report noted that progress had been made but the claimant was not yet fit for a return to work. The report noted the claimant was keen to return to work and she was keen to return to a familiar setting. A return to work was not expected within the next 6 weeks. The recommendations were accepted by Ms Fitzpatrick. The report continued to state that the physician did not consider the claimant to be a disabled person in terms of the Equality Act 2010. Ms Fitzpatrick had asked for clarification as to a suggestion that another member of management attend meetings which she did not consider necessary given this was her role.

61. On 8 January 2019, the claimant went onto nil pay.

62. Another formal Absence Review Meeting took place on 15 January 2019. The attendees were the claimant, Ms Adam HR Adviser, and Ms Fitzpatrick. The claimant said she had felt she had improved and intended to return to work upon expiry of the latest fit note on 5 February 2019. A structured return to work was discussed and the claimant was told she would be "supernumerary" during the phrased return to work to allow her to complete her mandatory training and organisational updates. The claimant was to contact her line manager to arrange her shifts.

63. Occupational health had recommended a phased return to work based on her established working pattern which was 3 days a week. The claimant had asked to change her shifts at this meeting. She had not given a reason for this. Ms Fitzpatrick explained that shifts were a matter to be agreed with her line manager. Ms Fitzpatrick did not refuse the claimant's request but told her the matter had to be discussed (and agreed) with her line manager. The return to work was agreed and a flexible approach was taken.

64. The claimant had explained that she wanted to use annual leave from her return, on 6 February 2019 to return to work on 11 February 2019. The return to work would be phased over 8 weeks. It was agreed that the next meeting would take place in April to review the progress and consider any further support needed.

Phased return to work

65. The claimant took annual leave from 6 February 2019 to 10 February 2019, returning to work on an 8-week phased return to work on 11 February 2019.

66. On 11 February 2019 the claimant returned to work on full pay to carry out her phased return. This began with very short shifts. Her return to work was to gradually increase.

67. In the weeks of 11 February and 18 February 2019 the claimant worked 2 hours on 2 days.

68. In the weeks of 25 February and 4 March 2019 she worked 6 hours on one day.

69. In the week of 11 and 18 March 2019 the claimant was to work one long day (13.42 hours) but did not manage to complete the shifts.

70. The claimant's contracted hours were 37 hours per week.

Sickness absence resumes

71. Unfortunately the claimant was not able to continue the return to work plan and on 26 March 2019 resumed sickness absence.

72. A formal absence review meeting had been scheduled for April but the claimant was unable to attend and a May date had been agreed.

73. On 2 May 2019, the respondent's Payroll Department wrote to the claimant to inform her that her sick pay would reduce to half pay on 11 June 2019 and nil pay on 11 November 2019. This information was incorrect and the letter should have said that she would go onto nil pay on 11 June 2019. Ms Fitzpatrick's had called the claimant to explain the error.

Discussion in May 2019

74. The claimant was due to attend a Formal Absence Review meeting on 21 May 2019. The claimant telephoned Ms Fitzpatrick that day to postpone the meeting. The claimant said she found it stressful attending NHS premises and asked if the next meeting could be at her home which was agreed for 11 June 2019. The claimant agreed the questions that were to be asked of the occupational health physician. Ms Fitzpatrick had focused upon the claimant's ability to return to her full duties as the claimant had indicated that she wanted matters over with and Ms Fitzpatrick wished to understand the prognosis.

75. The claimant had told Ms Fitzpatrick that she was not fit to return to work and was concerned that she may not return to work. The claimant indicated that she wished Ms Fitzpatrick to terminate her contract. Ms Fitzpatrick explained that an opinion was needed from occupational health who would assess the likelihood of a return to work and if matters remained the same, termination of her contract could be considered. The claimant indicate that she wanted matters to conclude as soon as possible.

76. We did not find that Ms Fitzpatrick insisted the claimant return to full time duties. The claimant had indicated that she considered it likely that she may not be fit to return to work and wanted the process to conclude as soon as

possible, which could include her dismissal. It was agreed that a further referral to occupational health would take place to allow the matter to be considered fully.

77. Ms Fitzpatrick made a management referral in respect of the claimant to Occupational Health on 21 May 2019. Ms Fitzpatrick had asked for a medical opinion on the claimant's health and ability to return to work and whether there was a realistic timeframe for a return to work. Ms Fitzpatrick also noted, by way of background information, that the claimant was to start nil pay on 11 June 2019. This was background information (and was not intended by Ms Fitzpatrick to influence the occupational health physician in any way). The report stated that the claimant had bereavement, low mood, anxiety and that a return to work was to be expected in "further months" but not at that time.

78. The next date for the home visit (11 June 2019) was not possible due to annual leave and on 24 May 2019 Ms Fitzpatrick wrote to the claimant with a new date. The letter Ms Fitzpatrick wrote referred to the claimant's current long term sickness, which had commenced on 26 March 2019. The letter stated "You have requested a domiciliary visit to your home address to discuss your attendance, any support you may require and to plan the way forward". The letter also noted that the meeting was convened to ensure facts regarding the recent absence were clearly understood and that the claimant received appropriate management interventions.

Occupational health reports

79. Following a consultation, Occupational Health issued a report on 3 June 2019. This was a report by an occupational health nurse. The report stated that the claimant had received a medical certificate for a further 2 months and that the claimant was awaiting psychological support. The claimant needed time to deal with the anxiety and trauma before an improvement was likely. There was no time frame for a likely return at this stage. No adjustments were identified. The report noted that due to the claimant's increased anxiety when on NHS premises redeployment would not be suitable until she had further

treatment. It was likely that the claimant would be a disabled person in terms of the Equality Act 2010.

80. The claimant attended a further Occupational Health consultation on 4 June 2019 with Dr Haldane and a report was issued that day. The consultation the preceding day was supposed to have been with a doctor but an error had occurred.

81. The report noted that the claimant continued to experience considerable distress and anxiety. The medical opinion was that there was no possibility of the claimant successfully re-establishing herself back into work in the short term and that there were no adjustments to facilitate a sooner return to work. It was the doctor's view that it was likely to take another 6 to 9 months before there was any prospect of a change in the position.

82. The occupational health consultant had made it clear that the claimant's disability arose from the trauma of her son's death. We found no evidence that the claimant's disability arose or was aggravated as a result of matters arising at work.

83. The claimant had been told by the doctor that this was his view during the course of the meeting. It was not disputed by the claimant at the time.

Sick pay

84. On 19 June 2019, the respondent's payroll department wrote to the claimant informing her that she had gone onto nil pay on 11 June 2019.

85. Ms Fitzpatrick had contacted the claimant to explain the error. She understood the position.

Claimant asked to be dismissed sooner

86. The claimant contacted Ms Fitzpatrick to ask if the meeting arranged for 4 July could be brought forward. The claimant wanted the matter to conclude swiftly. The claimant wanted her employment terminated at the earliest opportunity; she wished the matter over with. She believed that her

employment would be terminated and wanted to progress this. She was comfortable with another member of staff conducting the meeting if necessary. Ms Fitzpatrick explained that it was best to maintain consistency with the same persons involved and that the meeting should proceed on the date agreed.

87. Prior to the meeting on 5 July 2019 Ms Fitzpatrick spoke with Mr McCormack. He was Head of Adult Services and was responsible for all aspects of the service, including management of doctors and nurses. Ms Fitzpatrick explained to him that the claimant had asked that her employment be ended and Ms Fitzpatrick advised him that she may be recommending her employment be terminated.

Dismissal meeting

88. A Formal Absence Review Meeting took place on 4 July 2019. The attendees were the claimant, Ms Harvey, Ms Adam, and Ms Fitzpatrick. This meeting took place in the claimant's home. The claimant knew that the termination of her employment would be considered given she had discussed this matter with Ms Fitzpatrick (and asked for termination) earlier. The claimant's return to work was discussed as was the medical position which included that there was no adjustment recommended to assist with a return to work (which included redeployment).

89. The claimant was told that a decision required to be made as to the claimant's continued employment given the prevailing facts. No specific adjustments had been considered and it was likely that at least 6 to 9 months further absence would take place before a return to work could be contemplated. No adjustments or other roles would alter the position. The claimant did not dispute this and indicated that she wished her employment to be terminated. The claimant had known how significant the medical evidence was and did not dispute the content of the report.

90. Taking account of all the information, Ms Fitzpatrick told the claimant that she would recommend that her employment be terminated. She believed that the

claimant had been unable to attend work. Her sick leave had commenced on 8 January 2018. An attempted return to work had failed. The recent absence had commenced on 26 March 2019 and the claimant remained unable to work with the medical position suggesting she would remain unfit to work for at least 6 to 9 months. It was believed that no adjusted duties or roles or redeployment would alter the position.

91. It was not possible for the respondent to recruit to fill a post if the incumbent is still in the role. Even although the claimant was not entitled to sick pay, the respondent was unable to recruit a replacement. Continuing to "keep her on the books" had an impact upon recruitment. Ms Fitzpatrick considered that if dismissal had not been recommended the ward in which the claimant worked could be understaffed as the post could not be filled while the claimant was absent.

92. The claimant was told that her dismissal would be recommended. She was told that she had the right to a formal meeting with Mr McCormack before he made a final decision. The claimant told Ms Fitzpatrick that she did not want a formal meeting. She was told that this was a matter for her. She was also reminded that she had a right of appeal if she wished, in addition to a meeting.

93. The claimant and Ms Fitzpatrick agreed that her last day of work would officially be 7 July 2019 (as it was not possible to conclude matters the same day, which was what the claimant wished). This date was a date suggested by the claimant. It was a Sunday. For superannuation purposes the relevant date would be 19 September 2019. That was to ensure the claimant received the correct pension and other contributions.

94. The claimant's union representative queried the latter point and Ms Fitzpatrick said she would contact payroll to ensure the proper procedure in that regard was followed. It was notable that the claimant's union representative did not query any of the other outcomes to the meeting (including the fact Ms Fitzpatrick said the claimant had not asked for a formal meeting before being dismissed). The claimant's union representative told Ms Fitzpatrick that she

had also checked the position and been told that what Ms Fitzpatrick had said had been accurate.

95. Ms Fitzpatrick met with Mr McCormack and explained the circumstances to him, including the medical position and the claimant's own views. She told him that the claimant did not want a meeting with him as she was content that he made the decision and confirm the position in writing.

96. On 10 July 2019 Ms Fitzpatrick wrote to the claimant. Having referred to the meeting and its purpose, which the letter said had been arranged to discuss the impact of her continuing incapacity on her future employment, she said she considered and took into account all the surrounding circumstances regarding the claimant's current state of health, the advice from Occupational Health, which stated that there was no "no likely prospect of a return to work in any capacity in the foreseeable future". She said: "In considering all of these factors that decision was likely to be the termination of your employment on the grounds of your continuing incapacity".

