EMPLOYMENT TRIBUNALS

Claimant: Ms S Adomi	**Respondent:**	**Sheffield Teaching Hospitals NHS Foundation Trust**
Heard at Sheffield ET	**On:**	**7, 8, 9, 10, 11, 14, 15, 16, 17, 18 March, 16 (reading), 17, 18, 19 (deliberations) and 20 (deliberations) May 2022**
Before		**Employment Judge Davies** **Ms J Cairns** **Mr K Smith**
Appearances		
For the Claimant:		**Mr R Patton (counsel)**
For the Respondent:		**Ms R Kight (counsel)**

RESERVED JUDGMENT

1. The Claimant's complaints of direct disability discrimination, harassment related to disability, unfair dismissal, unfavourable treatment because of something arising in consequence of disability, victimisation, unauthorised deduction from wages and breach of contract are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of unfair dismissal, direct disability discrimination, unfavourable treatment because of something arising in consequence of disability, harassment related to disability, victimisation, breach of contract (expenses and accrued holiday pay) and unauthorised deduction from wages (accrued holiday pay) brought by the Claimant, Dr S Adomi, against her former employer, the Sheffield Teaching Hospitals NHS Foundation Trust.

2. The Claimant was represented by Mr R Patton (counsel) and the Respondent was represented by Ms R Kight (counsel). The Tribunal discussed reasonable adjustments with the Claimant at the outset. She did not identify any adjustment she needed. The Tribunal made clear that we would take regular breaks and that the Claimant should ask if she needed a break. On the seventh day of the hearing Mr Patton requested an adjournment for the day on the basis that Dr

Adomi was not fit to give him instructions. She had slept very little over the previous few days, and indeed had sent Mr Patton lengthy emails during the night. The remaining witnesses could make themselves available on the eighth day, and in those circumstances the Tribunal agreed to the adjournment. On the eighth day, Dr Adomi was still not fit to attend. The hearing was adjourned and further dates listed.

3. The Tribunal was provided with very extensive documentation. The main hearing file was over 4200 pages long and there were also complete copies of the files used for capability and grievance hearings and appeal hearings, totalling more than another 2700 pages. We made clear that we would read those documents to which the parties drew our attention and we did so. We admitted a small number of additional documents during the hearing by agreement. At the very end of the hearing, after closing submissions, the Claimant sought to raise an issue about references that had not been disclosed by the Respondent. The Tribunal told her that it was too late now to raise such an issue, at the end of the two days' reconvened hearing. Nor were references likely to be of any material relevance to the issues the Tribunal had to decide.

4. The Tribunal heard evidence from the Claimant. For the Respondent, we heard evidence from Dr N Massey (former Deputy Medical Director); Dr P Anderson (former Consultant Physician); Dr David Hughes (Consultant Histopathologist and former Medical Director); Dr Colin Pollock (former part-time GP and holder of senior NHS, Department of Health and national medical regulation posts); Mr Grahame Barker (retired police officer and independent chair for NHS capability appeal hearings); Mrs A Laban (Chair of the Trust); and Mrs R Robson (HR Operations Director).

5. Mrs J Grice (external HR consultant) had produced a signed witness statement but was not fit to attend to give evidence. The Tribunal decided that it was in the interests of justice to admit the statement in evidence, but recognising that only limited weight could be given to it in circumstances where Mrs Grice had not been cross-examined. Mr Patton was not able to identify any matters he would have put to Mrs Grice in cross-examination and it would have been prejudicial to the Respondent if it had not been able to rely on relevant evidence simply because of the witness's ill health.

Issues

6. The Respondent admitted that the Claimant was disabled at the time of the events complained about because of the mental health impairments of stress, depression and PTSD. The claims and issues had been identified and agreed at preliminary hearings. The issues for the Tribunal to decide were as follows.

Direct disability discrimination

5.1 Did the Respondent do the following things:
- 5.1.1 Refer the Claimant to a capability/conduct hearing;
- 5.1.2 Fail to investigate the Claimant's grievances of 15 March and 9 May 2018 in a timely manner;

5.1.3 Dismiss the Claimant?

5.2 If so, was it less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. The Tribunal will decide whether she was treated worse than a non-disabled community dentist would have been treated.

5.3 If so, was it because of disability?

Discrimination arising from disability

5.4 Did the Respondent treat the Claimant unfavourably by:

5.4.1 Referring her to a capability/conduct hearing;

5.4.2 Dismissing her?

5.5 Did the following things arise in consequence of the Claimant's disability:

5.5.1 Her sickness absence, which made her less employable;

5.5.2 Her sickness absence, which made the Respondent less willing to delay the capability hearing?

5.6 Was the unfavourable treatment because of any of those things?

5.7 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were: in order to provide safe and effective care to patients it was necessary for all employed senior community dentists to be able to demonstrate good verbal communication skills towards patients (many of whom have learning difficulties); to show appropriate communication towards colleagues; to be able adequately to communicate with, supervise and teach dental students; to show an ability to accept constructive criticism and advice from colleagues/senior colleagues; to demonstrate competent and appropriate clinical practice at all times; and to be able to work at the level of dentist for which they are employed by the Respondent.

5.8 The Tribunal will decide in particular:

5.8.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.8.2 could something less discriminatory have been done instead;

5.8.3 how should the needs of the Claimant and the Respondent be balanced?

Harassment

5.9 Did the Respondent:

5.9.1 Refer the Claimant to a capability/conduct hearing;

5.9.2 Delay in investigating her grievances of 15 March and 9 May 2018?

5.10 If so, was that unwanted conduct?

5.11 Did it relate to disability?

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

5.13 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

5.14 The protected acts the Claimant says she did were:
- 5.14.1 Complaining of unlawful race and disability discrimination in her first grievance;
- 5.14.2 Complaining of unlawful race and disability discrimination in her appeal against the outcome of the first grievance;
- 5.14.3 Complaining of unlawful race and disability discrimination in her second grievance of 15 March 2018;
- 5.14.4 Complaining of unlawful race and disability discrimination in her third grievance of 9 May 2018;
- 5.14.5 Bringing Employment Tribunal claim 1809290/2018.

5.15 Did the Claimant do a protected act as set out above?

5.16 Was the Claimant subjected to detriment as follows?
- 5.16.1 Referring the Claimant to a capability/conduct hearing;
- 5.16.2 Delay in investigating her grievances of 15 March and 9 May 2018;
- 5.16.3 Dismissing the Claimant;
- 5.16.4 Rejecting the Claimant's grievance in the dismissal letter dated 29 August 2019;
- 5.16.5 Rejecting the Claimant's grievance appeal on 10 January 2020;
- 5.16.6 Rejecting the Claimant's appeal against dismissal on 3 February 2020?

5.17 If so, was it because she did a protected act?

Unfair dismissal

5.18 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (performance) or some other substantial reason.

5.19 If the reason was capability or some other substantial reason, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

Breach of contract

5.20 Did the Respondent breach the Claimant's contract by:
- 5.20.1 Failing to pay her expenses in respect of her attendance at a conference in Manchester on 26-28 May 2016 amounting to **£214.70**;
- 5.20.2 Failing to pay her expenses in respect of her attendance at BDA Study Days in London on 15-16 January 2018 amounting to **£473**;
- 5.20.3 Failing to pay her for 14 days' accrued but untaken holiday?

Unauthorised deduction from wages

5.21 Did the Respondent pay the Claimant less than was properly payable to her on termination of her employment, in that it failed to pay her for 14 days' accrued but untaken holiday?

Findings of fact

Parties

7. The Respondent is the Sheffield Teaching Hospitals NHS Foundation Trust. The Claimant is a dentist. She is obviously intelligent, well-qualified and eloquent. In 2009 she was employed by a predecessor of the Trust, the Sheffield PCT, as a Senior Community Dentist. Her employment transferred to the Respondent in April 2011. The Community Dental Service treats dental patients who fall within the remit of the Primary Dental Care Service, for example those with additional needs such as learning difficulties or dental phobia. Most dentistry occurs in high street dental practices and very little is done in the Trust.

Policies

8. The PCT had a document entitled, "Conduct, Capability, Ill Health and Appeals Policies and Procedures for Practitioners" ("the CCIHA Policy"), which was implemented to comply with the requirements of the nationally applicable framework "Maintaining High Professional Standards in the NHS" ("MHPS"). That was the policy that applied in Dr Adomi's case. Under the CCIHA Policy, when a concern of substance is raised about a practitioner, by a patient or colleague, a Case Manager must be appointed. The possibility of restrictions on practice or exclusion must be considered. The Case Manager should carry out a preliminary assessment to establish the nature and seriousness of the concern and decide whether it is necessary to appoint a Case Investigator to carry out a full investigation. The preliminary investigation may include short interviews with key witnesses and a review of medical notes. Where serious concerns are raised the Case Manager must again consider restrictions or exclusions from practice.

9. If the Case Manager considers a formal investigation is needed, consideration must be given to appointing a Case Investigator and Terms of Reference must be determined. As promptly as possible after a decision has been taken to carry out a formal investigation, the practitioner must be informed in writing of that fact and of a number of other things, including the specific allegations or concerns. The Case Investigator must establish the facts in an unbiased way and adhere to the Terms of Reference. A Clinical Advisor may be appointed. The Case Investigator must prepare a written report, with the assistance of the Clinical Advisor if appropriate. The report must provide the Case Manager with enough information to decide whether:
    9.1 There is a case of misconduct to go to a disciplinary panel;
    9.2 There are health concerns to be considered by Occupational Health;
    9.3 There are performance concerns to be further considered with the National Clinical Assessment Service ("NCAS");
    9.4 Restrictions on Practice or Exclusions from Work need to be considered;

9.5 There should be a referral to the GMC or GDC;
9.6 The matter should be dealt with under the capability procedure; or
9.7 No further action is required.

10. In a case concerning capability allegations, before the Case Investigator provides the report to the Case Manager it must be provided to the practitioner to comment on the factual parts. The Case Manager must decide which of the courses of action to take, and must discuss the matter with the Chief Executive, the Head of HR and NCAS. The Case Manager must write to the practitioner setting out their decision, and providing a copy of the report and the statements and other evidence gathered during the investigation.

11. If the matter is to be dealt with under the capability procedure, the Case Manager may decide that no action is required; decide that retraining or counselling should be undertaken; decide that the matter should be referred to NCAS to be dealt with by an assessment panel; or refer the matter to a capability panel. Wherever possible, issues of individual capability should be dealt with by ongoing assessment, retraining and support. Before a matter can be referred to a capability panel, NCAS must be contacted for support and guidance. Capability is defined and includes out-of-date or incompetent clinical practice; inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk; inability to communicate effectively; and ineffective clinical team working skills.

12. The practitioner must be sent details of the allegations and copies of the documents and evidence that will be before the capability panel. Postponement requests are dealt with by the Case Manager in the first place. A request for a postponement of over 30 working days should be referred to chair of the panel. The CCIHA Policy makes clear that the chair may decide to proceed with the hearing in the practitioner's absence if it is "reasonable" to do so. The outcome options available to the capability panel include taking no action; a verbal agreement by the practitioner; a first or final written warning; and dismissal. The practitioner has a right of appeal and the appeal process is set out.

13. The CCIHA Policy makes clear that exclusion from practice is a last resort and can only be justified on specified grounds. All other options must have been thoroughly explored first. Those include obtaining voluntary undertakings from the practitioner, placing them under the supervision of a Medical or Clinical Director, amending or restricting their clinical duties, or restricting them to non-medical duties. A decision to exclude can only be made once it has been decided that there are significant concerns about the practitioner's capability or conduct and provided that other conditions are met. Those include that there has been a critical incident where serious allegations have been made, or that there has been a breakdown in relationships between a colleague and the rest of the team. NCAS should be consulted. There is a detailed process. Exclusion must be kept under review. The situation must, at certain stages, be referred to the Chief Executive and NCAS. While excluded, the practitioner must be available to work or assist the Case Investigator during normal working hours. They must request permission to take annual leave from the Case Manager.

14. There are timescales for achieving the steps throughout the CCIHA Policy. They are short.

15. The Respondent has a Grievance Procedure. That procedure says that where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. However, where the disciplinary and grievance issues are related, it may be appropriate to deal with both issues concurrently.

16. The Respondent has an Annual Leave Policy. Under that policy, the leave year runs from 1 April to 31 March. It is expected that staff will take their full annual leave in the relevant leave year, but in exceptional circumstances consideration may be given to allowing them to carry five days forward. That must be agreed by the Clinical Director. Employees absent due to sickness may continue to request and take annual leave. Their statutory leave (under the Working Time Regulations) is deemed to be used first. If an employee is prevented from taking annual leave in the relevant leave year because of sickness, they are only entitled to carry forward their statutory leave into the next leave year. Where employees return from a period of long-term sickness absence before the end of the leave year and have had a reasonable opportunity to use some or all of their accrued annual leave, either as part of a phased return or as paid holiday, the principle of "use it or lose it" will still apply. The Claimant was contractually entitled to 32 days' leave per year.

17. The Respondent also had a Study Leave policy applicable to medical staff. It said that all expenses claims must be made within 90 days using the E-expenses system. The individual was required to complete a study leave application form in advance of the study leave. They had to include an estimate of the expenses to be incurred, but the form made clear that once they had attended the course the must complete a travel and subsistence claim form within 3 months to activate payment.

2009

18. The events giving rise to these Tribunal claims have a long history. The Claimant started work on 2 February 2009 at the Heeley Green Dental Clinic. There was a small team of around 6 to 8 people working there. Dr Peter Bateman was the Director of Dental Services. WR was one of the dental nurses. The Claimant spoke to Dr Bateman about WR's conduct at an early stage. She told the Tribunal that a patient made a racist comment to her and that WR just smiled. She had told Dr Bateman and Dr Heyes about this. The Tribunal did not hear evidence from WR and we do not need to make a finding about whether or not the incident happened as the Claimant describes. It does not appear to the Tribunal that the Claimant made a formal complaint or grievance about WR at that stage; she spoke informally to senior colleagues. She did include this complaint in a subsequent grievance. It was not upheld (see below).

19. On 15 June 2009 Dr Bateman and a colleague from HR spoke to the Claimant. Dr Bateman told her that concerns had been reported about her clinical ability and communications with staff, students and patients. He gave examples and said that she would be provided with a full list in writing. After a preliminary

investigation by the Oral Health Promotion Manager, it had been decided that an investigation should take place under the CCIHA Policy. While the investigation took place, the Claimant was being moved to Deepcar practice, with effect from Monday 22 June 2009. Dr Bateman wrote a letter confirming this dated 16 June 2009.

20. The Claimant accepts that by 2 or 3 July 2009 at the latest she had been provided with the list of allegations made about her at Heeley Green. The list was compiled by the Oral Health Promotion Manager, who had spoken to eleven people, including dentists, dental nurses and receptionists. WR was one of them. The concerns included:

    20.1 Lack of experience in special care dentistry;
    20.2 Inaccurate recording of patient notes;
    20.3 Concerns about clinical abilities with respect to tooth extraction;
    20.4 Organisation of treatment and length of time taken to treat patients;
    20.5 Changing treatment plans or preparing confused treatment plans;
    20.6 Berating and bullying treatment towards students;
    20.7 Abruptness towards nursing staff;
    20.8 Poor communication with patients;
    20.9 Patients refusing to return to clinic for treatment;
    20.10 Patients wanting to see a different dentist;
    20.11 Patient motioning for the Claimant to stop and the Claimant continuing to treat them.