97. The letter stated that other options to facilitate the claimant's return to work had been looking into, including reasonable adjustments that could be made to the claimant's post or alternative posts that could be sought but given the advice from occupational health and taking account the claimant's own views, that was not possible.

98. The letter continued that at the meeting a discussion took place as to the process for ending the claimant's employment and that under the respondent's policies a decision required to be taken by Mr McCormack. The letter emphasised that the claimant had a right to a formal hearing with him prior to him making a decision. But that the claimant confirmed she was happy for a recommendation to be made without a formal hearing and that the decision be confirmed in writing.

99. The letter confirmed that the claimant would have a right to appeal against that decision.

100. The letter referred to the parties discussing a termination date and that 7 July 2019 had been identified. Ms Fitzpatrick confirmed she would make a recommendation to bring her employment to an end at that date as the claimant could not foresee a return to work in the foreseeable future.

101. The letter then confirmed the payments the claimant would receive, including a one off payment with regard to notice pay and outstanding annual leave. The letter stated that once the annual leave was taken into account (which amounted to 406.32 hours) the termination date for superannuation and enhancement purposes was 19 September 2019

102. Ms Fitzpatrick met with Mr McCormack following the meeting and confirmed the position and her recommendation, and the reasons for it. Mr McCormack relied upon Mr Fitzpatrick's assessment of the position and her reasons for the recommendation in reaching his decision, which was to confirm the claimant's dismissal.

103. By letter dated 11 July 2019 Mr McCormack referred to the meeting on 4 July 2019. He noted that Ms Fitzpatrick had advised him that she and Ms Adam (HR Advisor) had discussed the impact of the claimant's ongoing absence and that the claimant and the Occupational Health clinician were both of the view that the claimant was unable to return to work in any capacity for the foreseeable future. He then stated: "In view of this, the options for bringing your employment to an end were discussed with you and I understand that you were in agreement for the Board to terminate your contract on the grounds of your continuing incapacity with effect from 7 July 2019. As such having taken account of all of the above I am now writing to confirm the Board's decision to terminate your employment with effect from 7 July 2019 on account of your continuing incapacity. Your entitlements in this respect are as outlined in Ms Fitzpatrick's letter of 10 July."

104. He stated that: "As a formality I am obliged to inform you that you have the right to appeal against the decision to terminate your employment and should you wish to do so you should put your appeal in writing to Ms McPherson Director of HR, within 2 working weeks of your receipt of this letter."

105. Within a few weeks of the claimant's termination of employment, and receipt of the letter from Ms Fitzpatrick and Mr McCormack, the claimant began to send emails querying the September date and the payments she was to receive. She wanted to know if she was being paid for her usual 3 long day shift pattern.

106. No appeal by the claimant or on her behalf was lodged with the respondent. The claimant had been accompanied by her union representative during the process. No appeal or suggestion of an appeal had been raised by the claimant's union representative.

Post dismissal communication from the claimant

107. Following her termination the claimant queried how much annual leave she had been provided and asked about her shift pattern. The claimant's line manager had adjusted the shift times for administrative purposes to ensure the claimant received the full sums to which she was entitled.

108. The claimant was concerned about when the termination date was. She had exhausted her sick pay and was trying to resolve what benefits she could obtain. The claimant believed all payments due to her should have been paid in July and not September 2019 but understood that due to pension payments and shift enhancements, payroll had to keep her on the payroll until 19 September 2019.

109. The claimant also began to challenge the amount of annual leave she was paid during the year and wished this to be investigated. She sent a number of emails around these issues. On 16 August Ms Fitzpatrick explained how the annual leave was calculated.

110. The claimant also contacted her line manager when she discovered that her shifts had been put through as 5 days over 7 (the standard pattern) rather than her usual pattern. Her line manager sent an email on 20 August confirming that he understood all the claimant's enhancements and

entitlements had been processed. He noted that the claimant had been rostered for 37.5 hours per week during both sickness and annual leave (which was her contractual position). He said that the shifts had been changed to a 5 shifts over 7 days (which meant she was rostered "virtually every weekend during that period".

111. Her line manager had changed the detail while the claimant was absent by reason of sickness. He made the change as it was the default shift pattern for the system and he wanted to ensure the claimant had as many weekends as possible. He did not change the claimant's actual work shift patterns. It was an administrative matter.

112. The claimant's line manager stated that: "In real terms it makes no difference as it's your contracted 37.5 hours per week that is important. You'll have got shift allowances for all the backshifts and weekends that you were rostered to do so you would not have lost out". He also asked why the claimant was querying this.

113. The claimant replied on 3 September 2019 saying: "To be honest it's not about the money. I am just hurt that Margaret never mentioned this to us during any of our meetings."

Claimant sent letter of complaint

114. On 16 September 2019, the claimant sent a 6 page letter of complaint to the respondent. She referred to the situation with regard to her son and of the need for support. She said that:

- she felt as a result of her poor mental health and long term absence she had been discriminated against
- She had received numerous work texts and phone calls which exacerbated her poor health
- She was threatened with her job and told her registration would lapse and there was nothing she could do

- She was initially denied a request to use her son's parental leave despite him being terminally ill and then advised that was put through
- Changes were made to her shift pattern without her knowledge which was never discussed and feels deceptive
- She was urged to attend meetings without representation despite being anxious, her symptoms being in keeping with PTSD being dismissed
- She was given incorrect advice regarding annual leave and benefit
- She was denied as result to reduce her shift to assist at the end of her phased return
- She was denied a request for someone else to carry out her meetings
- Her occupational health management plan was ignored and the final meeting was delayed.

115. She noted that in May she was advised that the next meeting would be to terminate her contract and that Ms Fitzpatrick was unable to meet on the suggested date and someone else could have dealt with it rather than delaying. She said that "waiting for this was anxiety provoking to say the least". She said that it had been pointed out to the that work appeared to be a stressor and the sooner it was removed from her life the quicker she could focus on recovery. She was hoping the matter could be resolved quickly (but does not say what the resolution she sought was).

116. She referred to the uncertainty as to the superannuation issue (and September date).

117. She also explained that she had sought advice from ACAS.

118. Her letter also made reference to her shifts and that the change to her shift pattern caused her considerable hurt and set out in detail concerns about how

she was treated during her employment, including in respect of the revalidation.

119. She concluded by stating: “I would appreciate it if you could investigate my concerns as a matter of urgency and possibly give me a response within the next 7 days. Thank you very much for taking the time to hear my concerns.”

120. By letter dated 3 October 2019 Mr MacKay, In Patient Services Manager stated that he had received the claimant’s communication. He explained that he asked Ms McGregor, People and Change Manager to review the claimant’s file and check the actions taken against the respondent’s policies. An extensive review had been undertaken and concluded that the process had been followed correctly. The appropriate process to contest the decision was via an appeal, which the claimant had not done.

121. The letter noted that the claimant had been represented throughout the process by a trade union representative and there were no concerns raised by the representative.

122. With regard to the issues regarding Ms Fitzpatrick’s handling of the matter he said these matters had been covered in the internal review which was an objective internal review of process, with which he was comfortable.

Claimant remained unfit to work

123. Following the claimant’s dismissal she remained unfit to work and was unfit to work as at the date of the Hearing. It was not clear when she would return to fitness such as to be able to return to work.

Observations on the evidence

124. Each of the witnesses sought to give their evidence candidly. We did not consider any of the witnesses to be seeking to mislead the Tribunal or not tell the truth. There were a number of significant conflicts in the evidence and we required to assess what was more likely than not to be the case in order to determine the issues before us. We did so by assessing all the evidence.

125. With regard to the claimant, we considered that she had gone through significant trauma in her life. She did her best to recall matters. Where there was a conflict in her evidence with Ms Fitzpatrick, we preferred the evidence of Ms Fitzpatrick. This is not a criticism of the claimant but an assessment we made based on the evidence we heard and the contemporaneous paperwork produced.

126. We considered that the claimant, after the event, potentially some months after the event, recalled matters differently or believed matters had occurred which, from the evidence before us, had not been properly recalled by the claimant. We consider that she perceived Ms Fitzpatrick (and the respondent generally) to be acting in ways adverse to the claimant and that in her subsequent recollection she interpreted matters in a way that supported her belief. In reality the respondent had not been acting adverse to the claimant.

127. There were a number of examples of this. For example when the claimant discovered that her line manager had changed the shifts the claimant worked on the system, which was an act done to ensure the claimant was paid as much as possible (including shift enhancements etc) the claimant believed this was something adverse to her. She also believed that Ms Fitzpatrick knew about it and had been disrespectful to the claimant in not disclosing it, despite this not being a matter for which Ms Fitzpatrick was responsible.

128. The claimant had also been asked in cross examination whether the respondent had supported her, in terms of the occupational health referrals and the provision of various forms of special leave (and reconvened meetings). The claimant said that what was seen in black and white was "not always what it seemed". She believed the respondent was in some way, particularly via Ms Fitzpatrick, acting in ways to hinder rather than support her, which was not, objectively viewed, what occurred.

129. One example that evidences why many of the issues that arose stemmed from the claimant's perception rather than the objective reality of the situation was when she was asked whether text communication with her was positive (as opposed to letters). She said she "didn't feel this was the best way". In

other words it was how she felt she had been treated but at no stage did she indicate this to be the case or ask someone, such as her union representative, to put her feelings forward. Had she done so, she may have discovered that the respondent was seeking to support the claimant and accommodate her as best they could.

130. We found that the remaining witnesses gave their evidence carefully and clearly. While there were some conflicts, we did not consider those to be material nor to have affected the credibility or reliability of the evidence.

131. The key issue we required to resolve was with regard to the conflict in evidence as between the claimant and Ms Fitzpatrick. Both counsel opined that this case in large measure revolved around whose evidence we preferred. The claimant's position was that she had not wanted her contract terminated and believed that with further support she might have been fit to return to work in some capacity. The respondent's case was that the claimant had made her position clear before Ms Fitzpatrick and Ms Adam, namely, that she wanted her contract to be terminated (and agreed with the medical assessment that she was not fit for any type of work and was not likely to be fit for any type of work in the foreseeable future).

132. We carefully assessed the evidence led before us, both in terms of the oral evidence and the written evidence. Having done so at length we concluded that the position set out by Ms Fitzpatrick was more likely than not to have occurred. In other words we preferred the evidence of Ms Fitzpatrick to that of the claimant. There were a number of reasons for this.