21. The Tribunal also saw a letter written by Dr Vora, another Senior Community Dentist, on 13 June 2009. The Claimant had taken over some of Dr Vora's former special needs patients at Heeley Green. Dr Vora had observed the Claimant on the student clinic at the Wheata Place dental clinic because nursing staff had raised concerns that the Claimant was confusing students when she was supervising them and changing treatment plans other supervising dentists had started. Dr Vora set out concerns relating to specific patients. On the day of the observation, a dental nurse had called him in because the Claimant was proposing to change the treatment plan for a patient put in place by the previous dentist. Dr Vora told her that she should stick to the planned treatment unless the clinical need had changed. She disagreed. He raised his voice in front of the patient telling her to stick to the original plan. On the same day a child had been hit by a tennis ball and had a mobile tooth. The dental student thought that it should have been extracted but the Claimant sent the patient away with different treatment. The dental nurse had "felt too scared" to call Dr Vora in to intervene. On another occasion, a radiograph showed that a particular tooth needed extracting but the Claimant had recorded the wrong tooth. Dr Vora also said that WR and another dental nurse had contacted him with concerns and he told them to put them in writing. He reported some of the concerns WR had raised, including one patient refusing to be seen by the Claimant and another (named) for whom WR believed that the Claimant had requested incorrect equipment and handed her a different item. WR felt undervalued by the Claimant.

22. The Tribunal also saw a letter from Dr Dunning (Consultant in Special Care Dentistry) to Dr Bateman dated 11 June 2009 raising concerns about a patient

seen jointly by Dr Dunning and the Claimant on 2 June 2009. The Claimant was provided with a copy of this letter by 2 or 3 July 2009 at the latest. The Claimant had been treating the patient and Dr Dunning had been responsible for the patient's intravenous sedation during the session. Dr Dunning wrote to Dr Bateman that after their first joint intravenous sedation session, she had agreed with the Claimant that they would only book in one straightforward patient per session because of Dr Dunning's concern about the Claimant's speed of working and lack of familiarity with the patients and surgery. However, after the session on 2 June 2009, she felt that it was no longer acceptable for the Claimant to be treating patients under intravenous sedation at all. She had told the Claimant her concerns immediately after the session, in the presence of Dr Utting, Senior Community Dentist. Dr Dunning said that the Claimant had demonstrated insufficient experience and speed to be competent in providing treatment under intravenous sedation; appeared unfamiliar with the equipment; was very slow in providing routine treatment and was unable to settle into a relaxed method of patient care. She felt that the problems were exacerbated by a lack of insight into the difficulties that had been encountered.

23. The Claimant moved to Deepcar practice from Monday 22 June 2009. On 2 July 2009 she was formally excluded by Dr Bateman because further concerns had been raised by colleagues at Deepcar. For example, patients had told receptionists that they did not want to see the Claimant or were not happy with her. Dr Bateman wrote a letter confirming this dated 3 July 2009. Dr Bateman had not consulted NCAS before excluding the Claimant. He did so about a week later.

24. Dr Bateman appointed an investigation team and an investigation was carried out. Witnesses were interviewed and the Claimant herself was interviewed on 21 August 2009. The Claimant was represented by a representative from the Dental Defence Union (DDU) and/or from the British Dental Association (BDA) during the investigation and at all times subsequently (except as explained below in relation to her capability hearing and appeal hearing).

2010-2011

25. The Claimant started a period of sick leave on 14 September 2009, initially for a "stress reaction" and subsequently for "depression and anxiety." She remained unfit for work until July 2011.

26. Initially, the capability investigation was put on hold but in May 2010 a decision was taken that it needed to be progressed. The Claimant attended a further meeting on 9 June 2010 accompanied by Mr Harvey, and a meeting on 13 July 2010 accompanied by Mr Paul of the BDA. She sent a number of lengthy, written commentaries on the matters discussed. An investigation report was produced in September 2010. We refer to that as the 2010 Investigation Report. It recommended that the matters of concern should be dealt with at a formal capability hearing. In fact, the Tribunal understood that there was some exploration of a compromise agreement at that stage.

27. Dr Massey was appointed Case Manager when the Community Dental Service transferred to the Respondent in 2011. Advice was sought in May 2011 from Occupational Health ("OH") about the Claimant's fitness to work and to

participate in the capability process. Her initial appointment was not productive, partly because she arrived late and partly because she said she had not received the referral letter. Evidence in the Tribunal file indicated that it had been sent to her twice and that she had acknowledged receipt on the second occasion. It seemed to the Tribunal that there was a recurrent theme of the Claimant saying that she had not received emails, letters or documents in the events that followed. It would have been very surprising if so many had gone missing and the Tribunal considered it more likely that the Claimant had not opened or processed them in many instances.

28. In June 2011 the Claimant's GP reported that she might be fit to work with adjusted duties and that she must not be placed in a position where there was potential bullying. An OH report was received on 30 June 2011. Dr Terry agreed with the Claimant's GP that she needed to return to work. Her view was that the Claimant's health would improve further once all the outstanding issues had been resolved. Her health was stable at that time and she was fit to participate in conduct or capability meetings. Given the duration of her illness and the length of her absence, it was possible that she would be considered disabled for the purposes of the Equality Act, and a supported and supervised phased return to dental duties was required.

29. Dr Massey sent an email to Ms Wardle of HR on 30 June 2011. One of the things he wrote was that Dr Bateman was certain that they could not allow the Claimant back into the department, even in a non-clinical role, without causing upset to others and/or making her feel vulnerable. We note at this stage that later in the process (September 2012) Dr Massey noted that Dr Bateman was concerned that the Claimant did not undertake any work that would bring her into close proximity with his staff as there was still bad feeling following previous grievances and the current investigation still not being completed (see further below). It was suggested to Dr Massey in cross-examination that comments of this kind showed that there was no way, whatever happened, that the Claimant would be returning to the department. He disagreed. His evidence was that when the PCT existed, Dr Bateman was the head of department. Whatever happened, happened. When Dr Massey took over as case manager, if it had been appropriate for the Claimant to go back to the department he could and would have forced that to happen. He was highly motivated to try and resolve this, and if he could, it would not have mattered how much the department did not want the Claimant back. They were part of the Trust now. At the end of the correct process, he could have orchestrated a return to the department if that was safe for the Claimant, patients and the department. It would have been a challenge but one he would have been prepared to attempt. The Tribunal had no hesitation in accepting Dr Massey's evidence about this. All of the evidence suggested that throughout his involvement, Dr Massey was consistently pushing to resolve the situation and making every effort to do so by returning the Claimant to clinical practice as a Senior Community Dentist.

30. Dr Massey met the Claimant on 26 July 2011 to discuss her return to work and the conclusion of the investigation process. The Claimant was supported by a member of staff from OH. She told Dr Massey that she had lots of documents relevant to the investigation and that she had been too unwell to correct the minutes of the meeting she had attended. She agreed to provide the documents

to Dr Massey. Dr Massey hoped that the investigation would be completed by September. Dr Massey had already arranged for Mr Wright, a postgraduate dental tutor from the Deanery, to support the Claimant in developing a Personal Development Plan to refresh her skills and professional development as the first step in returning to work. The Claimant was able to meet Mr Wright the following day. Dr Massey wrote to the Claimant summarising their discussion. She met Dr Wright twice and provided Dr Massey with some information about possible courses, in an email in mid-August 2011.

31. During the meeting with Dr Massey the Claimant indicated that she had previously lodged a grievance and intended now to re-submit it. She did so on 8 August 2011. We refer to this as the First Grievance. It is the first protected act relied on in these claims. The First Grievance contained detailed complaints about the way Dr Utting, WR, Dr Dunning and others had treated the Claimant during 2009. She referred to a campaign of harassment, intimidation, unfair treatment, obstruction, lack of duty of care and discrimination on the grounds of disability and race. The First Grievance also contained detailed complaints about the conduct of the capability investigation. Dr Throssell, Deputy Medical Director, was appointed to deal with the First Grievance. The capability investigation was put on hold because of the content of the First Grievance and Dr Massey wrote to the Claimant on 30 August 2011 to tell her that this was happening. He confirmed that they would continue with the back to work programme they had discussed. Dr Massey updated the person who was Designated Director for the capability process.

32. Dr Massey contacted NCAS to update them about the situation and he spoke to them in September and October 2011. In September NCAS advised Dr Massey that if the Claimant returned to work and there remained concerns about her clinical performance, it might be worth referring her for a formal NCAS assessment. That would normally require her to be providing the full range of clinical duties in her role. In October, the agreed approach was to conclude the First Grievance and then complete the investigation of concerns. Dr Massey would consider the next steps, and discuss with NCAS, when he received the complete report. The Claimant was to continue updating her CPD until December 2011. After that, Dr Massey was considering a placement at the Charles Clifford Dental Hospital and NCAS proposed a facilitated meeting to draft a return to work plan if that placement was agreed.

2012

33. Dr Massey continued to progress the return to work programme. That culminated in meetings with the Claimant in December 2011 and January 2012, and a series of meetings with NCAS on 2 February 2012 at which the return to work programme was agreed. The Claimant attended with Mr Harvey of the DDU. The return to work programme included an initial induction, and a six month programme to the end of July 2012, with clear objectives, clearly identified supervisors, and clearly identified timescales and steps for review. Dr Jones, Director of Dental Public Health, was the Programme Supervisor; Dr Wright of the Deanery was the Educational Advisor; and Professor Loescher, Professor Deery, Professor Brook, Dr Orr and Dr Figures at the Charles Clifford Dental Hospital were the Clinical Supervisors. The agreed purpose of the plan was for the Claimant to be in a position to complete a safe and sustainable

phased return to work after a prolonged sickness absence. The plan included provision for the Claimant to work with a mentor but no mentor had been identified at that stage. The Claimant was tasked with identifying a mentor.

34. Dr Massey agreed in cross-examination that the return to work plan was not a formal assessment of capability and was not part of the CCIHA process. It was a plan to resolve the fact that the Claimant had been out of practice for over a year and get her in the position that she could return to clinical practice. It involved assessments but it was not an assessment. NCAS helped set it up but it was not an NCAS assessment. It was not going to help resolve the 2009 issues. But there were assessments (milestones) to check they were achieving what they needed to by the end of the programme. It was clear to the Tribunal that, if the programme had been successful, Dr Massey would have ended the Claimant's exclusion and brought about her return to work in a clinical role at that time.

35. The Claimant started at the Dental Hospital in accordance with the plan. Dr Massey met the supervisors at the halfway point (25 April 2012). Although the Claimant had passed the first and second milestones, the supervisors raised concerns. They reported that the Claimant appeared stressed, that it took her a long time to do things, that she did not accept constructive criticism; and that she was rude to people below her status. Her basic competence was said to be that of a level 3 student. She had taken an exam that involved technical work such as fitting crowns. The exam is designed to ensure that an individual is safe to work with patients on a more independent or extensive basis. The supervisors reported that the Claimant took the exam reluctantly but it "took forever" and she "demanded" more time. At 6.30pm, an hour and a half after the finish time, the team threatened to call security because the Claimant was refusing to leave. The assessment of her work was not good and the conclusion at that stage was that the Claimant would not be safe to proceed further with patients.

36. Dr Martin, Senior Clinical Lecturer, supervised the course that led to the exam. He had emailed Dr Orr on 4 April 2012 to raise concerns about the Claimant's behaviour. He said that he had found her professional attitude to be very poor throughout the course. He described the situation that occurred with the practical exam. He also referred to an earlier occasion on which he said that he had asked the Claimant to tidy up her work station at the end of her session, and said that she only did so after an argument about the fact that she could not be expected to do so if nobody had shown her how. Dr Martin suggested that the Claimant was "argumentative, never wrong, selfish in her endeavours, disrespectful to colleagues, impossible to have a rational discussion with and I guess very difficult to work with." He said that he would not employ her and would not wish her to work in his team. That feedback was shared with Professor Jones, Dr Massey and some of the clinical supervisors.

37. Professor Loescher and an associate specialist, Ms Nasse, exchanged emails at the end of April setting out concerns about the Claimant's competence. Ms Nasse said that uncomfortable as it was, it was important to be frank in order to protect the public. She would not want a member of her family treated by the Claimant. By 16 May Ms Nasse emailed Professor Loescher requesting not to

be allocated to supervise the Claimant again. She said that the Claimant did not listen properly to her instructions and turned a discussion of surgical technique into an argument. They had ended up arguing over a patient because the Claimant would not take advice. Her surgical techniques were fine but she was completely oblivious to the wider issues concerning personal relationships, communication and self-improvement. Ms Nasse said that she had only written part of this in the Claimant's feedback because she knew she would "try to bully me into crossing them out."

38. The Tribunal found that there was a very substantial risk of the programme simply being abandoned at that stage because of the difficulties that had arisen. However, Dr Massey consulted NCAS, Dr Jones and others, and explored the available options. One strategy was to secure some behaviour coaching for the Claimant. Dr Bateman agreed to meet the cost (£400 per session) from his budget. Dr Massey and Dr Jones met the Claimant on 22 May 2012. They discussed the positive and negative feedback with the Claimant. She expressed the view that many matters were misunderstandings of her position and were amplifications or arose from knowledge of events two years previously. Dr Massey was certain that this was not the case. The hospital based dentists operated separately from the Community Dental Service, and indeed some of those providing feedback were academics employed by the University. The Claimant agreed to undertake some sessions with the Occupational Psychologist. She wrote to Dr Massey after the meeting to say that she wanted her concerns to stand "in terms of the misunderstandings." The Claimant also told Dr Massey that she had prepared feedback letters for Professor Loescher, addressing some of the concerns. He advised her not to send them until she had spoken to the Occupational Psychologist, but she let him know on 24 May 2012 that she had given the letters to Professor Loescher. The letters contained the Claimant's detailed explanations in respect of events that had given rise to criticisms.

39. There were improvements in the second part of the return to work programme. In her evidence to the Tribunal the Claimant repeatedly attributed that to her realising from discussion with the Occupational Psychologist that she should not provide her responses to the supervisors' written feedback, and therefore stopping doing that. That did not suggest to the Tribunal that the Claimant had in fact improved in her ability to accept or act on constructive criticism. On the contrary, she gave the clear impression that she remained of the view that the feedback or constructive criticism was misplaced; but had simply stopped setting that out in writing.

40. The written feedback at the end of the return to work programme in July 2012 recorded clear improvements:

    40.1 In Assessment, the Claimant was able to work more efficiently and her assessment was more structured. She rarely omitted important details. Her treatment planning had improved and she was more able to accept constructive criticism. This was a marked improvement since the start of the programme.
    40.2 In Diagnosis and Clinical Management the Claimant was said to have made "significant progress" over the past six months. Supervisors were

pleased overall. Issues of lack of focus on the matter in hand in terms of history taking and time taken to do so remained, but the direction of travel was good. The Claimant still at times found it difficult to take constructive criticism or advice and felt the need to justify her actions at length, but that was not as much of a problem as it had been. She worked above the standard of a new graduate.

40.3 In Clinical the Claimant had completed a denture course and had performed very well in terms of clinical treatment, patient management and teamwork.

40.4 In Clinical Record Keeping the only concern identified was that sometimes the Claimant's notes were rather lengthy.

40.5 In Teamworking the Claimant had positive feedback in the last month and was recorded as making progress in that area. She was interacting better with colleagues and patients and appeared to be benefiting from working with the Occupational Psychologist.

40.6 Professor Brook emailed Dr Massey on 17 July 2012 to say that the Claimant had improved a lot over six months but was still only at new graduate level.

41. Dr Massey met the supervisors at the end of July to discuss their final assessments. During the discussion Dr Jones indicated that the Claimant was working at the level of a Foundation Dentist (i.e. a new graduate). Verbal concerns were raised about whether she was safe to practise in her role. Dr Massey's evidence in cross-examination was that there had clearly been progress by the end of six months, but from a very low starting position. He said that the position he was told at six months was that the Claimant was not in a position where she could work unsupervised. The Tribunal accepted that evidence. It was reflected in what NCAS recorded about their discussion with Dr Massey on 18 July 2012.

42. Dr Massey and Dr Jones met the Claimant, accompanied by Dr Harvey, on 31 July 2012. The Claimant reported that she was glad to have gone through the return to work programme. She was pleased with the positive feedback more recently. She had not done as much clinical practice as she would have liked. Dr Massey told the Claimant that the assessments had been made at graduate level and that she had not been seen working as a Senior Dental officer. She pointed out that supervisors had not been in a position to comment on that. Dr Massey noted that the grievance process was not yet concluded and that he wanted to get the capability investigation concluded. He expressed the view that he was not able to ask the Claimant to go back to the environment she had originally been in, saying that this would not be fair to anybody. Dr Harvey said that it would be much more sensible to have a more structured return, with an intermediate plan. Dr Massey said that he and Dr Jones had spent time looking for a suitable post but had failed. There was only one post at the appropriate level and the practitioner was newly appointed. Foundation posts were all allocated and it had been difficult to find a post elsewhere. Dr Massey also suggested that the Claimant should take some annual leave. Dr Harvey asked whether any access centres had slots and Dr Jones said that there were none in the area. Dr Harvey also suggested Dental Radiology, or any research or audit that would keep the Claimant up to date. The Claimant referred to a post

that was being advertised for Acute Dentistry (A&E for adults). She wanted to offer her services, on the basis she was being paid in any event. There was also discussion of whether the Claimant was on the Performers List. That question had arisen some time earlier and was still not resolved at this stage. We do not need to deal with it in any detail. Eventually, it was discovered that the Claimant was on the Performers List. However, the Tribunal was quite satisfied that there was a genuine and legitimate question about this for a period, which neither the Respondent nor the Claimant could resolve at the time.

43. The Tribunal accepted on the evidence before it that Dr Massey and Dr Jones made every effort to identify a suitable clinical post for the Claimant at the conclusion of the return to work programme. As we have noted, very little dentistry is done in the Trust. Dr Jones was employed by Public Health England and was well-placed to identify any suitable post outside the Trust. She had been unable to identify anything across the region. We have referred above to Dr Bateman's concern at that time about the Claimant returning to the department. Her grievance about colleagues in the department had still not been resolved and the investigation about the matters that had led to her exclusion in the first place was still incomplete. In those circumstances, it seemed to the Tribunal that it was inappropriate for the Claimant to return to the department at that stage. Dr Harvey appeared to acknowledge that in the meeting with Dr Massey and Dr Jones. After the meeting, Dr Massey explored the suggestions that had been made. He emailed Professor Brook to ask whether an attachment to dental radiology was possible or whether the Claimant could assist with the A&E post. Professor Brook forwarded the email to the relevant people, and also to a colleague in restorative teaching, in case they had anything. Professor Loescher subsequently confirmed that the A&E post would not be suitable because the role was to supervise and teach students. The radiology colleague emailed to say that there were three more junior radiology colleagues, all of whom required training and supervision, and himself. There was just sufficient radiology material for their current staffing levels and if they were to take somebody else it would detract from the training of the more junior colleagues, so he did not feel they could offer the Claimant a placement, even temporarily. Dr Massey was quite clear that the Claimant still required appropriate supervision; she could not simply be placed into any available clinical role. That was a matter of patient safety. He explained that they had exhausted what the dental school could offer. The supervisors had told him that they had struggled to cope with supervising the Claimant and could not carry on and offer more. Dr Massey was on annual leave during August 2012.

44. Meanwhile Dr Throssell had dealt with the Claimant's First Grievance. According to the outcome report, he had met the Claimant on 4 September 2011 and it had taken until 16 March 2012 before the notes of the meeting were finally agreed. Meetings were then arranged with Dr Bateman, WR, Dr Utting and Ms Wardle on 20 June 2012. Dr Throssell's detailed outcome report was produced on 25 July 2012. He found that the capability investigation had not been carried out in accordance with the CCIHA Policy. Terms of Reference had not been produced at the outset, but only part way through; NCAS had not been

consulted before the Claimant's exclusion, but a week after it; the Claimant had not been sent the factual part of the report in draft to comment on; and the Claimant had not been told of the Case Manager's decision on the report or sent a copy of it. The First Grievance was upheld in this respect. Dr Throssell also upheld complaints that the Claimant's grievance was initially wrongly rejected in its entirety by the PCT in March 2011 on the basis that it all related to matters that were the subject of without prejudice discussions, and about scheduling a potential date for a capability hearing and failing to inform the Claimant that it was not to go ahead. However, the complaints about WR and the other remaining complaints about the behaviour of colleagues at Heeley Green were not upheld. Dr Throssell recommended that a new Case Investigator should be appointed to review the information already obtained in the CCIHA process and any new information and to prepare a further investigation report.

45. The Claimant took three weeks' annual leave in August 2012. On 3 September 2012 she returned from annual leave. She lodged a detailed appeal against the outcome of the First Grievance. She disagreed with a number of the conclusions, and she said that aspects of her grievance had not been dealt with at all. Dr Massey decided that it was again necessary to delay the CCIHA process until the appeal had been concluded.

46. When the Claimant returned from annual leave on 3 September 2012, no role had yet been identified for her. Dr Massey emailed her on 7 September to let her know that he was exploring opportunities to use her skills to support some audit, service review or similar for a few weeks. At that stage, that was, of course, the anticipated timescale for resolving the First Grievance and investigation. By 17 September 2012 a placement had been devised, working at Claremont Place producing a master catalogue of communication aids for dental patients with communication difficulties. Dr Massey spoke to the Claimant the next day. She met the relevant Deputy Nurse Director and emailed Dr Massey on 24 September 2012 to say that from what she had gathered so far this was a very relevant and worthwhile project, and she was grateful to be involved in it. The Tribunal accepted Dr Massey's evidence that the Claimant was given a non-clinical role because there was no appropriate supervised clinical job available.

47. The Claimant's grievance appeal was heard by the Respondent's Chief Executive on 22 and 23 November 2012. He wrote to the Claimant with an outcome on 30 November 2012. He did not uphold the appeal. He confirmed that the CCIHA investigation was the appropriate forum for the Claimant to give her response to the particular allegations that were made against her.

48. The Claimant began another period of sickness absence on 6 December 2012. That period of sickness absence ultimately lasted until December 2013. Dr Massey periodically discussed the situation with NCAS throughout.

2013

49. Dr Massey wrote to the Claimant in December 2012, once her grievance appeal had concluded, to try to arrange a meeting. In January 2013, he wrote to explain that the purpose was to discuss the appointment of a new Case

Investigator to conclude the capability investigation and to seek her consent for an OH referral. His letter was not delivered because the Claimant did not answer her door. An OH appointment was made for February 2013 but the Claimant was not able to attend. It was rearranged for March. On 6 March 2013 Dr Rimmer, Consultant OH Physician, advised that the Claimant's diagnosis was work-related stress and anxiety. The recent episode was triggered by the grievance appeal outcome. The Claimant was not fit to participate in any investigatory process at present, but Dr Rimmer thought that would change. She would review the Claimant in three months. She noted that until the matter was fully resolved it was unlikely that the Claimant would be fully well. Dr Rimmer provided a further update in June 2013, when the Claimant still remained unfit. Dr Massey specifically asked whether the Claimant was well enough to receive draft terms of reference for the investigation and Dr Rimmer advised that this should wait. In August 2013 Dr Rimmer again advised that the Claimant was still manifesting severe symptoms of stress, anxiety and depression and was not fit to participate in the capability process. After taking advice from Dr Rimmer, Dr Massey wrote to the Claimant on 9 October 2013 to say that as it was now nine months since the investigation should have re-started, he felt that it was in the Claimant's interest to do so. He intended to ask the new Case Investigator to undertake as much investigation as possible without the Claimant's immediate involvement. He would then review the Claimant's health.

50. Dr Massey had already appointed a new Case Investigator, Dr Anderson. He was a Consultant Physician who had retired from the Trust in 2010. He had been on the Trust's Local Negotiating Committee, and as its Chair had been responsible, with colleagues, for writing its Conduct, Capability, Ill Health and Appeals policy, based on the MHPS framework. He had been a long-standing member of the BMA's Consultants Committee and a medical member of Social Security Appeals Panels for thirteen years. Dr Massey had also appointed Dr Rowe, Director of Community Dentistry in another city, as external clinical advisor.

51. On 20 November 2013 Dr Rimmer advised that the Claimant's health was much improved and that she was fit to return to non-clinical project work with modified duties and a phased return. However, she was not fit to participate in the capability process. Arrangements were made for the Claimant's return to work. There was about 6-8 weeks' work left to complete on the project she had started before her sickness absence. At a meeting on 12 December 2013, the Claimant was told where she would be located, and the hours of her phased return were agreed. She was told that once the project was completed, further projects would follow associated with NICE guidance. The Claimant started her phased return on 16 December 2013

2014

52. On 9 January 2014 Dr Massey wrote to the Claimant to provide information about the new Case Investigator and others appointed to deal with the investigation, and to provide a copy of the Terms of Reference that had been provided to them. He said that he had asked Dr Anderson to progress the investigation as far as possible without her involvement. He would then review the Claimant's health status. On 10 January 2014, the Claimant's BDA

representative emailed accepting the Terms of Reference on her behalf. The Terms of Reference identified the aims of the investigation as:

To establish:
1. Whether the concerns that were raised in 2009 about Miss Adomi's style of communication with colleagues, patients and students and her clinical performance were well founded. The Case Investigator is required to do the following:
1.1 Review the draft investigation report prepared in September 2010 and the supporting documents;
1.2 Re interview any witnesses considered appropriate;
1.3 Interview Mr Peter Bateman, Clinical Director of the Service and former Case Manager;
1.4 Interview Miss Adomi and/or her representatives as appropriate and/or seek written representations from her. In particular, Miss Adomi must be given the opportunity to comment on the factual content of the investigation report before this is finalised.
2. The relevance of the outcomes of the development and training undertaken by Miss Adomi between 2011 and 2012, following her original exclusion in July 2009, to her capability to undertake her role as a Senior Community Dentist in Special Care Dentistry. In particular the Case Investigator will do the following:
2.1 Review the outcomes of the six month phased return to work programme undertaken from February 2012;
2.2 Interview Dr Kate Jones, Director of Dental Public Health, Sheffield;
2.3 Interview Miss Adomi and/or her representatives as appropriate and/or seek written representations from her. In particular, Miss Adomi must be given the opportunity to comment on the factual content of the investigation report before this is finalised.
3. Whether Miss Adomi is on a List of Performers held in accordance with the National Health Service (Performers List) Regulations 2004 (as amended), including the history, since February 2009, of any entries of Miss Adomi on such lists.

53. Dr Anderson and Dr Rowe were provided with the 2010 Investigation Report, statements, clinical notes and documents from the return to work programme. They initially held meetings with Dr Bateman and Dr Jones and they asked the witnesses who had been interviewed for the 2010 investigation to review, amend and sign their previous witness statements.

54. There were signed notes of the interviews with Dr Bateman and Dr Jones. Among other things, Dr Bateman said that he had personally had one mentoring session with the Claimant. He could not recall the nature of the work but apart from the Claimant not getting along with the treatment in a timely way there was no concern. Dr Bateman provided copies of some complaints that had been received after the investigation started but before it concluded. Dr Anderson's evidence to the Tribunal was that the substance of these four complaints did not form part of the matters considered by him and Dr Rowe. Dr Jones gave some information about the return to work programme. She said that there was feedback about the Claimant's interpersonal skills. She said that the Claimant's practice was observed as being at the same level as a fresh graduate but pointed out that she had not been able to do as many assessments as hoped. Dr Jones said that she was very careful with what she said and felt she had to be guarded. The notes record Dr Anderson asking whether the Claimant was "spiky" and Dr Jones agreeing. In cross-examination, Dr Anderson said that Dr Jones was struggling to put into words her view of the

Claimant. He suggested a number of words and Dr Jones agreed with "spiky." The Tribunal accepted his evidence. Dr Jones said that things improved after the Occupational Psychologist was involved.

55. Dr Anderson's evidence was that after they received the signed statements back, they decided not to re-interview the original witnesses who had given statements in 2010. Their statements gave what appeared to be a reliable contemporaneous account of events at the time. In cross-examination it was suggested to him that this meant it was not a fresh investigation. He disagreed. He said that it was a fresh investigation using contemporaneous interviews. He explained that it was now five years after the event and they considered that the statements made at the time were likely to be more accurate than interviews so distant from the event. The investigators had statements from the following witnesses:

    55.1 Ms Mills (receptionist): Ms Mills said that the Claimant was "lovely" out of clinic but appeared to be a different person when she was busy. Ms Mills referred to a patient calling to ask if their dentist was qualified, and to a patient saying that if she had to see the Claimant she was not coming back.

    55.2 Ms Tomlinson (receptionist): Ms Tomlinson said that she had a good relationship with the Claimant and had made an effort to get to know her. Ms Tomlinson described patients as looking startled or like a rabbit in headlights when they came out of surgery. A phobic patient looked "haunted" and did not want to see the Claimant again. A patient on the telephone said that he did not want to see the Claimant and that she made him feel anxious. Ms Tomlinson had not witnessed the Claimant being abrupt to anybody. She referred to a patient's carer commenting that he did not like the way the Claimant had treated the patient. The carer had tried to stop her from approaching the patient in a particular way and the Claimant had dismissed the attempt with a raised hand, sit down, "I am the dentist." The mother of a patient with Downs Syndrome had asked whether the Claimant had seen patients like her daughter before, and said that her daughter was not deaf and did not need shouting at.

    55.3 Ms Booth (dental nurse): Ms Booth described difficulties following the Claimant when she was charting teeth. She said that out of the surgery the Claimant was a lovely person. In the surgery it was her way or no way. She was very abrupt and did not give the patients a choice. Ms Booth felt as if the dental nurses were nothing to the Claimant. She said that the Claimant's treatment of patients was satisfactory but she did not explain things well.

    55.4 Ms Ogden (dental nurse): Ms Ogden said that the Claimant ran late with her appointments and wrote excessively long notes. She told patients the treatment and what the best thing was, "forcing them down the wrong road." She referred to an incident when the Claimant had argued with a patient. She said that the majority of patients went to reception and did not know what they were coming back for. The receptionist had to come into the surgery for clarification. Ms Ogden said that the Claimant was very short with people if she was running late. She had snapped at Ms Ogden in front of patients. She said that the Claimant

was a “lovely person” at lunchtime but different when she was working. Ms Ogden said that during one week five patients left and said they did not want to come back.