133. Firstly we found the evidence of Ms Fitzpatrick as to the claimant asking that her employment be ended supported by Ms Adam. Both witnesses were clear that this was something the claimant wished. Both witnesses understood that the claimant had wanted her employment to be terminated by the respondent without delay. The letter Ms Fitzpatrick issued, while not absolutely clear on this, did state that the claimant's views were taken into account. We considered the evidence we heard carefully and were satisfied that Ms Fitzpatrick's position was more likely than not to be the case.

134. Secondly there were a number of aspects of the claimant's evidence which did not support her position when considered in context. For example, the claimant gave evidence that she did not want her employment to be ended and that she wanted a meeting with Mr McCormack. Despite that evidence at no point did the claimant ever raise that – not even in her very lengthy letter of complaint when she was clearly able to identify the specific areas of concern. Her union representative did query the position as to the September date and process but made no issue of the absence of any formal meeting. Had the claimant asked for a formal meeting at the time, it would have been likely that the claimant would have asked her union representative to make an issue of this. Nothing was said.

135. This was an important point since the respondent had sought to give the claimant the opportunity to explain her position and, if so advised, challenge the recommendation. She did not seek a meeting at the time – despite giving evidence that she had done so. Ms Fitzpatrick and Ms Adam were clear that the claimant did not want such a meeting; she wanted her employment to be terminated. The fact she did not ask for a meeting, or ask her union representative to request such a meeting, and did not raise the failure to convene a meeting as an issue, supports our view on this issue.

136. Further if the claimant had wished a meeting, she knew of the right to appeal and have her points considered by an objective member of staff. She did not appeal against her dismissal and took no action, despite around that time being able to send communications challenging the payments she received and being able to query shifts and other matters. She could have raised any challenge to what happened during those communications but the claimant made no mention of being aggrieved as to her dismissal.

137. While in evidence the claimant said she had lost all trust and had not believed her union representative had properly protected her position, this was not something that the claimant had ever disclosed to the respondent. We considered the information available to the respondent at the time in our

assessment. We had no evidence from the claimant's union representative and were unable to make any decisions in that regard.

138. We accept that Ms Fitzpatrick and Ms Adam's evidence was not identical. We did not consider, however, that such a position suggests their evidence was not credible. One of the conflicts referred to by the claimant's agent was that Ms Adam said in her witness statement that at the meeting in January the claimant did not specifically ask for a change to her shift pattern and that Ms Fitzpatrick had indicated that discussion had taken place as to a change in shifts (which she advised the claimant to raise with her line manager locally). We did not consider that both positions were mutually exclusive and that it was possible for a general discussion about the claimant not wanting to return to 3 long shifts to have taken place without a specific request being made, with both witnesses' position being accurate.

139. We considered that it is common for witnesses' memory to fade or for recollections to differ but on the substantive issues before us both witnesses were clear and candid in their approach and we found their evidence to be preferable to that of the claimant.

140. In assessing the evidence, particularly the claimant's, we were mindful and took careful account of the issues she had faced in her life and her mental health. We understood that it was possible for an employee to say they want things all over, and to ask for dismissal, but not to mean it or to feel under pressure. In this case we carefully analysed the evidence we heard and concluded that from all the facts, taking account of the claimant's specific position and the situation in which she found herself, during her employment she asked for (and desired) her employment to end at the earliest opportunity. Clearly her position changed by the time she had lodged her Tribunal claim but the facts before the respondent at the relevant time was clear.

141. With regard to specific conflicts in evidence we considered all the evidence before us in resolving any conflicts.

142. The first issue was who contacted whom first, the claimant or Ms Fitzpatrick. We preferred the evidence of Ms Fitzpatrick in this regard. While she was initially uncertain, upon reflection she recalled the claimant calling her first. The claimant had been through a huge amount of stressful activity during this period of time and Ms Fitzpatrick wanted to support the claimant. We considered it more likely than not that the claimant would have telephoned Ms Fitzpatrick to keep in touch and that she considered it preferable for contact to be maintained via mobile phone. From the messages presented to the Tribunal the claimant and Ms Fitzpatrick had regular, chatty and informal text exchanges. There was no suggestion at all that the claimant did not wish to engage in such discussions or that she would have preferred another forum for the communication. At no stage whatsoever during the claimant's employment did she ask that the communication method change or that communicating with her by text was not wanted (or desired) by her.

143. We did not find that Ms Fitzpatrick ever said to the claimant that she would not be returning to work due to her son's disability. We preferred Ms Fitzpatrick's evidence in this regard. The claimant was dealing with significant amounts of stress in her life at this time and we considered that the claimant was mistaken in her recollection. There was no reason for Ms Fitzpatrick to say this as she believed that the claimant was returning to work and the process was designed to assist the claimant with that return. While the claimant may have wanted time to be with her family and while the claimant may have been uncertain, understandably. There was no basis or reason for Ms Fitzpatrick making the comment the claimant alleges and we found Ms Fitzpatrick's evidence on this to be more likely than not to be the case.

144. With regard to the discussion as to the claimant changing her shifts, we did not find that Ms Fitzpatrick refused the claimant's request, as alleged by the claimant. We found that the claimant wanted to change her shifts (following her phased return to work) but that was not a matter for Ms Fitzpatrick. It was a matter to be determined by her line manager at the ward. That was supported by her line manager. The claimant was in contact with her line manager and changing her shifts was not discussed with him nor was any

flexible working application lodged by her. We preferred the evidence of Ms Fitzpatrick on this issue and considered that evidence to be more likely than not to be the case.

145. We did not find that Ms Fitzpatrick insisted the claimant return to full time duties as the claimant had alleged. The claimant had indicated that she considered it likely that she may not be fit to return to work and wanted the process to conclude as soon as possible, which could include her dismissal. It was agreed that a further referral to occupational health would take place to allow the matter to be considered fully. Ms Fitzpatrick was seeking to work with the claimant to facilitate her return to work. That included consideration of any alternatives, which would necessarily have involved consideration of less than full time work.

146. The claimant had also alleged that Ms Fitzpatrick made comments knowing this was a trigger for the claimant's post-traumatic stress disorder. We found no basis for this assertion. It was not put to Ms Fitzpatrick that she was aware of the claimant's position in that regard and we did not find any evidence that supported the assertion of the claimant. Ms Fitzpatrick sought to manage the claimant's absence and work with her to facilitate a return to work in some capacity.

147. We did not accept the claimant's assertion that Ms Fitzpatrick did not tell the claimant that she would not be revalidated. Ms Fitzpatrick had been asked to check on the claimant's revalidation by a manager and she provided the claimant with the new protocol that had been introduced at the hospital, that the revalidation had to be signed by the manager. She also passed on the information from the Professional Nurse Adviser given the claimant was unable to have her line manager sign the documents and told her to contact the regulator with regard to an exemption. We found that more likely than not to be the case from the evidence before us.

Law

148. Unfair Dismissal

149. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

150. The potentially fair reasons in Section 98(2) include a reason which:-

> "**relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".**

151. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

152. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> **"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

153. It has been clear ever since the decision of the Employment Appeal Tribunal ("EAT") in **Iceland Frozen Foods Limited -v- Jones** 1982 IRLR 439 that the starting points should be always the wording of

Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden** 2000 IRLR 827.

154. The application of this test in cases of dismissal due to ill health and absence was considered by the Employment Appeal Tribunal in **Spencer –v- Paragon Wallpapers Limited** 1976 IRLR 373 and in **East Lindsey District Council –v- Daubney** 1977 IRLR 181. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

155. The Employment Appeal Tribunal considered this area of law in **DB Shenker Rail (UK) Limited –v- Doolan** UKEATS/0053/09/BI). In that case the Employment Appeal Tribunal (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell** 1978 IRLR 379) is applicable in these cases. The Court of Session in November 2013 decided **BS v Dundee City Council 2014 IRLR 131** in which at dismissal the employee had been off sick for about

12 months (after 35 years' service) with a fit note for a further four weeks. The Court reviewed the earlier authorities and said this at paragraph 27:

> **"Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."**

Jurisdiction

156. The complaints of disability discrimination were brought under the Equality Act 2010. By section 109(1) an employer is liable for the actions of its employees "in the course of employment".

Burden of proof

157. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

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

158. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

159. It is for a claimant to establish facts from which the Tribunal can
10 reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

160. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme
15 Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that
20 analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

161. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof
25 provision is unlikely to be material.

162. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909*)*. Although it would normally be good practice to apply the two-stage test, it is not
30 an error of law for a Tribunal to proceed straight to the second stage in

cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

163. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions for the reasons we set out below.

Time limits

164. The time limit for Equality Act claims appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three 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 …

(2) …

(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".

165. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: "The concepts of policy,

rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

166. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

167. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

168. In **Barclays v Kapur** 1991 ICR 208 the then House of Lords held that a discriminatory practice can extend over a period. The key issue is to distinguish between a continuing act and an act with continuing consequences. The court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

169. Since 6 May 2014, anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See section 140B of the Equality Act 2010 and **Luton Borough Council v Haque** 2018 UKEAT/0180/17.

Extending the time limit

170. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

171. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
    - Length and reason for any delay

- The extent to which cogency of evidence is likely to be affected

- The cooperation of the respondent in the provision of information requested

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- The promptness with which the claimant acted once he knew of facts giving rise to the cause of action

- Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

172. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

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173. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

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174. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

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175. Finally we have also taken into account the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial

assessment from all the facts to determine whether to allow the claims to proceed.

Harassment

176. In terms of section 26 of the Equality Act 2010:

5 (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

10 ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

177. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys**
15 **NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is
20 related to the particular characteristic in the manner alleged in the claim.

178. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a
25 performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question
30 posed by section 26(1)(a) must evaluate the evidence in the round,

recognising that witnesses 'will not readily volunteer' that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'.

179. The Employment Appeal Tribunal held in **Peninsula v Baker** UKEAT/0241/16/RN that in claims of disability harassment, the claimant must (normally) be a disabled person in terms of the Equality Act 2010 in order for the claim to be engaged. There are exceptions to this set out in the judgment. The harassment need not relate to the claimant's disability provided it relates to disability.

180. At paragraph 7.10 of the Code the breadth of the words "related to" is noted. It gives the example of a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

181. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906).

182. Section 26(4) of the Act provides that:

"(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;

(a) the other circumstances of the case;

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

183. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a Tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

184. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant's perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

185. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (**Lindsay v LSE** 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said "Tribunals must not cheapen the significance of these words. They are

an important control to prevent trivial acts causing minor upset being caught”.

186. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

5 *Maternity discrimination*

187. Section 18(4) of the Equality Act 2010 states that: “A person “A” discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave.”

10 188. Chapter 8 of the Code provides useful guidance in this regard. It notes (at paragraph 8.5 and 8.6) that the employer’s motive is irrelevant and unlike for direct discrimination, no comparison is needed. If the woman is treated unfavourably because of maternity leave, that is unlawful.

189. Paragraph 8.20 also notes that maternity leave does not need to be the
15 only reason for the treatment, provided it is an important factor or effective cause. The example given is where an employer dismisses an employee because the person covering for the woman on maternity leave is regarded as a better performer. If she had not been absent on maternity leave, the Code notes she would not have been dismissed
20 and so her dismissal is unlawful even if performance was a factor in the employer’s decision making.

Discrimination arising from disability

190. Section 15 of the Act reads as follows:-

“(1) a person (A) discriminates against a disabled person (B) if –

25 (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)
5 had the disability".

191. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to
10 demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

192. In order for the claimant to succeed in his claims under section 15, the following must be made out:

(a) there must be unfavourable treatment (which the Code interprets
15 widely saying it means that the disabled person 'must have been put at a disadvantage' (see paragraph 5.7)).

(b) there must be something that arises in consequence of the claimant's disability;

(c) the unfavourable treatment must be because of (i.e. caused by)
20 the something that arises in consequence of the disability;

(d) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

193. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR
25 170: *"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this*

stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

194. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the respondent's motive in acting as he or she did is simply irrelevant.

Unfavourable treatment

195. The Supreme Court considered this claim in **Williams v Trustees of Swansea University Pension and Assurance Scheme** 2018 IRLR 306 and confirmed that this claim raises two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?' 'Unfavourably' must be given its normal meaning; it does not require comparison, it is not the same as 'detriment'. A claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.

196. In **Williams** the claimant was able to access his pension early due to ill health and because of the pension rules. The claimant argued that he ought to be able to access an enhanced element (which was calculated on his final salary level). He said the reduced figure arose because it was calculated by reference to his part time and not full-time salary was unfavourable treatment (because it stemmed from his only being able to work part time, due to his disability). While he succeeded at the Employment Tribunal, this was overturned by the Employment Appeal Tribunal and Court of Appeal.

197. The Supreme Court said that in dealing with a section 15 claim, the first requirement was to identify the treatment relied upon. In that case it was the award of a pension. There was nothing intrinsically unfavourable or disadvantageous about the pension on the facts of this case. On the facts the pension was only available to disabled employees (since the entitlement only arose upon permanent incapacity). While that could be less favourable than someone with a different disability, who may have worked more hours upon cessation of employment, no comparison was needed for the purposes of section 15. The claim failed. The Court emphasised that unfavourable treatment meant what it says and was not a high hurdle to surmount.

198. This issue was considered by the Employment Appeal Tribunal in **Chief Constable Gwent v Parsons** UKEAT/143/18 where HHJ Shanks stated, at paragraph 20: *"The Chief Constable relies on the decision in the* Williams *case and says that this case is indistinguishable from it. In* Williams *it was decided that the claimant had not suffered unfavourable treatment because the "relevant treatment" was the award of a pension which he would not have received at all if he had not been disabled and that the award of a pension could not be construed as unfavourable. In this case the "relevant treatment" was identified as the application of a cap to a payment that would otherwise have been substantially larger. It seems to me plain that the two cases are quite different and that the ET was entitled to distinguish* Williams*."*

199. It is therefore necessary firstly to identify the relevant treatment that is said to be unfavourable and a broad view is to be taken when determining what is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

200. In order to achieve the stated purpose, the concept of 'unfavourable treatment' will need to be construed widely, similar to how the concept of 'detriment' has been construed for the purposes of other anti-discrimination provisions. The Code (at paragraph 5.7) indicates that unfavourable treatment should be construed synonymously with 'disadvantage: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'.

201. There is no need for a comparator which is seen by the example given in the Code involving a disabled worker with multiple sclerosis who is dismissed on account of having taken three months' sick leave. The Code states: 'In considering whether… [this] amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination".

Causation

202. There are two causation issues. Firstly, the unfavourable treatment must be "because of something" which gives rise to the same considerations as in direct discrimination with the focus on the alleged discriminator's reasons for the treatment (**Dunn v Secretary of State** 2019 IRLR 298). The Tribunal must identify what the reason was, the reason being a substantial or effective reason, not necessarily the sole or intended reason.

203. Secondly the "something" must more than trivially influence the treatment but it need not be the sole or principal cause (**Hall v Chief**

Constable 2015 IRLR 893 and **Pnaiser** above). It is enough if the unfavourable treatment is the cause of the something (irrespective of whether the respondent knew the something arose as a consequence of the disability – **City of York v Grosset** 2018 EWCA Civ 1105). This is a matter of objective fact decided in light of the evidence (**Sheikholeslami v University of Edinburgh** 2018 IRLR 1090 and **Risby v London Borough of Waltham** UKEAT/0318/15/DM) and there may be a number of links in the chain and more than one relevant consequence may need consideration.

204. Paragraph 5.8 of the Code notes that "there must be a connection between whatever led to the unfavourable treatment and the disability".

205. The fundamental matter for the Tribunal to determine is therefore the reason for the impugned treatment (see **Cummins Ltd v Mohammed** UKEAT/39/20). We have applied the reasoning of HHJ Tayler in this aspect of the claim.

Justification

206. As to justification, in paragraph 4.27, the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

- is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

207. As to that second question, the Code goes on in paragraphs 4.30 to 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

"*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.*"

208. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."*

209. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

210. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

211. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

212. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

213. Finally, in terms of section 15 (2) the obligation arising in section 15(1) does not arise if the respondent shows that it did not know and could not reasonably have been expected to know that the claimant had a disability.

214. Chapter 5 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Submissions

215. Both parties were given significant time to consider the evidence that had been led and produce written submissions. These were exchanged and then the Tribunal heard oral submissions which supplemented the written submissions. The submissions are summarised as follows.

Claimant's submissions

216. The claimant's agent began by noting that counsel were in agreement that in this case much, if not all, depends on credibility, especially that of the

claimant and Ms Fitzpatrick. In some respects Ms Fitzpatrick's evidence did not match that of Ms Adams which is a relevant factor. Nothing can be made of the fact that the claimant did not call her union representative.

Time bar

5 217. The discrimination complained of spans from Spring 2018 to 4 July 2019. The actions of the respondent in the lead up to dismissal formed a course of conduct, culminating in dismissal on 4 July 2019. It was submitted that the Tribunal has jurisdiction to hear those claims. The actions from 21 May 2019 were directed towards achieving the eventual dismissal and were 10 carried out by the same person. Together with the other actions, the actions formed a course of conduct by the respondent.

218. In any event, if the actions are not in time, it is just and equitable to extend time. The claimant was at all times extremely unwell. Taking Tribunal action against her employer during a sickness absence management 15 process whilst struggling with her mental health was clearly an unpalatable option. The respondent was not prejudiced by the Tribunal hearing the claims. It has been able to lead evidence on the claims. The claimant would be prejudiced if the claims are not heard.

Unfair dismissal

20 219. It was accepted that the claimant was dismissed by reason of capability, which is a potentially fair reason in terms.

220. With regard to procedure, the respondent failed to follow a fair procedure in dismissing the claimant. The decision to dismiss the claimant was predetermined. There was no warning that the meeting could result in 25 dismissal. A reasonable employer would have informed the claimant that this was a possible outcome. In any event, the respondent's policy requires there to be notification by letter that a meeting may result in dismissal. a reasonable employer will adhere to their own policy.

221. The claimant was offered a formal meeting and wished to have such a meeting. A reasonable employer would have allowed such a meeting where one had been offered.

222. In the circumstances, the respondent did not act reasonably in treating the claimant's capability as a sufficient reason for dismissal. The respondent failed to investigate with the claimant whether redeployment was possible in terms of its policy.

223. There had been no meaningful discussion of options for redeployment. A reasonable employer would have fully considered options for redeployment within their organisation and in terms of the respondent's policy.

224. It was argued that the claimant did not ask for her contract to be terminated and the evidence was not clear on this point.

225. Although the claimant did not appeal against her dismissal, she stated that this was because she felt she had lost faith. She relied on her union representative who told her the deadline for appealing had passed and that nothing could be done.

226. Had the respondent properly considered redeployment, then it is likely that a career break would have been investigated. A career break would usually last for 12 months although Mr McCormack gave evidence that in exceptional cases it could be up to 2 years. It can't be said with any certainty that had redeployment been properly investigated that dismissal would nevertheless have occurred.

Knowledge of disability

227. The parties agreed that the claimant was disabled for the purposes of the Equality Act 2010 from Spring 2018. She suffered a Depressive disorder with associated post-traumatic and anxiety features. The respondent admits knowledge of her disability from 3 June 2019 (the penultimate OH report). The claimant submitted that the respondent knew, or ought to have

known, of the claimant's disability from 24 May 2018 or, if not, from 11 October 2018.

167. The claimant submitted that the respondent knew, or ought reasonably to have known that the claimant was disabled in or around 24 May 2018. It is clear that the claimant had a mental impairment from 8 January 2018 until dismissal. In May 2018, her mental health had caused her to be unable to work for over 4 months. The ability to work is a normal day-to-day activity. The prognosis was that the claimant would be unable to work for at least several months more. If actual or constructive knowledge was not held at 24 May 2018, then certainly at 11 October 2018 the respondent ought to have known that the claimant was unlikely to be able to return to work before 8 January 2019 and therefore met the statutory definition for having a disability.

Harassment by association

168. *Issue 1(a) – Comments by MF re returning to work:* The claimant's evidence in her statement is that during a phone call on 26 October 2017 Ms Fitzpatrick stated that it the claimant would not be returning to work due to Y's disability. Her statement was clearly related to the claimant's son's disability. Given the position of the claimant at the time, it can be seen to have created an intimidating and hostile environment for the claimant. It was a disturbing comment for a claimant to hear from a person who was managing her absence from work.

169. *Issue 1(b) – Claimant told by MF that she would need manager to revalidate:* The claimant was informed by Ms Fitzpatrick that her former manager had resigned, and therefore could not sign her revalidation, and that her new manager did not know her well enough to sign her revalidation. It is clear that Ms Fitzpatrick's interpretation of the respondent's policy regarding an employee in that position was that revalidation would lapse unless there were exceptional reasons or an exemption. The approach created an intimidating and hostile environment.

Maternity discrimination

170. The inclusion of maternity leave in the OH referrals demonstrates that it was clearly in the mind of Ms Fitzpatrick when considering the dismissal of the claimant. The inclusion of that information constituted unfavourable treatment because the claimant had exercised her right to maternity leave.

5 **Harassment of the claimant**

171. *1(a) – Exchange of texts:* Clearly, the exchange of texts during the claimant's absence from work was related to her disability. The texts from Spring 2018 until June 2019 were sent during the formal absence process. They were related to the claimant's disability since disability was the reason for her 10 absence. The claimant engaged with the texts as she was trying to engage with her employer and not be obstructive. From the perception of the claimant, they created a hostile environment.