55.5 WR (dental nurse): WR said that the Claimant seemed uncomfortable with the client group. She would get very stressed and seemed a bit bossy with the patient at times. She would talk over WR if WR was talking to the patient. WR said that the Claimant could be abrupt. She referred to notes she had kept. She gave examples, such as a phobic patient who had walked out and said that the Claimant had been too rough with him and that he did not want to see her again. She gave an example of a patient having a treatment that lasted two hours, and who was very upset and rang in afterwards to say that she did not want to see the Claimant again. WR also dealt with the patient seen on 2 June 2009 by Dr Dunning and the Claimant. WR had been the dental nurse. She said that the Claimant did not start with the tooth extraction, but with other treatment. That was unusual. Then the Claimant encountered difficulties getting the tooth out. She asked for instruments WR had already given her. She said quite early on that she wanted to do a surgical extraction and Dr Dunning resisted because normally you can elevate a root out if you take the time. The Claimant tried but decided she was going down the surgical route. WR said she had “never seen anything like it”. The Claimant “drilled and drilled away” and WR was quite horrified. An SHO was present squirting water onto the area and the Claimant snapped at her. Another nurse came in to hold the patient’s head steady. Dr Utting came in to see if he could help. Dr Dunning went to get him. She said, “I think the patient has had enough” and took the handpiece away to stop the Claimant taking more bone away. Dr Dunning seemed upset. The patient was in a lot of pain afterwards. WR referred to a brief note she had made. She had noted that the session took from 10:45am to 1.30pm. She said that the Claimant had said that they did not get the patient in until after 11am. She said that that was “rubbish”. The patient had not come back. WR said that in all her years as a qualified IV Nurse since 1995 she had never had a session like that.

55.6 Dr Vora (Senior Dental Officer): Dr Vora referred to a patient that he had treated before the Claimant took over his role at Heeley Green. WR had reported to him that the Claimant had proposed to use a particular approach that Dr Vora had already done. WR had told him that she told the Claimant that. Dr Vora said that the Claimant’s approach (as described by WR) was clinically wrong. Dr Vora said that there were also issues at the teaching clinic. The Claimant made changes to treatment plans, which confused the students she was supervising. Dr Vora described the occasion on which he observed the Claimant. He referred to the two patients described in his letter in June 2009. Dr Vora expressed the view that the Claimant lacked basic skills and needed further supervision or training if she wanted to see special care patients. He, too, said that she was a “lovely” out of clinic.

55.7 Dr Heyes (Senior Dental Officer): Dr Heyes said that she had observed the Claimant in peer review sessions in May and June 2009. During the first session the Claimant took 2 ¼ hours over a root canal treatment

and it was still not finished. This would normally take 45 minutes to an hour. She was abrupt with the patient. Dr Heyes spoke to the Claimant afterwards about how she spoke to the nurses. The Claimant was defensive. Dr Heyes said that the Claimant was "a lovely person" in the staff room but appeared to change in the surgery. The Claimant's explanation for running over time was that WR had brought the patient through late. Dr Heyes's biggest concern was that procedures appeared to be taking twice the time. At the second review session, Dr Heyes said that the Claimant appeared to take a long time over oral hygiene rather than getting on with the procedure. She felt that the Claimant was drawing back from the actual work. For one phobic patient the Claimant was to perform a crown preparation. It took 2½ hours instead of the usual 50 minutes. The Claimant prepared a plastic crown that broke. She asked for Dr Heyes's advice. Dr Heyes suggested two things. The Claimant did neither. Instead she fitted a white filling, which would be "a nightmare to remove" and would have to be drilled off. This could mean that the crown would not fit. When Dr Heyes challenged the Claimant about it, she became defensive, saying that the patient constantly wanted to stop and rinse and that the nurse had to fetch further equipment during the procedure. Dr Heyes concluded by saying, "I am just concerned why we left it so long. I feel that the nurses were not listened to initially, but we had to be sure before we started proceedings. We needed to ensure that the concerns were not coming from one direction only."

55.8 Dr Dunning (Consultant in Special Care Dentistry): Dr Dunning gave more information about the patient on 2 June 2009. She said that the Claimant appeared stressed because of the timescale and because she was aware the patient was becoming distressed. Dr Dunning said that WR was calm and professional. She just kept handing the Claimant the instruments she requested. The Claimant was agitated towards WR. She was a bit tense and snappy. She wanted instruments straight away.

55.9 Dr Utting (Senior Dental Officer): Dr Utting said that his first concerns were the Claimant's communication skills with patients and lack of the holistic approach required with special needs patients. The Claimant would go over the treatment plan, the patients would be confused and the nurses would have to explain it to them. Dr Utting said that the Claimant's record keeping was very long and over detailed. He had concerns over her diagnostic skills – she had missed things that were obvious such as a tooth cavity and focussed on the less important things. She appeared to be lacking in dental extraction skills. Dr Utting referred to the patient on 2 June 2009. He said that he was "horrified" at what he witnessed. The patient was left with flap damage and bone damage. Dr Utting had been told that the Claimant had spent the first part of the sedation scaling the teeth rather than doing the extraction. She appeared to hide behind a scale and polish rather than the actual procedures. Dr Utting said that the Claimant was short with patients and nurses. His gut feeling was that she was in above her head. Dr Utting said that he and Dr Dunning had spoken to the Claimant. She said that she did not have the correct equipment. He challenged her about that. Dr Dunning said to her that she seemed to be saying that all the

extractions she had seen her performing were difficult. Dr Utting did not think that the Claimant accepted what they were saying.

55.10 Dr Nandha (Senior Dental Officer): Dr Nandha said that she had only met the Claimant a couple of times, but had seen patients who had previously seen the Claimant. Patients had commented that they were glad they were not seeing the Claimant. One dental phobic patient had told Dr Nandha that she felt uncomfortable and not relaxed in her manner. A reliable nurse had told Dr Nandha that the Claimant had been very abrupt with a student in front of the patient almost to the point she was shouting at her. The Claimant's treatment plans were very different and it was not always clear where they were heading. When the Claimant was supervising students the focus was on oral hygiene instructions to the point where other items of treatment were being avoided. She seemed to be avoiding supervision of more complex procedures. This was not just when the Claimant was new. Nurses would raise this concern regularly and Dr Nandha felt it was justified. She found the same when she saw patients the Claimant had treated. Fillings were needed but the Claimant had spent the appointment giving oral hygiene advice. Dr Nandha felt this was inappropriate for special needs patients. Dr Nandha changed a number of the Claimant's treatment plans. One example was a special needs patient for whom an extraction was planned. The Claimant changed that to a root canal filling. Dr Nandha then saw the patient and her view was that it really needed to be extracted. She confirmed that her professional opinion was that the tooth needed to be extracted. At the end of the student placements, two students had told Dr Nandha that they did not want to write it down, but they did not think that the Claimant was adequate for a supervisory role. In the second group, a student made similar comments. He was an able student, not one who might be concerned about lower grades.

56. The evidence from the time also included a letter from Dr C Anderson (Senior Community Dentist). She had carried out peer review with the Claimant. One of her main concerns was that treatment took a long time and the Claimant only managed to see three patients each session. She made unusual choices of materials. When Dr C Anderson raised that with her, she told her that she would not normally have used the product but did so because she thought Dr C Anderson would prefer her to. Dr C Anderson said that the Claimant changed treatment plans and that her plans were confusing and had no clear direction. Some treatment plans had not been carried out. The Claimant often opted for scaling rather than more invasive treatments such as fills and root canal work. Dr C Anderson was the teaching lead at the teaching clinic where the Claimant supervised patients. Nursing staff had told her that they had no confidence in her choice of local anaesthetic. They described her communication with students as "berating and bullying." One student felt extremely upset and spoke directly to Dr C Anderson, who in turn spoke to the Claimant. On one occasion there was some confusion and a patient left without the filling being placed in one of his cavities. The student put that in the notes and the Claimant deleted it and left it as though the tooth had not been prepared. Communication with patients was a problem.

57. On 11 March 2014, Dr Massey wrote to the Claimant's BDA representative, Mr Williams, to let him know that the investigation was taking longer than planned, and that the Claimant's involvement would not be needed until April or May. On 30 April 2014, he wrote to him again to say that the investigators were now ready to see the Claimant, and to discuss arrangements for referring her to OH to confirm whether she was fit to participate. Mr Williams asked Dr Massey to write directly to the Claimant and copy him in. Mrs Eyre did so, on Dr Massey's behalf, on 7 May 2014. She sent OH referral documentation for the Claimant to sign. There was delay in obtaining the Claimant's consent because the letter was sent to an incorrect address. Eventually, the Claimant was seen by Dr Rimmer on 4 August 2014. Dr Rimmer confirmed that the Claimant was well enough to participate in the next steps. She advised that the Claimant should have adequate time to prepare, and background material well in advance.

58. Ms Sutton, who was providing HR support to the investigators, wrote to the Claimant on 9 September 2014 to invite her to a meeting on 13 October 2014. There was correspondence about that, and on 9 October 2014 the Claimant's BDA representative, Mr Paul, asked for the meeting to be postponed because of a lack of communication from the Claimant to her professional advisors. Mr Paul said that they would need further information about the investigation, including Terms of Reference. Ms Sutton sent the Terms of Reference the next day. They had, of course, been sent and accepted by the BDA in January 2014. One issue that arose at this stage was that the BDA and the DDU provided representation for different matters – one dealt with conduct and one with capability. The Claimant sent an email about that on 17 October 2014. She said that she had not seen the Terms of Reference or background documents before.

59. The investigation meeting was rearranged for 26 November 2014 but that too had to be cancelled. Eventually the investigation team met the Claimant on 12 June 2015 – see below.

60. In terms of the Claimant's work, we note that by February 2104 there had been some issues relating to the Claimant's working arrangements. The office she was working in was not suitable and a different desk was needed; there had been some IT difficulties; and there were some issues about the project. She remained at work. Organisational changes led to a change of line management in October 2014 and there was evidently a period of sickness absence around the end of 2014.

2015

61. The Claimant returned to work on 28 January 2015. An investigation meeting was arranged for March 2015. Dr Harvey of the DDU emailed Ms Sutton in February 2015 asking for a copy of the Terms of Reference, if they had been updated since 2014. He asked for a copy of the material that had been provided to the case investigators. On 20 March 2015 Ms Sutton confirmed in an email to the Claimant that she had put a copy of the 2010 Investigation Report in the post to her. By 23 March 2015 Dr Harvey emailed Ms Sutton to say that he still had not been supplied with all the material the case investigators had, including the 2010 Investigation Report. He said that there were inaccuracies in the Terms of Reference. Dr Harvey understood that a copy of the report had been

sent to the Claimant on Friday, but said that she had not yet received it. He requested a postponement of the meeting. Mr Paul of the BDA emailed to confirm his agreement. The Claimant's GP wrote on 23 March 2015 expressing the view that the Claimant was not in a fit state to attend the meeting on 25 March 2015. The meeting was eventually postponed late in the day. Dr Anderson's evidence was that the aim had been to meet the Claimant to start to hear her version of events. The plan was then, if they wanted her to comment on particular documents, they would provide them to her.

62. Dr Rimmer saw the Claimant on 14 April 2015. The Claimant had referred herself. Dr Rimmer said that the Claimant was fit to work. She had experienced an acute stress reaction in relation to the meeting on 25 March 2015, but there was no medical reason why the investigatory process should not now continue. There had been some confusion about how to contact the Claimant and this should be resolved. It would also be helpful to ensure she had adequate time to receive, digest and discuss any documents.

63. Dr Massey reviewed the situation with the Claimant's work at this stage. An email he sent on 14 April 2015 indicated that the Claimant had been left with the Community Services Care team after the directorate change, to minimise stress and maximise the chance of the investigation meeting going ahead. She was now being reviewed by OH and they needed to organise a location within dental and some non-clinical work for her to continue. Some work was done on a temporary role at the Charles Clifford Dental Hospital but Dr Massey was not happy that it was appropriate. He asked the team to look again for opportunities that used the Claimant's skills. On 12 May 2015 Professor Loescher, now Clinical Director for the Dental Hospital, suggested that the Claimant could do some telephone reviews with patients who had not attended, and some work preparing patients to attend the Hospital. Dr Massey obtained details of two relevant workshops in improving patient experience. A project brief was drawn up, the aim being to reduce non-attendance and cancellation rates. The Claimant met the relevant Operations Director on 27 May 2015 and she wrote on 28 May 2015 to confirm that she was looking forward to working in the team. There was a review meeting on 18 June 2015. The Claimant is recorded as saying that she had settled in and that colleagues were friendly and welcoming.

64. The investigation meeting took place on 12 June 2015. The Claimant attended with Dr Harvey and with a friend for support. The Tribunal noted that the minutes of the meeting were not finalised until October 2015. The Claimant sent lengthy comments on them, many of which were not corrections to the minutes of what had been said, but additional observations and information after the event. During the meeting Dr Anderson made clear that this was a fresh investigation. The 2010 Investigation Report would only be used for the chronology, dates and names. The panel asked questions about the Performers List and then moved to questions about concerns. They asked the Claimant about the perception that she was pleasant socially but a different person in the work environment. The Claimant's response was fundamentally that without specific examples she could not respond. Vague allegations could be a hiding place for bullying or unfairness. Dr Anderson said that the Claimant's responses were often too detailed, causing the message to get lost. The Claimant said that her general response was that the allegations were not true. People were

ganging up on her. She felt that people at the Charles Clifford Dental Hospital knew about the situation before she got there. There were misrepresentations from the beginning. In terms of accepting constructive criticism, she said that understandably she needed to ensure she provided information about what she had done and why, and that was consistently put down as not accepting constructive criticism. In terms of relationships with the dental nurses, the Claimant said that it was only WR with whom there was an issue. As regards the extraction on 2 June 2009, the Claimant wrote in her comments on the minutes that Dr Dunning had commended her clinical skills and confirmed that she was only unhappy about the time taken. She said that Dr Dunning had apologised for changing the Claimant's plan by herself starting off the extraction of the fractured tooth with elevators. Dr Dunning saw that the Claimant was right and apologised. The Claimant explained that they started late because Dr Dunning was supervising the SHO and Dr Dunning apologised. The Claimant said that, in order to make sure Dr Dunning did not feel she was blaming her for everything, she diplomatically asked to be allowed the space to carry out her informed treatment decisions and said that she would ensure timings were not an issue in the future. Dr Dunning agreed. Mr Utting was not present until the very end of the session, at which point the Claimant removed the remaining fragment of root. At the end of the meeting, it was agreed that there would be a further investigation meeting in August 2015.

65. Following the meeting, Dr Harvey sent an email with information showing that the Claimant was on the Performers List. That was the first time this was confirmed. Dr Harvey also said how grateful he was for the way the meeting was handled. He hoped that it had given the Claimant the confidence that the process would be handled fairly.

66. The Claimant started a further period of sickness absence on 19 August 2015 and the second investigation meeting did not go ahead as planned. She remained absent until 8 October 2015. The meeting was rearranged for December 2015. The Claimant referred herself to OH and Dr Rimmer wrote on 1 December 2015 to say that the Claimant did not feel well enough to attend it and did not feel she would be well enough until the beginning of February. On 10 December 2015 Ms Sutton emailed Dr Harvey to propose delaying the meeting to 22 January 2016. She said that the Trust would accept a written submission if the Claimant failed to attend, and also reminded Dr Harvey that the Claimant had been asked [in June and October] to send a written response to the 2009 list of concerns.