172. *1(c) – Pressure to return to the workplace or else contract would be terminated:* The claimant was subjected to pressure by Ms Fitzpatrick to 15 return to work. The claimant's evidence was that during a phone call in May 2019,she was told she would be referred to OH as the respondent needed her back as soon as possible to fulfil her duties. If not, the likely outcome would be termination of her contract. The referral to OH of 21 May 2019 asks for an OH opinion on a time frame for return to work or if termination should 20 be considered. This contrasts with earlier referrals where OH is asked for advice on supporting the claimant. Clearly, her absence was related to her disability and so the pressure to return was also related to her disability. The pressure created an intimidating and hostile environment for the claimant.

173. *1(d) - Being informed of dismissal prior to assessment by the respondent:* The 25 claimant was advised during the phone call in May 2019 that she would be dismissed if she did not return to work. She was also told at the start of the meeting of 4 July 2019 that she was to be dismissed. The statements were related to her disability. The statements created an intimidating and hostile environment for the claimant.

174. *1(e) - MF stating that intention of meeting was to terminate the contract:* The claimant was also told at the start of the meeting of 4 July 2019 that she was to be dismissed. The statement was related to her disability. It created an intimidating and hostile environment for the claimant.

5 **Section 15**

175. *1(b) – Pressure to return to the workplace or else contract would be terminated:* The pressure to return to work was unfavourable treatment, whilst the claimant was absent due to mental health issues. The pressure was because of her long absence from work, which arose in consequence of her
10 disability.

176. *1(c) – Reduction in sick pay:* The claimant's pay was reduced to nil in January 2019 and again in June 2019. Reduction in pay was clearly unfavourable treatment. It arose because of the claimant's sickness absence, which arose in consequence of her disability.

15 177. *1(d) - Information relating to the claimant moving to nil pay was included in the OH referral:* This information was included in the referral of 21 May 2019. The information was irrelevant to the medical assessment of the claimant. it constituted unfavourable treatment. It arose because of the claimant's sickness absence, which arose in consequence of her disability.

20 178. *1(e) - Unilateral change to shifts:* The claimant’s line manager made changes to the claimant's shifts on the respondent's system. The claimant perceived this as unfavourable treatment. She was concerned that matters pertaining to her employment were being addressed without her input. Her previous shift pattern of three long days had been negotiated with previous management.
25 She was concerned that changes to her shifts could continue on her return to work. The change constituted unfavourable treatment from her point of view.

It arose because of the claimant's sickness absence, which arose in consequence of her disability.

Dismissal

179. The claimant was dismissed because of her continued absence from work. Her absence from work was because of her disability, which was known at the time of her dismissal. The claimant did not wish to be dismissed. The dismissal was clearly unfavourable treatment. There is no documentary evidence of the claimant wishing to end her employment.

180. The issue is whether the dismissal can be objectively justified. The onus was on the respondent to prove justification. In order to be justified, treatment must be reasonably necessary and must be the least discriminatory way of achieving the legitimate aim (*Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704, paras 19 - 24).

181. That dismissal was reasonably necessary has not been proved by the respondent. Whilst the respondent states that dismissal was necessary for the purpose of recruitment, the evidence was that there were vacancies on the ward at July 2019 and that these have continued since then. The fact that the claimant remained an employee was not preventing recruitment to the ward.

182. Redeployment instead of dismissal was not properly investigated. Redeployment to another site would presumably have allowed the respondent to recruit for the claimant's position. In any event, this appears to not have been even considered by the respondent.

Remedy

183. The claimant is currently unable to work. At the time of the final OH report (4 June 2019), the prognosis of Dr Haldane was that the claimant could return to work possibly after 6-9 months. The claimant's evidence was that but for the actions of the respondent she would likely have been able to return to

work. A Compensatory Award should be based on the claimant returning to work at the mid-point of the 6-9 month period, *i.e.* 7.5 months.

Respondent's submissions

Jurisdiction

5 184. The claims are time barred as they relate to events that occurred more than 3 months prior to the lodging of the claim. It was not just and equitable to extend time as the claimant could have raised the issues at the time or at least shortly after.

Unfair dismissal

10 185. The claimant was dismissed for reasons of capability as the OH report was clear that the claimant was not fit for work. The claimant agreed with OH that she was not fit for work. She had been off work on sickness absence from 8 January 2018 until 5 February 2019. She then tried a phased return but was only able to complete a few reduced hours shifts before going off sick again 15 from 26 March 2019.

186. With regard to procedure, the claimant's position is that the claimant was not warned in writing that the meeting of 4 July 2019 may result in her dismissal. Further, that the decision to dismiss was predetermined and that the respondent refused to allow the claimant a formal meeting with Mr 20 McCormack.

187. The respondent's position is that it followed a fair procedure which was reasonable in the circumstances. In particular, Ms Fitzpatrick tried to support the claimant back to work from when she went off sick in January 2018 to a phased return in February 2019. The phased return was reasonable starting 25 with 2 hours per day. The claimant went off sick again on 26 March 2019. Ms Fitzpatrick continued to support the claimant to return to work. The claimant was invited to an absence meeting in April 2019. The claimant was unable to attend the meeting in April and so it was rearranged for 21 May. The meeting was proposed to discuss her prospects for a return to work.

188. Issue of warning of termination: The Tribunal was invited to find that the claimant did not need to be explicitly told that the meeting on 4 July was to discuss a possible recommendation for termination as she was fully aware that that was the purpose of the meeting on 4 July. The claimant was aware because she initiated the discussion regarding the termination of her contract. The claimant phoned Ms Fitzpatrick on 21 May to say that she could not attend the planned meeting. She explained that she wanted to bring her contract to an end and asked for that to be done. Ms Fitzpatrick explained that she could not do that then and there and that a process had to be gone through and Ms Fitzpatrick explained the process on the telephone call. She explained that questions would need to be put to OH about termination. Those questions were discussed with the claimant. The claimant agreed to them. Ms Fitzpatrick would not have posed those questions if the claimant had not asked for termination of her contract to be considered.

189. Issue of predetermination: The decision to terminate her employment was not predetermined. The evidence was that if the claimant had changed her mind then other options could have been looked at. She also explained that there was a financial incentive to come off the books. Ms Fitzpatrick believed she was doing what had been requested of her. If at any time the claimant had said she had changed her mind and wanted to explore other options then matters would have been different. There was no predetermination to dismiss the claimant.

190. At the meeting on 4 July the claimant confirmed that she wanted her employment terminated. The claimant now says that she did not want her employment to be terminated. She did ask for her employment to be terminated prior to 4 July meeting and agreed to it at the meeting. In evidence she said that she agreed the date of 7 July for her termination. The letter that was issued confirmed she was happy for the recommendation for termination to take place without a hearing. The claimant had her union representative present and if she had not wanted her employment to be terminated at that meeting on 4 July then representations would have been made. The claimant at no time during the process stated that she did not agree to termination and

was not aware of the nature of 4 July meeting, namely to decide on a recommendation to terminate.

191. Issue of meeting with Mr McCormack: The Tribunal was invited to find that the claimant was offered a meeting with Mr McCormack to discuss the proposed termination but refused. Both Ms Adam and Ms Fitzpatrick were clear that at the meeting on 4 July the claimant refused the offer of a meeting. If the claimant wanted a meeting she would have been granted it. She did not dispute the terms of the letter nor did she appeal nor did her union representative ever raise any issues.

192. The failure to follow the policy to the letter was not material since in reality the position was that the claimant was not fit for any work. There was no point considering other jobs if the claimant was not fit for them. The claimant did not dispute this at the time. The respondent was entitled to rely upon the unchallenged medical evidence before it and did not need to look beyond it.

Did the respondent act reasonably in treating capability as a sufficient reason for dismissal within the meaning of s98(4) Employment Rights Act 1996?

193. It was submitted that the respondent acted reasonably. The claimant had been off sick, with a short return to work since 8 January 2018. There was no prospect of a return within at least 6 to 9 months. The respondent had sought and received adequate medical information. The claimant herself was keen for the respondent to terminate her employment.

194. The OH report indicated that there were no adjustments and no redeployment due to the claimant's anxiety increasing on NHS premises. There was no timeframe for a return to work and Dr Haldane was clear that she was not fit for work and that at best it could be another 6 to 9 months depending on the effectiveness of the planned input. Redeployment was discussed but not in any detail because it had already been discussed and the claimant did not want to redeploy.

195. The claimant asked for termination. She had signed the OH report agreeing with Dr Haldane's assessment and that she was too ill to return to work. Ms

Fitzpatrick could not force the claimant to consider redeployment when she was asking for termination and the OH view was that she was not fit for any work on NHS premises.

196. The claimant was offered a meeting with Mr McCormack to discuss termination but she declined this. That was her choice and it was reasonable of the respondent not to insist on such a meeting given the views of the claimant and that she wanted to move forward with termination as soon as possible. An appeal was offered but not taken.

Disability discrimination

197. The respondent argued it could not know or could reasonably have been expected to know that the claimant had a disability and was likely to be at a substantial disadvantage compared with persons who were not disabled, prior to receipt of the OH report indicating likely disability status on 3 June 2019. The illness at that time was described as bereavement panic attacks which would not necessarily lead one to think the claimant would struggle with day to day activities for a year. The claimant had only been off work since January.

198. It was also not accepted that the respondent knew or ought to have known by October. The letter sent in October talks of the claimant coming back to work at that point.

Harassment due to discrimination by association

199. Did the following acts happen as alleged by the claimant?

(a) Did Ms Fitzpatrick make comments to the claimant during a telephone call on 26 October 2017 stating that she felt the claimant would not be returning to work due to her son's disability?

212. It was argued that Ms Fitzpatrick understood that the claimant would be returning to work. The only question was when she would be returning and that she understood that the claimant wanted to use annual leave and might want to use sick leave before returning. She did not tell the claimant that she would not be returning due to her son's disability.

(a) Did Ms Fitzpatrick give repeated advice to the claimant in October 2017 by phone call regarding her registration with the Nursing and Midwifery Council? In particular, did she tell the claimant that she would not be able to maintain registration with the Nursing and Midwifery Council? Further did she tell the claimant that she required her line manager to sign off on her revalidation?

213. Ms Fitzpatrick was required to remind the claimant that her revalidation was due. She was asked to do that by Mr McKay. She explained to the claimant the new protocol namely that the line manager needed to sign off on her revalidation. She did not say that the claimant would not be able to maintain registration. She said she would find out what the claimant should do and she was advised by the Professional Nurse Advisor that the claimant should contact the NMC and explain her situation. The advice had nothing to do with the claimant's son's disability.

<u>If so, did the conduct above amount to unwanted conduct related to the claimant's son's disability which had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?</u>

214. It was denied that the conduct happened other than the advice re the new protocol. The advice was not unwanted conduct which had the purpose or effect of violating her dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment. Ms Fitzpatrick was purely passing on the terms of the new protocol. Further the advice was not related to the claimant's son's disability.

215. In relation to the alleged comment that she would not be able to maintain registration, it was denied that advice was given. It was not unwanted conduct related to the claimant's son's disability.

Maternity discrimination

216. Did the respondent take into account the claimant's absence for maternity leave when coming to a decision to dismiss the claimant on grounds of capability?

217. The respondent did not take into account the claimant's absence for maternity leave when coming to the decision to dismiss. Ms Fitzpatrick took into account the claimant's sick leave from 8 January 2018. She did not take into account her maternity leave or other special or parental leave.

Harassment related to the claimant's disability: section.26

Did any of the following acts happen?:

(a) Was there an exchange of text messages and emails regarding the claimant's return to work? This was accepted by the respondent.

(b) Was pressure placed upon the claimant to return to the workplace on 21 May 2019?

217. The respondent denied putting any pressure on the claimant to return to the workplace on 21 May 2019. Ms Fitzpatrick wanted to support the claimant back to work. It was the claimant who raised the possibility of termination of contract as she said she could not see herself coming back to work. Ms Fitzpatrick took her through the OH process that would need to be undertaken.

(c) Was the claimant advised that she was being dismissed prior to fully establishing the impact of her disability?

218. There was an initial discussion regarding the process of termination on 21 May 2019. She was not advised that her contract was to be terminated. In order to come to a view a report had to be obtained from OH. Ms Fitzpatrick relied on that report when making her recommendation to terminate the contract. On the basis of that report she concluded that the claimant was unlikely to be able to return to work in any capacity for at least 6-9 months. The OH report acknowledged there was planned input via a psychologist but even with that OH did not envisage a return for 6-9 months. The claimant agreed with that assessment. The respondent was entitled to rely on the OH

assessment and the claimant's own view of her likely return when coming to a view as to termination. The impact of her disability had been fully assessed.

(d) Did Ms Fitzpatrick attend at the claimant's home on 4 July 2019 with the clear intention of terminating her contract?

219. Ms Fitzpatrick attended the meeting on 4 July 2019 knowing that one option the claimant had suggested was termination of the contract. It is accepted that that was the most likely option given the fact that redeployment did not appear to be a likely option given the OH report and the claimant's own views that she didn't want to be redeployed. The situation could have changed at that meeting and so termination was by no means inevitable.

220. If found to have happened, did any of the above acts amount to unwanted conduct related to the claimant's protected characteristic, namely disability, and if so did said conduct have the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

221. In relation to the text messages it is submitted that communication via text message is not unwanted conduct. The claimant herself agreed to communicate via text message and it is submitted that when entering the formal process Ms Fitzpatrick's view that a formal process all done by letter can be daunting. It is submitted that continuing to use text message to arrange meetings is a reasonable way to proceed. The conduct was not related to the claimant's disability. The text messaging happened before the claimant was disabled and continued because Ms Fitzgerald believed the claimant felt that was the most convenient method of communication for her. The conduct dud not have the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Discrimination arising from disability – section 15

222. Did any of the following acts happen?

(a) Was pressure placed upon the claimant to return to the workplace on 21 May 2019? This did not happen for the reasons submitted above,

(b) Was the claimant's sick pay reduced?

224. It was accepted sick pay was reduced by payroll. The claimant accepted that her sick pay was due to go to half pay and then nil pay as per the respondent's policies. The claimant did not request any extension to her sick pay. The respondent did not treat the claimant unfavourably by reducing her sick pay in line with the policy. It could only be unfavourable treatment if she had asked for something to be done and that request had been refused.

225. If the reduction in sick pay was unfavourable treatment then the legitimate aim was compliance with NHS terms and conditions which require payroll to calculate sick pay on the basis of the prior 12 months absence. Payroll cannot unilaterally decide not to reduce sick pay. No application was made.

(c) Did Ms Fitzpatrick's recording information relating to the claimant moving to nil pay in the OH referral amount to unfavourable treatment?

226. It was argued that referring to nil pay is not unfavourable treatment. It is information that is part of the background to a case and is given to OH. Dr Haldane's evidence was that it did not influence his view as to whether the claimant is fit for work.

(d) Was there a unilateral change to the claimant's work shifts?

227. The respondent disputed this. The only change made was for payroll purposes. There was no actual change to the claimant's shifts as for work purposes she remained on her agreed shift pattern namely 3 long days.

228. It was not unfavourable treatment. The change was made so the claimant could benefit for the most enhanced shifts. In any event the treatment did not arise from the claimant's disability. It arose because the claimant's line

manager believed it was better for the claimant to put the 37.5 hours through over 5 days rather than 3 long days. That decision was not related to disability.

Did the claimant's dismissal amount to discrimination arising from her disability within the meaning of s15 Equality Act 2010?

229. The claimant wanted her employment to be terminated at the time. St no time said that she did not want the termination and her main concern was that she was being kept on the payroll till September. It cannot be said in circumstances where the claimant at the time wanted her employment to end as soon as possible that the dismissal was unfavourable treatment.

230. It was argued that in any event dismissing an employee in circumstances where OH have indicated that they are not able to work for the foreseeable future which is not disputed is a proportionate means of achieving a legitimate aim. The legitimate aim being the respondent's need for staff to attend work and provide a service. Mr McCormack gave evidence that he would not be able to fill the claimant's role if she remained employed and it is therefore necessary to recruit on to wards. The fact that there are still vacancies did not take away from the need at the time to try to ensure that staffing levels are at a suitable level.

231. In terms of remedy the claimant was unable to work and so there was no financial loss. There was no evidence to support that the claimant's condition was in any way caused or exacerbated by her disability.

Decision and discussion

232. Having examined the evidence before us and considered matters carefully in light of the applicable law, we are able to reach a unanimous view on each of the issues. We shall deal with each of the issues in turn,

Jurisdiction

233. Are claims of disability discrimination, associative disability discrimination and maternity leave discrimination in relation to alleged events before 4 July 2019, time barred in terms of section 123(1) Equality Act 2010?

234. ACAS conciliation took place from 3 October 2019 to 15 November 2019. On 15 December 2019 the claimant presented her claims. Applying the ACAS Early Conciliation rules, 15 December was the last day for the presentation of her claim in respect of acts occurring on 4 July 2019. Any claims stemming from acts before 4 July 2019 would be time barred unless forming part of an act extending over a period.

235. The claimant's agent argued the actions all formed part of a course of conduct that led to the claimant's dismissal and were carried out by the same person, thereby amounting to a course of conduct.

236. The associative harassment claim related to 2 acts in October 2017. The other claims related to acts in 2019. We found no basis to link the acts that occurred in 2017 with the 2019 incidents. We found no evidence of a policy that was in effect or a continuing state of affairs. Rather, the 2 acts in October 2017 were discrete incidents and entirely unrelated to any subsequent acts. Those claims were time barred. The acts were not acts extending over a period of time.

237. The harassment claim and section 15 claim relied upon Ms Fitzpatrick's management of the claimant's absence, particular from May 2019 until her dismissal in July 2019. In principle the acts could have formed part of a continuing state of affairs such as to form an act extending over a period. As we set out below, we did not find that the acts as alleged by the claimant all occurred (and we did not consider any of the acts to amount to unlawful discrimination) but we would have preferred the claimant's agent's arguments with regard to the events from May to July 2019.

238. If so, is it just and equitable to extend time?

239. We considered whether it was just and equitable to extend the time limit in respect of the 2017 acts. We heard no evidence as to why the claimant did

not raise a claim in respect of those acts she believes to be unlawful discrimination. The claimant did have the benefit of trade union support.

240. We also take into account that a fair hearing in respect of those allegations was possible, with the respondent not arguing that recollections had faded such that it was not possible to determine those issues.

241. We balanced the prejudice to the parties and concluded that it was just and equitable to allow the 2017 claims to be considered. We took into account the lengthy period of time that had elapsed and the absence of any evidence as to why it took so long to raise the claims but the prejudice to the claimant in not having the claims determined in our view outweighed the prejudice to the claimant in having to deal with claims that occurred a number of years ago, when there was no suggestion any evidence could not be led.

242. We would have been satisfied that it was just and equitable to hear the harassment claims even if the conduct was not found to be an act extending over a period. We considered that a fair hearing was still possible and the balance of prejudice favoured allowing the claims to proceed to a determination.

243. We therefore decided to consider each of the claims.

Unfair dismissal

Was the claimant dismissed for a potentially fair reason, namely capability within the meaning of s98(1)(b) Employments Right Act 1996?

244. The claimant accepted that the reason for dismissal was capability. That is a potentially fair reason.

Did the respondent follow a fair procedure?

245. The main challenge with regard to the procedure was that it was alleged that the claimant was not warned in writing that the meeting of 4 July 2019 may result in her dismissal. It was also argued that the decision to dismiss was

predetermined and the respondent refused to allow the claimant a formal meeting with Mr McCormack.

246. We found that the procedure that led to the claimant's dismissal, by reason of capability, was a procedure that a reasonable employer could follow on the facts before us.

247. From the facts we have found the claimant knew that dismissal was being contemplated as a result of her health. By her own admission (as evidenced in her letter of complaint) she knew that the next meeting after the discussion in May 2019 was to explore her dismissal. Rather than accede to the claimant's request to expedite that meeting, the respondent sought further medical input. The respondent wanted to ensure it had up to date medical evidence with regard to the claimant's health before proceeding.

248. The claimant was invited to a meeting, by letter which was to explore her continued employment. She was aware that dismissal was being contemplated. If her position had changed or had the medical position been different to that which was before the respondent, the position may have differed but we are satisfied that the procedure followed was fair and reasonable in all the circumstances.

249. Had the claimant wished a formal meeting prior to the decision to dismiss being formally considered a letter may well have been issued at that point. We did not consider the absence of specifically referring to dismissal in Ms Fitzpatrick's letter inviting the claimant to the 4 July meeting to be unfair or unreasonable given the surrounding facts and the knowledge the claimant had. She was fully aware of the purpose of the meeting and understood the issues to be discussed and chose not to ask for a formal meeting.

250. We did not find that Ms Fitzpatrick's' position was predetermined such that dismissal was inevitable. We were satisfied that Ms Fitzpatrick supported the claimant and was open to exploring alternatives to dismissal. From the information before the respondent at the time the respondent acted reasonably in their approach.