2016

67. The second investigation meeting took place on 22 January 2016. The Claimant attended with Dr Harvey and a friend for support. On 1 March 2016 the Claimant sent her written response to the original 2009 list of concerns. The Claimant provided comments on the minutes on 23 March 2016 and additional comments on the interviews with WR, Dr Dunning and Dr Utting on 24 March 2016. She sent information about the return to work programme on 18 April 2016. The Claimant finally agreed the minutes of the meeting on 16 June 2016.

68. Mr Anderson's evidence was that the meeting on 22 January 2016 was difficult. The first part was taken up with the Claimant trying to make further additions to

the minutes of the previous meeting. In the end Dr Harvey confirmed that the minutes were a record of the meeting and if the Claimant wanted to add anything she could write it in a separate document. The panel also found it difficult to get a straight answer from the Claimant. This was reflected in the minutes. The panel had questions about the return to work programme. The Claimant questioned why it was relevant, when it had not been a formal assessment of her. Dr Anderson agreed that it was not a formal assessment but he said that there was information that they had to look at and use. He wanted to know the Claimant's views about it. He gave the example of the comments about the Claimant's attitude to feedback and advice given and said that those sorts of comments could not be ignored. At this stage, they wanted the Claimant's general views about the programme. The Claimant expressed concerns again about the inclusion of the return to work programme in the investigation. She said that untrue allegations had been made and that the programme was in an environment related to people who had made accusations about her. The Claimant went on to answer some questions about her experience of the return to work programme, identifying helpful parts and things that were less useful. She explained that comments about being at the level of a recent graduate were unfair because she did not have the opportunity to show that she was beyond that.

69. The Claimant's responses to the list of concerns and the interviews with Dr Dunning, Dr Utting and WR were extremely lengthy and detailed. It is not possible to summarise them here. We read them carefully. Key points include:

    69.1 The Claimant repeatedly said that WR had undermined her with other colleagues and patients and had a campaign against her. She listed many ways in which she said WR had done so, such as not providing her with equipment she asked for and being deliberately slow in cleaning up. She alleged that WR did not think the Claimant had the right to occupy a position "over her" and implied that this was connected to her race. She said that WR did not bring concerns to her attention at the time.

    69.2 The Claimant said that Mr Utting had not completed the extraction on 2 June 2009. Dr Dunning had participated, but using elevators when the tooth broke. In her comments on Dr Dunning's interview, the Claimant gave a detailed account. She said that Dr Dunning had delayed her in applying anaesthetic cream, and that was why she did not start the extraction first, but did some brief scaling and polishing.

    69.3 She rejected their account of the procedure and explained and justified her own actions.

    69.4 The Claimant disagreed with people's descriptions of her. For example, she described herself as humble, friendly, professional, ever learning and seeking to update her skills, evaluating pros and cons and making informed judgments in patients' best interests.

    69.5 The Claimant said that Dr Heyes was very close to WR.

    69.6 The Claimant gave different accounts of all the specific events, describing her own conduct and explaining how it was appropriate. She rejected all the negative accounts and descriptions as untrue and inaccurate in their entirety.

69.7 The Claimant gave detailed accounts of how the 2010 investigation had been conducted and criticisms of that process.

70. The investigators then interviewed Dr Dunning on 19 February 2016. She gave similar information about the patient on 2 June 2009 to that she had given previously. She said that after that patient, she had said that she could not do this any more because the Claimant did not have the experience. She did not work with her after that.

71. Dr Anderson, Dr Rowe and Ms Sutton reviewed all of the information and worked on a draft report. The draft factual parts of the report and all the underlying documents were sent to the Claimant on 16 September 2016, for her to comment. The Tribunal accepted that it took significant time to review all of the information and prepare the draft report. The report itself was 38 pages long and its appendices were more than 1000 pages. The Claimant asked for an extension of time to provide her comments and Dr Massey extended the deadline to 24 October 2016. The Claimant asked for copies of the relevant patient notes. Ms Sutton told her that she could review them at the Trust, because of their confidential nature. Dr Harvey also asked for copies of the patient notes and Ms Sutton confirmed that the Claimant should submit her comments on the factual part of the report by 24 October 2016. Dr Massey wrote to say that the Claimant could comment separately on the patient notes. They would be made available at the Trust and she could be released from her duties to review them. He asked for her comments on the notes by 11 November 2016. The Claimant's Operations Director emailed her separately to say that she could be released from her duties for the whole week.

72. The Claimant provided lengthy and detailed comments on the draft report and documents on 24 October 2016. She was signed off work on 26 October 2016. She remained signed off with work-related stress and depression until 2 May 2017.

73. The investigators met on 25 November 2016, after the deadline for the Claimant to submit comments on the patient notes. She had not reviewed or commented on the patient notes, but they reviewed her lengthy comments on the draft report. The investigators had seen patient notes, but they were not included in the report appendices. Dr Rowe provided a written response to some of the clinical scenarios and comments made by the Claimant, which was included as an appendix to the final report. As regards the patient on 2 June 2009, Dr Rowe noted that sometimes a badly broken tooth cannot be extracted by simple forceps delivery. He wrote that it seemed Dr Dunning had tried to loosen the tooth with luxators. An alternative to this, and the one preferred by the Claimant, was to raise a flap, remove some of the bone around the tooth and use elevators to remove the root. Dr Rowe would generally be tempted to use luxators first, but there was a risk of perforating the bony socket. As such, some surgeons would never use luxators in this situation and the Claimant was not necessarily wrong to opt for the surgical approach.

2017

74. The investigation report was finalised and Dr Anderson sent a copy to Dr Massey on 12 January 2017. The report summarised the evidence from

dentists, dental nurses and receptionists in 2009 and 2012, and the response from the Claimant. Essentially, the investigators concluded that the weight of evidence given by clinical staff, who were experienced in teaching, training and assessing dental students and trainees, was to be preferred to the Claimant's account. Particular concerns were said to be her failure to defer to the senior colleague on 2 June 2009, the allegation that she changed the clinical record to show that a tooth had not been prepared for filling, and her responses to constructive criticism. The report also found that there were concerns about the Claimant's interaction with staff and patients, particular examples being the concerns raised by Dr Nasse and Dr Martin. The panel noted that the reports indicated some improvements in the Claimant's attitude to constructive criticism over the duration of the return to work programme. The report found that the Claimant had been abrupt with colleagues and patients, and noted that colleagues had concluded that this resulted from her being stressed when performing procedures. The panel considered that the Claimant's written responses demonstrated an inability to respond concisely and with focus. The panel summarised information about the Claimant's performance during the return to work programme. They concluded that, while her performance had improved, there remained significant concerns about her. Their overall conclusion was that she lacked the clinical skills, aptitudes, attitudes and insight required of a Senior Dental Officer in Special Needs Dentistry. The report recommended that the matters should be dealt with in accordance with Part 5 of the CCIHA Policy.

75. Dr Anderson's evidence to the Tribunal was that he, Dr Rowe and Ms Sutton carried out a fresh investigation. They used the 2010 Investigation Report for help with dates and people, but they carried out their own investigation of the concerns based on the underlying evidence. In doing so, they used the original witness statements, now amended and signed by the witnesses, rather than re-interviewing most of the witnesses. That was because they considered that evidence would be more reliable after such a delay. The Tribunal accepted that a fresh investigation was carried out by Dr Anderson and his colleagues. Dr Anderson explained that in that context they did not want or need the Claimant to comment on the 2010 Investigation Report. In any event, it was sent to her. It clearly was. Dr Anderson was asked about the references made by WR to keeping notes of events. He was asked whether he had asked for copies of those notes. He said that he had not. He said that the Claimant and her representatives had not requested copies of the notes either. Dr Anderson confirmed that they had not specifically questioned the Claimant about 2 June 2009 when they interviewed her. However, she had provided detailed written responses and the panel considered that it was unlikely she could add anything. There had already been significant delay and the Claimant was having difficulty responding, so they decided not to prolong matters by trying to ask her about that extraction in person.

76. Dr Massey discussed the report with NCAS on 9 February 2017. Their advice was that all matters should be dealt with under the capability process and that, if further local action was not practicable (which they discussed as being unlikely) then a referral must be made to NCAS to consider whether a formal, external assessment should be carried out.

77. The Claimant remained absent from work and her absence was being handled under the relevant policy. Dr Rimmer's advice was sought in that context. On 28 February 2017 she advised that the Claimant should be fit to return to work at some stage in the next three months, but that the investigatory process should not re-start until she had been able to re-establish herself in the workplace. Dr Rimmer repeated the point that the Claimant's mental wellbeing would not recover completely until the workplace processes were finally resolved.

78. Dr Rimmer's advice was not copied to Dr Massey. He wrote to the Claimant on 24 March 2017 inviting her to a meeting to discuss the outcome of the investigation. The Claimant replied to say that she was expecting a meeting in a time frame consistent with Dr Rimmer's advice. She also said that she had not been able to access the relevant clinical records because she had been unwell. She provided a copy of Dr Rimmer's advice. Dr Massey told the Claimant that he would refer her to OH to assess whether she was fit enough to receive the report. He told her that he did not consider the medical records to be fundamental and that she could view them at a later stage if necessary.

79. The Claimant returned to work on 2 May 2017, continuing with the project work she had been doing. She had raised concerns about the work and working environment, and about her wish for more clinical focussed work, during the absence management process. Her managers indicated that they would seek to address those issues.

80. On 29 June 2017, Dr Massey asked Dr Rimmer to advise whether he could write to the Claimant to invite her to a meeting to receive the investigation report and discuss the next stages. On 10 July 2017 Dr Massey wrote to the Claimant (and Dr Harvey) asking her to come to a meeting to discuss the outcome of the investigation. He said that if the Claimant did not want to meet in person, he would arrange to send a copy of the report and his decision as to the outcome. Dr Harvey responded to ask for a copy of the report in advance. On 18 July 2017 Dr Massey sent a copy of the report to Dr Harvey. He said that the Claimant already had the appendices and that he would send an electronic version for Dr Harvey. Dr Harvey replied to say that the Claimant wanted to study the documentation and would not be attending the proposed meeting on 25 July 2017.

81. Dr Massey wrote to the Claimant on 18 July 2017. He sent her a copy of Dr Rowe's appendix as it was a new document. He told her that he now intended to make a formal application to NCAS for an assessment of her capability. He would await the outcome of the application before deciding how to proceed. The application process was detailed and would be a joint application with the Claimant. He had hoped to discuss it when they met, but instead he would complete his part of the application and send her a copy together with instructions from NCAS. Dr Massey sent the NCAS application documents to the Claimant on 27 July 2017. He had arranged for her to have time off her duties to complete them. He requested a response by 14 August 2017. Dr Harvey emailed on 4 August 2017 to ask how a clinical placement would be provided if NCAS required it prior to a clinical assessment. Dr Massey said that he would consider that if NCAS decided to do an assessment. On 8 August 2017 the Claimant said that she did now want to meet. Dr Massey said that as

the deadline was 14 August 2017 and he had made a number of previous offers to meet, he did not now want to delay the process. The Claimant sent her documents directly to NCAS. She and Dr Massey exchanged emails. By 5 September 2017 all the relevant documents, including medical information, had been provided to NCAS.

82. On 25 September 2017 NCAS wrote to the Claimant and Dr Massey with their recommendation, which was not to carry out an assessment. They did not feel that an assessment would appreciably add to what was already known. They noted that a considerable amount of time had passed since the Claimant had practised clinically and that a prerequisite to any assessment of clinical skills would be a programme or reskilling/remediation, which to date had not been possible. The Claimant asked for a review of the decision.

83. Dr Massey was due to retire from his post as Deputy Medical Director. He was preparing to handover the Claimant's case to somebody else. He prepared a Case Manager's report in anticipation that NCAS would not reverse their decision, but on the basis that if they did it could be revisited. His conclusion was that the Claimant had a case to answer in respect of communication towards patients, dental nurses and colleagues; communication and teaching skills towards students; inability to accept constructive criticism from colleagues/senior colleagues; incompetent clinical practice; and inappropriate clinical practice (the extraction that took 2 ½ hours and the allegation of changing patient notes). He decided, subject to confirmation from NCAS, that the matters should be referred to a capability panel hearing. Under the CCIHA Policy, the other alternatives (no action, remedial action and referral to NCAS) were not appropriate. He explained to the Tribunal that in his view the findings of the investigation were of very serious concern with clear patient harm. The Claimant had not worked clinically for a number of years. The return to work programme had been developed in collaboration with NCAS and the University Dental School senior staff, very experienced teachers and practitioners. The intervention of a professional psychologist had been necessary to allow the programme to conclude. Nevertheless, the required level of practice was not achieved. The overriding duty was patient safety. Any supervisor has to know that the learner will promptly take advice and will feedback honestly and with caution about how the procedure is going. The incidents in 2009 suggested a lack of that insight and acceptance of advice. That pre-dated any sickness or disability of the Claimant. The return to work programme was exactly that, and not an assessment, but it did again demonstrate severe difficulties with insight and taking advice and instruction. The programme could not corroborate the initial allegations but it did give information about what could or could not be achieved to resolve them. Dr Massey said that he considered that the seriousness of the original incidents made taking no action inappropriate. The Claimant's lack of ability to take supervision would make any attempt at remediation likely to be futile and a significant danger to patients, so he could not recommend that. Referral to NCAS had already been made. Referral to a capability panel was therefore the inevitable, and only possible, option in the circumstances.

84. Dr Massey said that his decision to refer the Claimant to a capability hearing was not because of her disability or in consequence of it and was not because she had made complaints of discrimination in her First Grievance in August 2011 or her grievance appeal in September 2012. The Tribunal had no hesitation in accepting Dr Massey's evidence that these matters played no part whatsoever in his decision to refer the Claimant to a capability hearing and that the reasons for doing so were as he explained. It is wholly implausible that complaints about discrimination made 5 years earlier played any part, particularly in the context of Dr Massey's careful approach to the matter throughout that time, including his efforts to implement and support a successful return to work programme. There was nothing at all to suggest that he would have treated a non-disabled person in the Claimant's position any differently, nor that the Claimant's sickness absence had anything to do with the decision to refer her to a capability panel. It plainly did not.

85. Dr Massey subsequently agreed to remain as Case Manager, so as to present the case to the expected capability panel. Had NCAS reversed their decision, a new Case Manager would have been appointed. NCAS confirmed on 8 November 2017 that they had refused the Claimant's request to review their recommendation. Dr Massey was required to take a break between his retirement and his return to the Trust in a part-time capacity. He returned to the Trust at the start of December and wrote to the Claimant on 14 December 2017 to inform her that he had decided that there was a case to answer and that he would be arranging a capability panel. He asked the Claimant for dates she and her representative would be available in February and March 2018.

2018

86. The capability hearing was arranged in consultation with the Claimant and her BDA representative for 5 and 6 April 2018. Dr Massey wrote to invite her formally to the hearing on 20 February 2018. He said that the full details of the concerns were contained in the investigation report and its appendices, but he summarised the concerns under the headings: communication skills towards patients; communication skills towards dental nurses and other colleagues; communication and teaching skills towards dental students; inability to accept constructive criticism or advice from colleagues/senior colleagues; incompetent or inappropriate clinical practice; inappropriate clinical practice (the 2 June 2009 patient); and that the concerns were supported by the findings of the team at the Charles Clifford Dental Hospital during the return to work programme. Bullet point concerns were set out under each heading. A timetable for exchanging statements of case and evidence was set out. The Claimant was given annual leave and special leave to prepare for the hearing.