251. Had the claimant wanted a formal meeting before her dismissal was confirmed by Mr McCormack she could have asked for such a meeting. It would have been likely that prior to such a meeting taking place the claimant would have received a letter explaining what the purpose of the meeting was. In any event the claimant had been told clearly in the letter she received the position as well as being told the position during her meeting with Ms Fitzpatrick and Ms Adam. The claimant accepted the position and did not seek a further meeting.

252. We did not consider it unreasonable for the respondent to proceed as it did given the facts before the respondent. The claimant knew the purpose of the meeting and had all the information the respondent had in her possession. We accepted Ms Fitzpatrick's evidence that the purpose of the meeting was to discuss whether the position had changed or the claimant had anything further to say, in addition to what was set out in the medical information. She had no further information to impart and agreed with what was set out in that letter.

253. We find that the procedure that was followed that led to the claimant's dismissal was a procedure that a reasonable employer could follow. The procedure fell within the range of responses open to a reasonable employer on the facts we found. It was a fair procedure.

254. **Did the respondent act reasonably in treating capability as a sufficient reason for dismissal** within the meaning of s98(4) Employment Rights Act 1996? The claimant disputes this arguing that alternatives to dismissal were not investigated or considered.

255. The respondent in this case genuinely believed the claimant was unfit to carry out her role. That belief was honestly held.

256. We are satisfied that the respondent carried out as much enquiry as to her fitness as was reasonable in the circumstances. The claimant had been examined on a number of occasions. While she had tried a return to work, that had not been successful. The up to date position by July 2019 was that

there was no reasonable prospect of a return to any form of work by the claimant for at least 6 months, potentially longer. We find that the respondent had waited a reasonable period of time to determine whether or not some recovery was likely. The information before the respondent was such that it was reasonable for the respondent to conclude that it could wait no longer and proceed to dismissal. Dismissal fell within the range of responses open to a reasonable employer.

257. The claimant understood the conclusion of the physician. She had the opportunity to challenge the view if she believed that it was overstated or if something material had been omitted. At no stage during the claimant's employment did she contest the medical position (whether herself or via her trade union). The respondent was aware that she was undergoing counselling sessions but there was no suggestion that the claimant would return to fitness in any capacity sooner than the medical information before the respondent suggested.

258. We also note that there is no mention in the claimant's letter of complaint that the information provided to the respondent was in any way inaccurate.

259. While the claimant during the Tribunal process sought to identify alternatives to dismissal, these were not suggested during the dismissal process. The respondent genuinely believed that there was no realistic prospect of a return to work in any capacity. They acted reasonably in not specifically exploring alternative roles in light of that information. The respondent's policy must be considered in context. Where an employee agrees there is no realistic prospect of a return to work in any capacity, it may not be unreasonable not to consider redeployment in detail. That was the position in this case.

260. We considered the evidence led by the claimant's mother. Unfortunately the information presented to the Tribunal was not information presented to the respondent at the time when the claimant's dismissal was being considered. There was no suggestion from the claimant that she was or was likely to be fit to carry out any work, or enter any NHS premises, for at least 6 if not 9 months. Even then the position remained uncertain. The claimant at no stage

suggested she wished to explore alternatives and had agreed that there were no alternative roles which she could carry out given her health position.

261. No mention was made of any career break during the dismissal process which would not ordinarily be something that would be raised as an alternative to dismissal of an employee who was unfit to return to work. We considered that the respondent acted reasonably in concluding from the information before it, together with the claimant's agreement, that there was no realistic prospect of a return to work in the near future and looking at alternatives (and a career break) was futile. The claimant was unfit for work and was likely to remain so for at least 6 months. The respondent acted reasonably in concluding that dismissal was an appropriate step.

262. The claimant was given the opportunity of a formal meeting but she declined that meeting. That was entirely a matter for the claimant. We consider that in the circumstances the respondent acted reasonably given the information before it in proceeding without such a meeting. The claimant had been clear in her position with Ms Fitzpatrick in the months leading up to the July meeting. The medical position was clear. The claimant did not dispute the medical position nor suggest that there was some way in which she could return to work in some capacity within the next 6 to 9 months. The claimant at no stage raised any issue with regard to the absence of a meeting until after her dismissal. She had shown that she was able to challenge things that happened with which she disagreed prior to her dismissal but did nothing in this regard. There was no suggestion even in her complaint that she had been denied a meeting. She had accepted the position and it was reasonable for the respondent to proceed as they did.

263. We considered it important that at no stage was the medical position before the respondent challenged by the claimant or her union representative. She knew dismissal was being considered and she knew that the evidence before the respondent suggested she could not return to work for at least 6 months. She chose not to have a further meeting to discuss the matter and she chose not to appeal the decision.

264. While we have considerable sympathy for the claimant (as did the respondent) the respondent reached a decision, based on the information before it, which was reasonable and fair.

265. In our assessment we took account of the size and resources of the respondent. The respondent had gone to significant efforts to accommodate the claimant. A number of steps had been taken to support her. While another, equally reasonable employer, might well have delayed dismissal or considered alternatives, the respondent was reasonable in its approach. We also took into account the respondent's policy and the context in which it was applied and considered that the respondent acted fairly and reasonably in light of the policy and facts facing the respondent.

266. We also considered equity and the substantial merits and found that the respondent's decision to dismiss was fair and reasonable on the facts. The decision to dismiss fell within the range of responses open to a reasonable employer.

267. The dismissal of the claimant was fair.

268. As the dismissal was fair we did not consider issues relating to remedy.

Disability discrimination

269. It was agreed between the parties that the claimant was disabled within the definition of section 6 of the Equality Act 2010 from Spring 2018.

270. The first issue is whether the respondent knew or could reasonably have been expected to know that the claimant had a disability and was likely to be at a substantial disadvantage compared with persons who were not disabled, prior to receipt of the Occupational Health report indicating likely disability status on 3 June 2019.

271. The claimant's agent argued that the respondent ought to have known about the claimant's disability on 24 May 2018 which failing on 11 October 2018. The respondent's agent argued the respondent only knew that the claimant

was a disabled person when it received the medical adviser's confirmation in July 2019.

272. The claimant's first absence was in 8 January 2018. On 18 May 2018 the occupational health report stated the claimant suffered from bereavement panic attacks. This continued during the claimant's absence and was verified later in May and in August 2018.

273. In the 24 May occupational health report the claimant is said to have bereavement, low mood and anxiety. The report stated that a return to work was expected in "further months". As a return to work was expected within months we could not say that in May 2018 it would have been reasonable for the respondent to consider the claimant to be a disabled person in terms of section 6 of the Equality Act 2010. There was no basis for the respondent reasonably to believe that the claimant's impairment (or its effects) were likely to last for 12 months or more at this stage.

274. By October, the claimant had been absent from work for 9 months. She had bereavement panic attacks. The report stated that a return to work should be considered "in the near future". The claimant was progressing with counselling sessions. Given a return to work was being contemplated in October we did not consider that it would have been reasonable for the respondent to have believed the claimant was likely to have been a disabled person at this stage. If the claimant had returned to work within 2 months it was more likely than not that the claimant would not have been a disabled person.

275. There was no reasonable basis for the respondent to believe, in October 2018, that the claimant would remain unfit until January 2019 (or that her mental impairment would have the requisite effects for a year). The occupational health reports were reasoned and a reasonable employer would

not consider the claimant to satisfy section 6 of the Equality Act 2010 at this stage.

276. The claimant confirmed that she remained unfit in November but again there was no suggestion her illness would continue or be likely to continue for 12 months.

277. On 24 December 2018 the claimant had been confirmed as suffering from bereavement, low mood and anxiety and that a return to work was not expected for at least 6 weeks. At this stage we considered a reasonable employer would believe that the claimant was likely to satisfy the conditions to be a disabled person in terms of the Equality Act 2010. It was only from 24 December 2018 that a reasonable employer ought to consider that the claimant would be a disabled person.

278. This finding has limited effect since each of the acts relied upon (in relation to the claimant's disability) occurred after 24 December 2018, when the respondent ought to have known the claimant was a disabled person.

279. We note that it was accepted that the claimant's son was disabled from birth and that the respondent knew, or could reasonably have been expected to know, that he had a disability from around April/May 2017.

Harassment due to discrimination by association

280. Did the following acts happen as alleged by the claimant?

(a) Did Ms Fitzpatrick make comments to the claimant during a telephone call on 26 October 2017 stating that Ms Fitzpatrick felt the claimant would not be returning to work due to her son's disability?

278. On the facts we found, Ms Fitzpatrick did not make these comments. Ms Fitzpatrick did not believe that the claimant would not be returning to work. This was a matter for the claimant to determine given the issues with which she was grappling in her life at the time.

(b) Did Ms Fitzpatrick give repeated advice to the claimant in October 2017 by phone call regarding her registration with the Nursing and Midwifery Council? In particular, did Ms Fitzpatrick tell the claimant that she would not be able to maintain registration with the Nursing and Midwifery Council? Further did Ms Fitzpatrick tell the claimant that she required her line manager to sign off on her revalidation?

279. Ms Fitzpatrick had been instructed to remind the claimant that her revalidation was due. The respondent had a protocol that dealt with this issue. While that was stricter than this required by the regulator, it was the position the respondent had adopted (and was not unreasonable). We did not find that the claimant had been told that she would be unable to maintain her registration. Ms Fitzpatrick took advice and passed this to the claimant, who was able to contact the regulator and maintain her registration.

280. Ms Fitzpatrick did give the claimant guidance with regard to her revalidation. That guidance was that a line manager required to complete the documents (which was the respondent's policy) and that if she was unable to achieve this, she required to speak with the regulator given the circumstances.

281. **If so, did the conduct above amount to unwanted conduct related to the claimant's son's disability which had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment** for her within the meaning of s.26 Equality Act 2010?

282. We find that the treatment we found to have occurred was not unwanted conduct relating to the claimant's son's disability. Ms Fitzpatrick was giving the claimant guidance to ensure her validation remained in place. It was not unwanted conduct since the claimant needed to understand how to maintain her registration. Ms Fitzpatrick communicated what the respondent's policy was (which was a new policy given the validation scheme had only recently been introduced).

283. Further, the conduct was unrelated to the claimant's son's disability. It was conduct related to the validation process and entirely unrelated to disability.

284. We were also satisfied that the conduct was not conduct that had the purpose or effect of violating the claimant's dignity or creating a hostile degrading humiliating or offensive environment for the claimant. The claimant was given advice and took it. It had neither the purpose nor the effects of violating the claimant's dignity or creating a hostile degrading humiliating or offensive environment for the claimant. The conduct was not unlawful harassment.