87. Dr Harvey emailed on 21 February 2018 to ask for specific allegations rather than vague ones. He asked for copies of the notes, complaints or witness statements that particularised the issues raised. Dr Massey replied on 27 February 2018 attaching a lengthy schedule of the evidence that would be relied on to support the allegations, together with two reflective statements that had not been included in the original pack of supporting evidence. The schedule identified clearly the evidence relied on in relation to each bullet point. In respect of the 2 June 2009 patient, the schedule made clear that it was not

being suggested that surgical extraction was itself inappropriate but that it was carried out with poor timing, incompetently and without insight into its poor progression. The concerns included that the Claimant had not stopped when asked by a colleague and had not listed to the feedback of senior colleagues.

88. The reflective statements were from Dental Nurses from 2012. One said that she found the Claimant pleasant in person but demanding and dismissive when doing clinical work. She had not listened when the nurse told her that she had run over the appointment by an hour. She talked to herself and mumbled, which disconcerted the patients. The nurse said that her work was good but she could benefit from some guidance at communicating and allowing the nurse room. The other nurse said that the Claimant did not work well as a team. She felt that the Claimant always needed to be correct, even if the nurse said something different, for example an occasion when she had asked for the x-rays and the nurse told her that there were not any. She spoke to herself throughout to make sure she was doing things correctly, which made the patient feel uncomfortable. She did not have good listening skills. She stressed over a lot and was always panicking over minor complications.

89. On 9 March 2018 Ms Whistler of the BDA emailed Ms Bembridge to say that she and Dr Harvey (DDU) would both attend the hearing because the concerns were a mixture of clinical and non-clinical concerns. She asked for a set of the documents.

90. On 16 March 2018 the Claimant sent a grievance to Mr Gwilliam, Director of HR and Staff Development (the Second Grievance). His PA acknowledged receipt and said that Mr Gwilliam was on leave until Monday. Mr Gwilliam himself replied on 10 April 2018. He said that he would request that her concerns were investigated under the Trust's Acceptable Behaviour Policy. The Second Grievance was about events in her current working environment and the behaviour of colleagues.

91. On 16 March 2018 Dr Harvey asked Ms Bembridge for notes for the patients in respect of whose treatment concerns had been raised in the investigation report. Anonymised copies were sent on 23 March 2018. The management statement of case was sent on 20 March 2018, with additional documents and details of the management witnesses.

92. By that time, the Claimant had been signed off sick again (from 15 March 2018). In the event, she did not return to work from this point. The Claimant was referred to OH on 22 March 2018. The Claimant did not attend the appointment on 27 March 2018. Her GP had provided a fit note that indicated she was not fit to prepare for or attend the capability hearing and Dr Massey therefore postponed it. A further OH appointment was arranged for 4 May 2018, which the Claimant did not attend, and her copy of the management statement of case was returned undelivered. No doubt this was a reflection of her state of health. Contact was made with the Claimant's BDA representative to check on her well-being, and Ms Whistler indicated on 11 May 2018 that the Claimant had not felt able to open any emails or post since late March.

93. However, on 9 May 2018 the Claimant sent a 98 page grievance to Sir Andrew Cash, the Respondent's Chief Executive (the Third Grievance). The Third Grievance began by referring to continuous unacceptable behaviour, intimidation, harassment, bullying, and unfair and discriminatory treatment on the ground of race from staff and HR. The Claimant then set out a very lengthy account dating back to 2009.

94. Ms Allred, Service Manager, had tried to meet the Claimant to discuss her Second Grievance in May 2018, but Ms Whistler asked for that to be postponed. Ms Allred had made a start on interviewing other witnesses.

95. On 12 June 2018 Sir Andrew Cash wrote to the Claimant. He had sought legal advice. He told her that in his view the Third Grievance fell into three categories. The first was matters that had already been considered in the First Grievance by Dr Throssell and in the appeal against Dr Throssell's outcome, by Sir Andrew. Those matters would not be re-opened. The second category was matters relating to the ongoing conduct/capability process. Sir Andrew referred to the relevant part of the Grievance Procedure (referred to above), indicating that a disciplinary process might be temporarily suspended when a grievance was raised, or, where the issues were related, it might be appropriate to deal with both concurrently. Sir Andrew said that it had been decided to consider those aspects of the Third Grievance concurrently with the ongoing conduct and capability concerns. This was proportionate as the matters were closely related. Time would be allocated at the start for the grievance to be dealt with. Some of the matters in the Third Grievance were more appropriately a response to the allegations themselves and should be addressed in the Claimant's Statement of Case. Sir Andrew had decided that the panel should be advised by an HR professional independent of the Trust. The third category was concerns about colleagues at the Charles Clifford Dental Hospital/Admissions department, which linked with the Second Grievance. Ms Allred had been asked to investigate these matters too. An external HR consultant would be appointed to ensure impartiality. A colour coded copy of the Third Grievance was provided, so that the Claimant was clear precisely which parts fell into which category.

96. In the event, the third category concerns were considered to be broadly the same as the concerns in the Second Grievance. A decision was taken to ask the external HR professional to investigate those concerns together, to ensure that the Claimant had confidence in the process as she was raising concerns about the Respondent's HR. Ms Allred's investigation of the Second Grievance was therefore halted. Mrs Grice was appointed to deal with the Second Grievance and the third category concerns from the Third Grievance. Mrs Robson was to act as the link between Mrs Grice and the Respondent for administrative purposes. Because the Claimant was unwell, Mrs Grice decided to interview witnesses who could be identified from the detailed grievance first. Interviews were arranged for September 2018. Some had to be postponed when Mrs Grice broke her leg but took place very shortly afterwards.

97. Meanwhile, Dr Rimmer had eventually seen the Claimant on 10 July 2018. The Claimant wanted to see her report before it was sent to Dr Massey. It was eventually sent to him on 5 September 2018. The Claimant had sent Dr Rimmer a letter from her GP dated 25 July 2018. The GP "strongly recommended" that

at present it would be difficult for the Claimant to manage the complexities in the conduct and capability hearing and those in the grievance process. S/he expressed the view that the Claimant would not be able to deal with both processes concurrently. The GP recommended that the Claimant needed time for her condition to improve so that she could properly and effectively represent herself. Dr Rimmer reported that the Claimant wanted the grievance to be heard first, and hoped that this would lead to a resolution of the other matters. Dr Rimmer agreed that the processes were adversely affecting the Claimant's mental health and that this was affecting her ability participate. However, she felt that until these matters were fully resolved the Claimant's mental health would not significantly improve. The Claimant's current poor health included poor concentration, which might affect her ability to instruct her representatives. Dr Rimmer thought that the Claimant would find participation in the processes difficult but that if her representatives were able to support her and present a coherent case on her behalf it might be possible to proceed. Dr Rimmer repeated that she did not think the Claimant's health would improve significantly until all these matters had been resolved.

98. Dr Massey considered Dr Rimmer's advice and also discussed with NCAS whether the capability hearing should proceed. Dr Massey decided that the hearing should go ahead. He thought that it was in the interests of the Claimant's health for this to happen. He thought that she had shown, by her ability to complete her grievance documents, that she was able to instruct her representatives and assist in preparing a written statement of case. He was concerned about the effect on the witnesses and their ability to recall events that were now 9 years old. He said that the hearing would take place on 25, 26 and 29 October 2018. The Claimant's options were to attend, ask her representatives to attend, and/or send written representations.

99. On 17 September 2018 the Claimant wrote to Sir Andrew Cash and the Chair of the Trust asking for the capability hearing to be postponed. She sent a copy of a letter she had sent to the Employment Tribunal indicating that she had recently had an operation for a "life-threatening" condition. She provided a letter from her GP, also addressed to the Tribunal, indicating that she had suffered from an abscess that required surgery and was likely to require 8-12 weeks' recovery. Dr Massey regarded this as a new medical condition. He noted that Dr Harvey was not available on the October dates. He therefore agreed to postpone the capability hearing for a second time. He wrote to the Claimant confirming this on 25 September 2018. He asked her to provide dates on which she could attend a hearing.

100. In the light of the OH advice, the investigation of the Claimant's Second Grievance and the third category concerns in her Third Grievance were also put on hold. Mrs Robson was told by Ms Eyre or Ms Davidson that the Claimant had requested the grievance process be put on hold and the Respondent had agreed. She was also advised that the Claimant should not be contacted by her or Mrs Grice. She told Mrs Grice. The Claimant emailed Mr Harper, Chief Operating Officer, in late September 2018 to say that she could not agree to Mrs Grice's appointment until her impartiality had been investigated. Mr Harper told the Claimant that Mrs Grice had already started interviewing witnesses. He said that he would tell Mrs Grice that the Claimant's interview should be

postponed to December. After that, the Claimant remained unfit and no further progress was made with Mrs Grice's process before the Claimant's dismissal in June 2019 (see below). Mrs Robson's unchallenged evidence was that the Claimant continued to submit fitnotes and advise that she remained too unwell to participate, and Mrs Robson continued to advise Mrs Grice not to contact the Claimant.

2019

101. The capability hearing was re-listed for 23, 24 and 25 April 2019. It was necessary to identify some new panel members in order to do so. Dr Massey asked for a view from Dr Rimmer. She reiterated that the protracted process was contributing to the Claimant's ill health and that it needed to be brought to a conclusion. Her view was that the hearing should be scheduled and that she would only review the Claimant if she or her GP indicated that she was not well enough to attend and the Case Manager requested a review. She thought it likely that a postponement request would be received, as being given a date was likely to lead to a deterioration. Dr Rimmer had serious concerns about the impact of the process on the Claimant's health; the longer it dragged on the greater that would be. She urged that all avenues for resolving it should be considered. Dr Massey was aware that Dr Harvey, but not Ms Whistler, was available. He decided that the hearing should go ahead. He took into account Dr Rimmer's advice about the risk to the Claimant's health the longer things went on. He wrote to the Claimant on 8 March 2019 to confirm the dates and on 26 March 2019 to confirm the details and the names of the panel. The chair was to be Dr Hughes, Medical Director. The other panel members were Mrs Carman, Assistant Chief Executive, and Dr Pollock, external medical representative. There were also an external clinical advisor and an external HR advisor.

102. By 4 April 2019, no contact had been received from the Claimant and it had not been possible to hand-deliver documents to her. Her representatives said that they had had no contact from her and would not be representing her. Dr Massey wrote further letters to her. On 16 April 2019 he confirmed that the hearing would go ahead.

103. On 18 April 2019 the Claimant wrote to Dr Massey. She pointed out that she was currently off sick and reiterated that she did not agree that she should be in the capability process because it had resulted from discriminatory behaviour; grossly unfair investigations with false witness statements and withheld documents; and other obstructive behaviours, which she had detailed in her grievance and had not been fully investigated. In view of that and her doctor's comments it was most disappointing that they had decided to proceed with the capability/conduct and grievance hearing together. She attached a copy of a recent letter from her GP to the Employment Tribunal. That letter referred to the Claimant having depression and PTSD. It said that she had been referred to IAPT and assessed by them on 15 March 2019. A lesion in her brain had also been identified in a recent MRI, which was to be investigated. She was keen to proceed but her cognitive function was currently affected by the mood disturbance and stress. The information was passed to Dr Hughes so that the panel could decide on the day what to do.

104. The Tribunal found the evidence of both Dr Hughes and Dr Pollock careful, measured and thoughtful. Dr Hughes explained that the panel decided on the morning of the hearing to proceed in the Claimant's absence. They took into account that she had had significant periods of absence, and that Dr Rimmer's view was that her health would not improve until the underlying issues had been addressed. They noted the advice from NCAS that the hearing should proceed subject to OH advice. They also noted that there was a significant passage of time from the events in question. They were worried that further delay would affect people's ability to remember the events. Finally, they noted that Dr Massey had retired and might become unavailable. In cross-examination, Dr Hughes and Dr Pollock were pressed at length about the decision to proceed in the Claimant's absence. Dr Hughes said that the panel would far rather the Claimant or a representative had attended, but these other considerations outweighed that. He said that the panel had taken into account the view of the Claimant's GP, as reported by Dr Rimmer, but that was just one factor, it was not decisive. It was clear that Dr Rimmer's view about the impact of delay on the Claimant's health weighed heavily with Dr Hughes. It was suggested to Dr Pollock that a few more months would have made no difference. He said that might be the case if this were the first postponement, but it was not; it was the third. He said that the panel weighed all the factors and their judgment was that it was reasonable and proportionate to go ahead. It was put to Dr Hughes that it would have been possible to delay for an hour and contact the DDU. He agreed that it would have been possible, but said that they knew in advance about the hearing and there had been no communication from them.

105. The panel dealt with those parts of the Third Grievance that they had been tasked with determining first. They had a written statement from Dr Massey. They heard evidence from Dr Anderson. He, Ms Sutton and Dr Massey gave explanations about the conduct of the capability investigation. The panel also heard from Professor Loescher. The panel went through each of the Claimant's thirty concerns.

106. On the second day of the hearing, the panel dealt with the capability issues. They had read Dr Massey's detailed statement of case. They heard evidence from Dr Dunning, WR, Dr C Anderson, Ms Tomlinson, Professor Brook, Professor Loescher, Dr Freeman, and Professor Deery. Dr Massey referred to the other written statements and made some concluding remarks.

107. The panel reached their decision on the third day. They dealt with the grievance first then the capability issues. They decided to send a draft letter with findings to the Claimant to review and comment on, given that the hearing had gone ahead in her absence. Their provisional decisions were that (1) the aspects of the Third Grievance they had considered were not upheld, and (2) the capability issues were upheld and the Claimant should be dismissed.

108. The draft outcome letter set out the panel's provisional conclusions in detail. It took some time to prepare. This was because of Dr Hughes's work commitments.

109. The panel's conclusions on each relevant aspect of the Third Grievance were set out. None of them were upheld. In particular:

109.1 The panel was satisfied that reasonable efforts had been made to find work for the Claimant after the return to work programme, given the limitations on her ability to work unsupervised and the level at which she was working;

109.2 The panel did not consider that the management of the Claimant's sickness absence and communication about the investigation meetings were "unfair, unkind, malicious or cruel";

109.3 The panel accepted that it was not possible to return the Claimant to clinical duties until concerns regarding her clinical capability identified in 2009 had been addressed; and were very concerned about the length of time that had passed since 2009. But they concluded that the delays in managing a return to work were in part because of the outcome of the return to work programme, and in part because of the Claimant's very substantial absences. They did not accept that the Claimant was victimised, degraded, humiliated or ostracised. They had not identified any specific action that was unfair or unreasonable.

109.4 The panel concluded that it was reasonable for the capability investigation to have considered the 2010 Investigation Report, whilst giving the Claimant the opportunity to comment on it. The Claimant had been given the opportunity in the Respondent's investigation process to respond to the concerns raised.

109.5 The panel found that the June 2015 investigation meeting had been impartial and thorough and that it was clearly necessary to include evidence about the return to work programme in the investigation. The approach of the team in trying to agree the minutes afterwards was reasonable. Reasonable allowances had been made for the Claimant's health issues.

109.6 The panel noted that Dr Anderson had pointed out to them that he had very little familiarity with any of the staff involved and had never held a management role at the Respondent. They were satisfied that he had conducted his investigation entirely properly.

109.7 The panel did not uphold any complaint of discrimination, bullying, harassment or physical intimidation at the dental hospital. They noted that the Claimant had not provided examples and that she had not complained of discrimination at the conclusion of the return to work programme.

109.8 The panel considered that the Claimant had had a reasonable opportunity to comment on the draft investigation report and to view the patient notes.

109.9 Concerns about Dr Massey's communication and attempts to arrange the capability hearing were not upheld. The panel concluded that Dr Massey and HR were simply trying in difficult circumstances to arrange the hearing after considerable delay.

110. In respect of the capability matters, the draft letter set out the panel's findings "in relation to the conduct and capability issues". It identified three key questions:

110.1 Was there evidence of serious concern about the Claimant's capability and conduct, which was sufficient to justify her restriction from clinical practice until those issues could be remediated;

110.2 If so, and given that no such remediation had taken place, had the Respondent made all reasonable efforts to arrange for remediation; and

110.3 In all the circumstances was Dr Massey right to conclude that the Claimant was irremediable as a Senior Community Dentist and that her employment should be terminated?

111. In respect of the first question, the draft letter referred to concerns about conduct and capability raised almost immediately after the Claimant started in her post, as set out in the investigation report in relation to style of communication with colleagues, patients and students; poor note-keeping; issues with treatment plans; and very prolonged treatment times. It referred to the incident on 2 June 2009. It referred to the conclusions in the 2010 Investigation Report. It referred to the period of professional education and supervision under a back to work programme in 2012, and to Professor Brook's view that while the Claimant had improved she was working at the level of a new graduate. The panel noted that the Claimant had complained in very strong terms in her grievance about her treatment whilst at the PCT and at the dental hospital. However, on balance, the panel was persuaded by the consistency of the evidence from colleagues in both organisations that the concerns expressed about the Claimant's professional behaviour were genuine and serious. Having reviewed all the evidence and interviewed the listed witnesses itself, the panel had no doubt that the concerns were rightly viewed as preventing the Claimant's return to clinical work unless it was possible to arrange remediation for her. The panel concluded that all those involved in the Claimant's management had conducted themselves professionally and patiently throughout. Errors had been made from time to time, but it would be remarkable if that were not so, since this had taken almost ten years. The panel did not accept that the Respondent's staff or Dr Anderson had been biased, bullying or discriminatory. They considered that the Claimant had been given every reasonable opportunity to challenge the factual allegations made against her. They were not persuaded that the allegations against her arose from bullying, harassment, discrimination or any improper motive. They were the genuine and reasonable concerns of her professional colleagues.

112. In respect of the second question, the panel noted that the return to work programme had not been successful in enabling the Claimant to return to unsupervised practice and that NCAS had subsequently determined that they could not assess the Claimant's professional ability, primarily because of the length of time she had been out of practice. The panel was unable to identify any realistic avenue for remediation, within the Respondent or elsewhere. Even if the Claimant were to regain sufficient and reliable fitness to attend work, the panel considered that there was a substantial risk that any programme of remediation would suffer the same problems as arose at the PCT and the dental hospital, both in relation to performance and behaviour. The panel concluded that the Claimant lacked the necessary insight and willingness to accept and learn from constructive criticism. Without those attributes, any further remedial action would, in their view, be bound to fail. It would not be reasonable or proportionate for the Respondent to expend further senior clinical and HR resources on exploring further remediation in those circumstances.

Turning to the third question, the panel's provisional conclusion was that there was no realistic prospect of the Claimant returning to work as a Senior Community Dentist, or in any clinical role in the Respondent, in the foreseeable future. They determined that her employment should be terminated.

113. The draft letter was sent to the Claimant for comments on 14 June 2019, with a deadline of 29 June 2019. The Claimant requested an extension to 28 July 2019 and Dr Hughes agreed an extension to 19 July 2019. The Claimant also contacted Dr Hughes's office to arrange to collect the hearing papers that she had not collected before the hearing. She collected them on 5 July 2019. The Claimant wrote on 17 July 2019 requesting a further extension to 29 August 2019, by way of reasonable adjustment and so that she could take legal advice. She said she had already taken legal advice. Dr Hughes extended the deadline to 2 August 2019. He took into account that the deadline had already been extended; there had been attempts to deliver the files to the Claimant before the capability hearing; and that she could have come to the hearing but had not done so.

114. The Claimant's legal representative emailed Dr Hughes on 2 August 2019. He said that the Claimant would appeal against the panel's findings in respect of her grievance. He asked for more details of the reasons for the proposed decision. He expressed the view that there had been unreasonable delay, contrary to case law and the ACAS Code of Practice, and said that the Claimant could not now recall the details. He asked for clarity about whether the Claimant was being dismissed for capability or conduct issues. He asked for further details of which allegations were upheld and why. He said that once that was provided, the Claimant would provide an alternative viewpoint. Dr Hughes decided that no further information had been provided to put before the panel members that might materially alter the outcome. He was satisfied that the Claimant had had enough time to provide her comments and that the draft outcome letter provided sufficient information to confirm the panel's findings that the Claimant was to be dismissed because of capability concerns. He did not consider it necessary to set out a finding in relation to each allegation. The letter was therefore finalised and sent to the Claimant's home address on 27 August 2019. It was in largely the same terms as the draft letter and confirmed that she was to be dismissed, with pay in lieu of notice. Dr Hughes also emailed the Claimant's legal representative on 27 August 2019, to confirm that the decision to dismiss the Claimant was on grounds of capability although matters of conduct had arisen. The legal representative emailed Dr Hughes on 31 August 2019 to say that the Claimant had not received the letter. Dr Hughes confirmed that it had been sent to her home address.

115. The Claimant was dismissed on grounds of capability with effect from 27 August 2019. She was paid in lieu of notice and paid for 19 days' accrued but untaken holiday.

116. In cross-examination, Dr Pollock and Dr Hughes were asked in detail about the process they followed and the decisions they reached. In particular:

    116.1 Dr Hughes said that if the Claimant's grievance had been upheld to a degree that called into question the evidence or approach leading to

the capability hearing, the capability process would not have continued.

116.2 As regards the 2 June 2009 incident, both Dr Hughes and Dr Pollock accepted that Dr Rowe's view was that the Claimant's choice of a surgical treatment approach was an appropriate one. Dr Pollock said that the concern was not about the choice of approach it was the manner in which it was undertaken. Dr Hughes said that Dr Rowe's evidence was constrained because he was not present in the room on the day. Dr Rowe made clear that a surgical approach was appropriate, but the concerns were about what happened on the day. Dr Dunning was concerned about how long it took and that the patient was becoming distressed. In assessing this incident, the panel also took into account the Claimant's detailed written account.

116.3 Dr Pollock accepted that there was some evidence before the panel suggesting that there were strong views against the Claimant, and that people had expressed unwillingness to work with her again. He said that this would not have affected the outcome of the capability process. If the panel's view had been that the Claimant should return to work, those concerns would have been overridden. It would have needed to be done "with finesse" by the Case Manager.

116.4 Dr Hughes did not consider that there was evidence suggesting "collusion" by the witnesses. He did not think the indication that WR had called Dr Vora at home in the evening, nor the comment by Ms Heyes about making sure that concerns were coming from more than one direction, indicated that there was collusion. He said that it was inevitable that people would talk to colleagues if something happened that surprised them. That was not collusion. He would look for evidence of an intention to lead the investigation in a certain direction. That was not there. He thought that Ms Heyes's comment simply reflected the fact that you would expect a degree of corroboration in a setting where someone was practising with a number of people. The concerns would carry more weight if they were raised by more than one person.

116.5 Dr Hughes confirmed that the panel did not consider it necessary to ask WR for the written notes she referred to keeping at the time of the events.

116.6 Dr Pollock accepted that none of the individual issues raised, including 2 June 2009, gave rise to a grave patient safety concern. But he said that taken together, all of the concerns gave rise to a problem that needed addressing.

116.7 Dr Hughes agreed that the return to work programme was not designed as an assessment programme, but to remediate the Claimant back into practice. He agreed that she made progress during the programme but was insistent that on the evidence before the panel she had not reached the standard where she could do the job to which she had been appointed, nor even where she could work unsupervised. There remained a very considerable gap between the assessment of where she was at by Professor Brook and Professor Loescher, and the post to which she had been appointed. Dr Hughes agreed that if a post had been found at the end of the return to work

programme, it might have been possible to remediate the Claimant back into work, but the panel accepted that there was no suitable post across the Respondent Trust at that time. He said that the panel did not consider recommending a similar process in 2019. It had already been done and had not been sufficiently successful. It had been tried five years ago and was even less likely to succeed five years later. The panel accepted that there was evidence of improvement during the return to work programme, but there was evidence going the other way too and, on balance, the panel concluded that there was no prospect of successful remediation in 2019.

117. It was put to Dr Pollock that the panel had discriminated against the Claimant and victimised her for doing protected acts. He disagreed. He said that the panel did their best to be fair and just in the circumstances. Dr Hughes likewise said that the Claimant had not been discriminated against or victimised. The panel would have gone ahead in her absence even if she had not been disabled; they would have reached the same conclusions on her grievance, which they considered item by item; and they would still have concluded that she should be dismissed for capability concerns regardless of disability or protected acts. The Tribunal had no hesitation in accepting their evidence. Dr Pollock and Dr Hughes were external to the Respondent. All of the written evidence pointed to a detailed and careful approach, with the panel considering the grievance and the capability concerns on their merits, and properly considering what course of action should be taken. That was reflected in the oral evidence to the Tribunal. We were quite satisfied that the grievance was rejected because the panel found that the complaints were not well-founded. The Claimant was dismissed because the panel concluded that there were serious concerns about her capability and that there was no realistic prospect of the Claimant being remediated back into work.

118. The Claimant's legal representative appealed against her dismissal in an email dated 26 September 2019. The grounds of appeal were:

    118.1 The Respondent had unreasonably concluded that the Claimant was not likely to return to work, and did so without medical evidence;
    118.2 The Respondent had unreasonably failed to engage with her grounds of defence as submitted on 2 August 2019;
    118.3 Her dismissal was unfavourable treatment in consequence of her disability and was not proportionate;
    118.4 Her dismissal was an act of victimisation because she had complained to the Tribunal.

119. Mr Barker was appointed to chair the panel determining the appeal against the Claimant's dismissal. He is a member of the group of individuals appointed and trained by NHS Employers to act as independent chairs for capability hearings for NHS doctors and dentists. He is independent of the Respondent, his main career having been in policing. The other panel members were Mr Pedder, Chair of the Trust, and Mr Curly, Deputy Medical Director of a neighbouring Trust. The panel was advised by Mr Kwasnicki, Consultant in Special Care Dentistry, and Mrs Hartley, the Respondent's HR Operations Director. Mr Barker advised that the Claimant's appeals against dismissal and the grievance

outcome should be dealt with separately. He asked for details of her Tribunal claim, which was referred to in the grounds of appeal, and other information. He explained in cross-examination that he asked for information about the Tribunal claim because she had complained of discrimination in her appeal and said she had brought a Tribunal claim. He thought it would be important to understand the details of her appeal so they could deal with it comprehensively. He did not receive much information, and understood that the Tribunal claim had been struck out (as it had at that time). He did not share the information with the other panel members and he did not inform the Claimant that he had asked about it. He simply made the request to try and get more information about the Claimant's appeal. The Tribunal accepted his evidence.

120. The dismissal appeal hearing was originally listed for 31 October 2019 but was postponed at the Claimant's request because she said she was not given enough time to prepare for it. It was rearranged for 13 December 2019.

121. Meanwhile, a hearing to determine the Claimant's appeal against the Third Grievance outcome (in relation to the capability panel's findings) was arranged for 9 December 2019. Mr Gwilliam wrote to the Claimant on 21 November 2019 to tell her the date. He asked for her written grounds of appeal and any documents by 2 December 2019. Mrs Laban, then Non-Executive Director of the Respondent, was appointed to chair the panel. Mr Morley, Chief Nurse, and Mr Parker, HR Director of Sheffield Children's Hospital, were the other panel members.

122. On 3 December 2019 the Claimant requested a postponement of both appeal hearings. She provided a letter from her GP saying that she suffered with depression due to work-related stress, and PTSD and was in a very vulnerable state emotionally. The Claimant wrote in a letter relating to the grievance appeal hearing that she had arranged to be accompanied on 10 January 2020. In a separate letter relating to the dismissal appeal she said that she felt overburdened and overwhelmed by the documents. She said that she had arranged to be accompanied on 8 January 2020 for the dismissal appeal hearing and 10 January 2020 for the grievance appeal hearing.

123. On 6 December 2019 Mr Gwilliam wrote to the Claimant confirming that after consulting both panel chairs, he agreed to postponing both hearings. He asked whether there would be any difficulty if he swapped the 8 and 10 January 2020 dates around. Mr Gwilliam confirmed that the Claimant had had the full set of documents from the capability panel hearing since 5 July 2019, and had only been sent additional documents on 28 November 2019. Mr Gwilliam's letter was copied to the Claimant's solicitor. On 17 December 2019 Mr Gwilliam wrote another letter to the Claimant. He referred to the 6 December 2019 letter and said that he had not received a reply. He told the Claimant that the grievance appeal hearing would therefore take place on 8 January 2020. The Claimant wrote back in a letter dated 18 December 2019 to say that it was not possible to swap the dates because 8 January 2020 was the date she could be accompanied in respect of her appeal against dismissal. She said she was trying to identify alternative dates in January 2020.

124. On 23 December 2019 Mr Gwilliam replied. He said that it had been possible to arrange the dismissal appeal hearing for 30 January 2020 and that the grievance appeal hearing had been arranged for 8 January 2020, using a date the Claimant had provided, so he assumed she was available to attend. The letter was copied to the Claimant's solicitor. Mr Gwilliam wrote another letter dated 27 December 2019, setting out the detailed arrangements for the dismissal appeal hearing. It too was copied to the Claimant's solicitor. He asked for confirmation that the Claimant had received the letter and would attend the hearing. He warned her that it might go ahead in her absence. The Claimant did not respond.

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125. Mr Gwilliam sent another letter about the grievance appeal hearing on 6 January 2020. He said he had sent an email on 2 January 2020. He said that he had had no response. He told the Claimant that the grievance appeal hearing would go ahead on 8 January 2020. Before that letter was sent, Mrs Laban discussed whether to go ahead with the hearing with Ms Davidson. Mrs Laban agreed that the hearing should go ahead on 8 January 2020. In cross-examination she said that she still hoped the Claimant would attend. In cross-examination Mrs Laban said that she was not aware of the Claimant before being asked to be involved in the capability hearing (which did not happen) and then the grievance appeal hearing. She was not aware of her case generally, and she was not aware of her claims of discrimination or her Tribunal claim. The Tribunal accepted her evidence.

126. The grievance appeal panel were informed at the start of the meeting on 8 January 2020 that neither the Claimant nor her representative would be attending. They considered whether to go ahead. The meeting notes record the matters they took into account. In cross-examination, Mrs Laban said fundamentally that they needed to bring this to a close, for the Respondent and the Claimant. Neither the Claimant nor her representative had provided grounds of appeal against the grievance outcome. The grievance appeal panel were dealing only with the parts of the Third Grievance that had been decided by the capability panel. Dr Massey and Dr Hughes attended the appeal hearing. They went through each of the grievance findings in turn. That is reflected in the hearing notes. The appeal panel had read the relevant documentation in advance. The grievance appeal panel rejected the Claimant's appeal. Mrs Laban wrote an outcome letter dated 10 January 2020. She explained that in the absence of any grounds of appeal from the Claimant, the panel had been through her original grievance, the management case in response and the outcome letter. They had questioned Dr Hughes and Dr Massey at the appeal hearing. The appeal panel had concluded that the process followed was reasonable and fair and that each of the conclusions reached was reasonable. They noted that, because this matter was dealt with by the capability panel, the Claimant's internal grievance had, unusually, been scrutinised by an external Clinical Director and Consultant in Special Care Dentistry and an external HR advisor.