285. This claim is ill founded.

Maternity discrimination

286. **Did the respondent take into account the claimant's absence for maternity leave when coming to a decision to dismiss the claimant on grounds of capability?**

287. We found that Ms Fitzpatrick did not take into account the claimant's maternity leave in reaching her decision (which was to recommend dismissal). The principal focus was in respect of the medical position that looking forward the claimant was not likely to be fit to return to work in any capacity within at least a 6 month period.

288. While the occupational health referrals made reference to maternity absence, the details entered were absences from work (and not just sickness absence). Although not strictly relevant (nor requested) it was background information as to dates the claimant was not at work. It was not information that Ms Fitzpatrick took into account in recommending dismissal (nor did Mr McCormack take it into account in accepting the recommendation). We accepted Ms Fitzpatrick's evidence that the claimant's maternity leave and maternity related absence was not a factor in her decision to recommend dismissal (which recommendation was taken up by Mr McCormack).

289. We are satisfied that Ms Fitzpatrick did not in her analysis take into account in any material way the claimant's maternity leave in reaching her decision.

Maternity leave was in no sense whatsoever related to the claimant's dismissal. That claim is ill founded.

290. **If so, did the respondent discriminate against the claimant by treating her unfavourably because she exercised the right to take maternity leave** under section 18(4) Equality Act 2010?

291. The claimant's dismissal was in no sense whatsoever related to the claimant having exercised her right to maternity leave. That claim is ill founded.

Harassment related to the claimant's disability (section 26 Equality Act 2010)

292. Did any of the following acts happen?:

(a) Was there an exchange of text messages and emails between Ms Fitzpatrick and the claimant regarding the claimant's return to work?

291. This was accepted by the respondent to have happened.

(b) Was pressure placed upon the claimant by Ms Fitzpatrick to return to the workplace on 21 May 2019?

292. We do not find that this treatment occurred. Ms Fitzpatrick was exploring the claimant's fitness to return to work. That continued to be the case notwithstanding the claimant's request that her contract be terminated. Ms Fitzpatrick was clear that the purpose in the discussions was to assess the claimant's position and support her with a view to a return to work.

293. We do not find that pressure was placed upon the claimant to return to work. While Ms Fitzpatrick had referred to return to full duties in her Occupational Health referral in May 2019 we did not consider this to be pressure to return but rather Ms Fitzpatrick seeing an assessment of the claimant's position to do the role for which she was employed. This referral was in the context of the claimant having told Ms Fitzpatrick that she wanted her contract to be terminated. Ms Fitzpatrick wished to assess the medical position in respect of the claimant's fitness for her duties.

294. The fact Ms Fitzpatrick met with the claimant in the way she did and sought medical intervention at each stage supported the respondent's position that Ms Fitzpatrick did not place pressure upon the claimant to return to the workplace on 21 May 2019.

5 295. This treatment has not been made out.

(c) Was the claimant advised that she was being dismissed prior to fully establishing the impact of her disability?

296. Dismissal had been discussed during the discussion in May 2019 but the claimant was not told that dismissal was inevitable. The respondent
10 reasonably obtained further medical information and reached its decision based upon an assessment of the information before it. The claimant did not provide any information to dispute the information before the respondent. The respondent had properly established the impact of her disability.

15 297. While the claimant alleges further steps should have been taken particularly with regard to the stress she said she had suffered we are satisfied that the information before the respondent was sufficient. While other employers may have obtained more information, the procedure undertaken is not a counsel of perfection. The approach undertaken was reasonable and sufficient
20 information was obtained with regard to the impact of the claimant's disability prior to dismissal. This treatment has not been made out on the facts.

(d) Did Ms Fitzpatrick attend at the claimant's home on 4 July 2019 with the clear intention of terminating her contract?

298. We do not find that Ms Fitzpatrick had a clear intention of recommending
25 dismissal of the claimant. From the information before her at the time Ms Fitzpatrick considered that dismissal was the most likely outcome but we accepted her evidence that had the claimant produced information to suggest a contrary position, the outcome may have been different. This treatment has not been made out.

If found to have happened, did any of the above acts amount to unwanted conduct related to the claimant's protected characteristic, namely disability, and if so did said conduct have the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her within the meaning of section 26 Equality Act 2010?

299. The treatment which occurred was the communication with the claimant by text. We are entirely satisfied that this was not unwanted conduct. At no stage during her employment did the claimant ever suggest the method of communication was unwanted. On the contrary, it appeared to suit the claimant's situation and she fully engaged with it.

300. We considered the claimant's suggestion that she believed she had to engage given it was a manager but we note that the claimant had been able to challenge the respondent when they did something with which she was unhappy, such as the notes following the meeting in August 2018. The treatment complained of was not unwanted conduct.

301. Even if the treatment was unwanted, we would have found that the use of text messages was not conduct that had the purpose or effect of violating the claimant's dignity or of creating an intimidating hospital or degrading offensive environment for the claimant. The approach adopted was entirely reasonable on the facts.

302. We were not satisfied any of the acts relied upon gave rise to a claim for unlawful harassment. This claim is ill founded.

Discrimination arising from disability (section 15)

303. **Did any of the following acts happen?**

(a) Was pressure placed upon the claimant by Ms Fitzpatrick to return to the workplace on 21 May 2019?

304. For the reasons set out above this conduct had not been established in evidence.

(b) Was the claimant's sick pay reduced?

305. It was accepted that the claimant's sick pay was reduced and that incorrect information was originally sent to the claimant.

(c) Did Ms Fitzpatrick record information relating to the claimant moving to nil pay in the Occupational Health referral?

306. The respondent accepted this happened.

(d) Was there a unilateral change to the claimant's work shifts?

307. We do not accept that there was a unilateral change to the claimant's shifts since this was an administrative act taken to maximise the claimant's income. At no point was her shifts in fact changed.

If so, did the respondent treat the claimant unfavourably?

308. We firstly consider whether reducing sick pay was unfavourable treatment. This was treatment which occurred as a result of the application of the respondent's policies, which applied to all staff. We have to determine whether the treatment was unfavourable. There are two ways to consider this. On the one hand paying anything less than full pay is clearly unfavourable treatment and places the claimant at a disadvantage. The alternative view, however, is that being paid sick pay is in fact more favourable since the alternative is to get paid no pay at all (where an employee does not carry out their duties) and therefore the application of sick pay, and a sick pay policy, is not unfavourable treatment, since the employee is not disadvantaged.

309. We accept the respondent's submissions with regard to this issue and find that there was no unfavourable treatment by applying the sick pay policy. At no point during her employment did the claimant suggest that she was unhappy or disadvantaged by the application of the respondent's sick pay policy to her. She received pay in accordance with it, and then received nil pay, all in accordance with the policy. It was not unfavourable treatment to pay the claimant what she was due under the policy when she was unable to

work, nor to reduce the claimant's pay to nil when she was unable to work on the facts of this case. All staff who were absent were treated in the same way. The treatment the claimant received was not unfavourable as she had not attended work and was not thereby entitled to pay. The fact the policy was
5 not more advantageous, did not mean that the treatment was unfavourable.

310. The error made by the respondent did not alter our view. The policy was applied by the respondent. There was no suggestion by the claimant that the policy had not been properly applied or that the policy was in some way unlawful. Ms Fitzpatrick advised the claimant of the error payroll had made.
10 The policy was fairly applied and the treatment the claimant received in relation to sick pay was not unfavourable treatment.

311. **If so, did the respondent treat the claimant unfavourably for a reason arising from the claimant's disability**? We considered that the treatment did occur because of something arising as a consequence of the claimant's
15 disability – her absence. We did not understand this to be disputed.

312. If so, was that treatment a **proportionate means of achieving a legitimate aim**?

313. If it was unfavourable treatment we would have been satisfied that the treatment was objectively justified. We would have upheld the respondent's
20 agent's submissions in this regard. The aim being achieved was to apply the NHS terms and conditions, to ensure public funds were used appropriately. Reducing pay in line with the sick pay policy was a proportionate means of achieving the aim. Continuing to pay full pay or some pay in the circumstances was not proportionate on the facts. The error made by the
25 respondent did not affect the outcome since the respondent had erred in their calculation and fixed this error by communicating the correct position to the claimant, which she understood. Applying the sick pay policy on the facts was a proportionate means of achieving a legitimate aim.

314. Secondly we consider whether referring to the claimant being on nil pay is
30 unfavourable treatment. We found no evidence to support the assertion that

this had somehow been taken into account to the claimant's detriment. It was a fact that the claimant had reverted to nil pay (and in any event could have been worked out by applying the sick pay policy to the length of the claimant's absence). It was background information as to the claimant's position. It was not something the claimant had raised at the time as being something about which she was concerned or that it was something that had been unfairly included or taken into account. The information that was included was accurate. It was background information. On the facts we did not find that treatment to be unfavourable. It was background information (which was accurate) and not something about which the claimant had raised concern.

Did the claimant's dismissal amount to discrimination arising from her disability within the meaning of section 15 Equality Act 2010?

315. From the facts we found the claimant wanted her employment to be terminated. That was not something the claimant disputed during her employment. She did not seek a meeting with Mr McCormack to challenge the decision and she did not appeal. Her dismissal on the facts of this case was not unfavourable treatment: It was something she wanted and desired.

316. If it were unfavourable treatment it would have been because of something arising in consequence of her disability, namely her absence.

317. We would have considered whether or not the dismissal was a proportionate means of achieving a legitimate aim. The aim relied upon was the need for staff to attend work and provide a service. We would have found that to be a legitimate aim.

318. In assessing the proportionately we would have taken into account all the facts and intensely analysed the position. Had dismissal not happened the respondent would not have been able to seek a replacement. That would impact upon the service. Mr McCormack noted that for every day a nurse is not at work, another employee requires to cover the work that would normally be done. That places stress on the service. That position could not continue

indefinitely. A lengthy period of time had elapsed already. It was unlikely that the claimant would be fit to return in any capacity within a reasonable period.

319. We balanced the effect of dismissal upon the claimant, bearing in mind this was something she had asked for and wished, with the effect upon the respondent, who required to replace the claimant and ensure the work she was contracted to do was carried out. It was not possible to recruit a permanent replacement while the claimant was in the role.

320. We would have found that the claimant's dismissal on the facts was objectively justified.

321. While the claimant had exhausted pay, retaining her prevented recruitment of a replacement. There was no realistic prospect of a return to work in the foreseeable future. The claimant remained unfit to work. She did not want to remain in employment. Dismissal was a proportionate means of achieving a legitimate aim.

Summary

322. Each of the claims is dismissed.

323. We wish to conclude by thanking both parties for their professionalism in working together to achieve the overriding objective.

Employment Judge: David Hoey
Date of Judgment: 08 September 2021
Entered in register: 10 September 2021
and copied to parties