127. Mrs Laban's evidence was that she and the grievance appeal panel had dealt with the Claimant's appeal in the same way they would have considered

anybody's appeal. Their decision was based on the evidence. They found no evidence that the Claimant had been discriminated against, and no evidence that any delays in the process were acts of discrimination. Delays in the grievance process were because of the Claimant's sickness absence. As far as the grievance appeal was concerned, attempts were made to progress it, whilst accommodating the Claimant's ill health. Mrs Laban said that the grievance appeal panel had not rejected the Claimant's appeal because she had done a protected act. They were not aware of the First or Second Grievance and they did not know that she had brought a Tribunal claim. The Tribunal accepted her evidence. There was nothing to suggest that the grievance appeal panel had been influenced in any way by the fact that the Claimant had done any protected act or the fact she was disabled. They rejected her appeal because they did not consider it well-founded.

128. On 14 January 2020 Mr Gwilliam wrote again to the Claimant about the dismissal appeal hearing. He referred to his letters of 23 and 27 December 2019 and said that he had had no response. He informed the Claimant of the relevant meeting room and asked her to confirm that she would be attending.

129. On 20 January 2020 the Claimant wrote to say that she had not received Mr Gwilliam's previous letters. She referred to the "short notice" and asked for the hearing to be rearranged for 26 February 2020. Mr Barker spoke to Mrs Davidson. He was satisfied that previous letters and been sent to the Claimant with the new date in good time. He was aware of the difficulties in reconvening the panel each time there was a postponement, and that the timescales for hearing an appeal in the CCIHA Policy and MHPS had been overshot by some months. He considered it important that the hearing should now take place on 30 January 2020, and the Claimant's request for a third postponement was therefore refused. In a letter to the Claimant dated 22 January 2020 Mr Gwilliam wrote that he had reviewed the position and was satisfied that his two letters had been sent to the Claimant by post, to the three email addresses she had previously provided, and to her solicitor. In view of the difficulties in re-arranging the panel, which consisted of senior individuals external to the Trust, who had clinical and other commitments; the prior notice given to the Claimant; and the two previous postponements; the hearing would go ahead on 30 January 2020. On 23 January 2020, the Claimant said again that she was not able to attend on 30 January 2020 and asked for the hearing to be postponed to 26 February 2020, so that she could be accompanied. Mr Barker asked for enquiries to be made about whether the panel members were available on 26 February 2020. They were not. Mr Barker decided that the hearing should go ahead on 30 January 2020. Mr Gwilliam informed the Claimant of this on 28 January 2020.

130. In cross-examination, Mr Barker accepted that there was a difference between letters being sent to the Claimant and her receiving them. He confirmed that he had accepted what the Respondent told him about the letters of 23 and 27 December 2019 being sent to the Claimant. That did not mean he was making an adverse finding about the Claimant or thought she was lying about not receiving the letters. He explained, "Whether the Claimant had picked it up and read it I don't know. … I was told documents had been sent and she had been made aware of the existence of the hearing. I was conscious she had significant

health problems and that this may have impacted her understanding of the existence of the hearing."

131. In respect of the Claimant's case that she did not receive Mr Gwilliam's letters of 23 and 27 December 2019, the Tribunal noted her evidence in her witness statement that she felt swamped by the number of posted and hand-delivered letters the Respondent sent at this time, and that their contents were often confusing. Given this, the long-standing pattern of letters apparently not being received, the number of letters and the fact that on their face they were also copied to her solicitor, the Tribunal considered it most likely that the letters were sent and delivered. They may not have been read or processed by the Claimant.

132. The Claimant sent a letter on 28 January 2020, with a letter from her GP dated 29 January 2020, saying that she was not medically fit to attend. The GP said that the Claimant's mental health was deteriorating, she was very anxious and on edge. She had been referred to IAPT and SOHAS, and had an appointment in February. The GP advised that with the necessary support the Claimant would get to a point at which she felt capable of attending hearings. The further application and GP letter were considered at the start of the hearing on 30 January 2020.

133. The Tribunal had no doubt that the panel considered the Claimant's application carefully. That was reflected in the notes made at the time, the decision letter and Mr Barker's evidence to the Tribunal. The notes of the discussion record anxious consideration of the Claimant's well-being, the need to ensure fairness to her, the practical and financial considerations, and the impact of the long delay. The panel noted that the proposed therapies would not be in place for some months, so any postponement would likely be of indefinite length. The panel noted that the Claimant had not attended the capability hearing. The panel decided to proceed in the Claimant's absence. The medical advice from Dr Rimmer, about the need for the Claimant to have closure in order for her mental health to improve, weighed heavily. Mr Barker reminded the panel about the importance of challenging the management case and the fairness of the process.

134. Mr Barker reiterated these matters in cross-examination. The Tribunal had no hesitation in accepting his evidence. It was suggested to him that Dr Rimmer's advice was from August 2018. He said that she had sent a more recent email, which the panel also considered. That email was from March 2019. Dr Rimmer had again emphasised that the protracted process of resolving matters was contributing significantly to the Claimant's mental health problems and that it needed to be brought to a conclusion. It was put to Mr Barker that the Claimant had said that she would engage and had said she would be available on 8 January 2020. That had not been possible because of the panel's availability, not the Claimant's. Mr Barker said that the Claimant had said on a number of occasions that she would engage and it had not then happened.

135. After deciding to proceed with the appeal, the panel heard the management case, presented by Dr Hughes, with Dr Massey as a witness. The hearing lasted 2 ½ to 3 hours. The panel focussed on the grounds of appeal provided

by the Claimant's solicitor. In cross-examination. Mr Barker said that the panel did not see it as part of their remit to go back and re-investigate. Their focus was on the grounds of appeal. The panel did not consider that the circumstances for re-opening the case and conducting a re-hearing were met. The Claimant's grounds of appeal did not request that further evidence be considered and there were not glaring matters on the face of the material that suggested a re-hearing was necessary.

136. The panel rejected the Claimant's appeal and Mr Barker wrote to the Claimant to tell her the outcome on 3 February 2020. The appeal panel's conclusions on her grounds of appeal were, in outline:

    136.1 The original panel had not acted unreasonably in concluding that the Claimant was unlikely to return to work and dismissing her. The panel was satisfied that the Claimant was dismissed on grounds of capability. There were genuine and reasonable concerns about her performance as a Senior Community Dentist in special care dentistry, and about her professional behavioural interactions with colleagues, students and patients. She was not considered to have the necessary insight and willingness to accept professional feedback and criticism for effective remedial action to be taken. All reasonable efforts at remediation had been considered and no realistic avenues for further remediation were identified, not least because of the time that had passed, and the impact on the Claimant's health. The Claimant's post involved treating the most vulnerable patients. The Claimant had been on sick leave for frequent and prolonged periods, which would have resulted in deskilling. The panel concluded that the Claimant had been dismissed on grounds of capability (with elements of misconduct) and not because she had frequent and lengthy periods of sick leave. The definition of capability in the CCIHA Policy was met.

    136.2 The appeal panel acknowledged that the Claimant had not attended the original hearing. They noted that a draft outcome letter had been sent to her. The Claimant did not respond. The original panel had dealt with the issues on the merits according to the evidence in front of them. The Claimant's solicitor's letter was taken into account.

    136.3 The appeal panel noted that the Claimant was disabled. They agreed, taking advice from their Consultant in special care dentistry, that providing dental care to vulnerable adults and children with disabilities and special needs required a well refined and diverse set of clinical and personal skills. Given the serious concerns about the Claimant's ability to practise safely, and concerns about her professional conduct, communication skills and insight, the panel were satisfied that her dismissal was a proportionate response to those concerns.

    136.4 The appeal panel found no evidence that the Claimant was dismissed because of her complaint to the Tribunal. The appeal panel noted that the capability panel included an external medical practitioner, Dr Pollock, who was a former GMC liaison officer, and that there were two external advisors.

137. In cross-examination it was put to Mr Barker that NCAS had not been consulted before the Claimant was excluded in 2009, contrary to the CCIHA policy. He

agreed. He said that the appeal panel had not looked at detail in the decision to exclude the Claimant in 2009. They had focussed on her grounds of appeal. They accepted that the Respondent had concluded at the time that the Claimant should be excluded on patient safety grounds. Mr Barker also accepted in cross-examination that there had not been any external or independent assessment of the Claimant's capabilities. However, he said that the appeal panel considered that the original panel had taken into account a whole range of things from 2009 and 2012 in coming to a view about the Claimant's capability. Mr Barker was asked about the appeal panel's decision in relation to remediation. His evidence was that the Claimant's sickness absence impacted on the possibility of remediation. He noted the positive feedback at the end of the return to work programme, but he said that the long term view was that remediation to the level of skills required in the role for which the Claimant was employed was not possible. That was the view of the capability panel, upheld by the appeal panel.

138. Mr Barker gave evidence that the decision to reject the Claimant's appeal had nothing to do with any protected act she had done. He explained that the appeal panel were not aware of the detail of her grievances. Mr Barker had been provided with the Claimant's Tribunal claim, in the circumstances referred to above, but did not share the detail with the appeal panel. The panel knew that she had brought a claim, because it was referred to in her grounds of appeal. Mr Barker was clear that the fact of the Tribunal claim, the Claimant's grievances and her grievance appeal played no part in the panel's decision to dismiss her appeal. As with all the witnesses, Mr Patton only challenged this evidence in cross-examination when prompted to do so by the Tribunal. The Tribunal again had no hesitation in accepting Mr Barker's evidence. There was absolutely nothing to support the suggestion that the appeal panel had been influenced in any way by any protected act done by the Claimant. The Tribunal was entirely satisfied that the appeal panel's reasons for dismissing the appeal were precisely as set out in the outcome letter.

139. We have noted above that Mrs Grice did not progress the Claimant's Second Grievance or the relevant aspects of her Third Grievance beyond her initial interviews with witnesses until after the Claimant's dismissal. In her written statement she confirmed Mrs Robson's evidence that from around September 2018 onwards she did not work on the investigation and awaited instructions from the Respondent about the Claimant's health. In early 2020 she was asked by Mrs Robson to prepare an interim report, based on the investigations she had carried out. She did so, identifying issues that required further exploration and evidence should she be able to speak to the Claimant. On the basis of the material she had gathered, she had not at that stage identified any evidence to support the Claimant's complaints. No further report was produced and no further steps taken in respect of the grievance. Mrs Grice's written statement said that she had never met the Claimant and had treated her investigation as she would any investigation. The Tribunal had no basis upon which to doubt that written evidence, even taking into account the lack of cross-examination; the Claimant did not identify anything that could have led to an inference of discrimination or victimisation on Mrs Grice's part.

Holiday pay

140. We deal separately with the claim for holiday pay. The Claimant's witness statement simply said that she was denied her accrued holiday pay. No detail was given in the statement or any other document. In cross-examination, the Claimant said that this related to prior leave years, not 2019-2020. She said that there were years she had not taken holiday at all, years she had more than 4 or 5 days outstanding because of sick leave but had not been permitted to carry them forward, and times she had taken annual leave instead of sick leave to safeguard her absence record. She also complained about having to use annual leave to support her phased return to work when she was working half days and taking the other half of the day as leave. She said that she was owed 14 days' accrued leave and that this was a rough estimate, on the conservative side. However, her evidence was simply at the level of generalities. There were leave records and other documents in the hearing file, but neither the Claimant nor her legal representatives had put forward any calculation or assessment based on those documents, by reference to specific dates, leave years or episodes.

141. The Tribunal noted that the Claimant was paid for all of the leave she had accrued in the 2019-2020 leave year at the date of her dismissal (14 days) and she was credited with 5 days carried forward from the previous year, 2018-2019. That was the most to which she was entitled contractually.

142. The Tribunal considered evidence relevant to the Claimant's entitlement under the Working Time Regulations. We noted that the Claimant was fit for work and attending work for most of the period October 2015 to October 2016, and the period May 2017 to March 2018. Those were long periods during which she was not prevented by sickness from taking her annual leave during the leave years 2015-2016, 2016-2017 and 2017-2018. The evidence in the file also suggested that she was requesting and taking annual leave at that time. For example, for the year 2017-2018, the Tribunal noted that the Claimant's manager wrote to her on 12 March 2018 to say that she had 8.5 days' leave to take before the end of March. Given that under her contract she was deemed to take her statutory leave first in the leave year, she must have taken all her statutory leave in the 2017-2018 leave year - she only had 8.5 days out of 32 (contractual) days remaining. Her last sickness absence started on 15 March 2018. By the time that sickness absence started, the Claimant had used all her statutory leave for that year and there was none to carry forward. We noted that in cross-examination the Claimant said that at this time she was taking annual leave and had a supportive manager. For the year 2018-2019 the Tribunal noted that, during her sickness absence, the Claimant requested and was granted 20 days' annual leave on 20 December 2018. Given that under her contract she was deemed to take her statutory leave first in the leave year, she must have taken all her statutory leave in the 2018-2019 leave year too.

143. Looking at all the information available, the Tribunal was satisfied that the Claimant did not have accrued statutory leave to carry forward into the leave year 2019-2020 in which she was dismissed.

Expenses

144. That brings us to the claim for expenses. The Claimant said in her witness statement that the Respondent had refused to pay her expenses for CPD undertaken in May 2016 and January 2018. The amounts claimed are £214.70 and £473 respectively. In cross-examination, the Claimant accepted that in principle if she did not follow the correct process and claim her expenses, she was not entitled to be reimbursed. She said that she had claimed them, but she did not give any detail and no expenses claim was identified for the Tribunal. Mrs Robson gave evidence about this in her witness statement. She drew attention to correspondence on both occasions on which the Claimant was reminded she needed to submit an expenses claim after the event. Requesting approval to attend the course with an estimate of the costs in advance was not the same thing. Mrs Robson said that the Respondent had no record of the Claimant submitting an expenses claim for either event. Mrs Robson's evidence was not challenged in cross-examination. The Tribunal found that the Claimant had not submitted expenses claims for either event and that is why her expenses were not reimbursed.

Legal principles

Disability discrimination and victimisation

145. Claims of disability discrimination and victimisation are governed by the Equality Act 2010. The Equality and Human Rights Commission's Code of Practice on Employment is relevant to discrimination claims and the Tribunal considered its provisions.

146. The burden of proof is dealt with by s 136 Equality Act 2010. The Tribunal had regard to the authoritative guidance about the burden of proof in *Igen Ltd v Wong* [2005] ICR 931. That guidance remains applicable: see *Royal Mail Group Ltd v Efobi* [2021] ICR 1263. In essence, the guidance outlines a two-stage process. First, the complainant must prove facts from which the Tribunal *could* conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable Tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires the Respondent to prove that he did not commit the unlawful act. However, as the Supreme Court again made clear in *Efobi*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

147. Direct discrimination is dealt with by s 13 Equality Act 2010. Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or

hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason? It is necessary to explore the mental processes of the employer, to discover what facts operated on his or her mind: see *R (E) v Governing Body of the Jewish Free School* [2010] IRLR 136, SC ("*JFS*"). The protected characteristic need not be the only or even the main cause of the less favourable treatment; it must be an effective cause: see e.g. *London Borough of Islington v Ladele* [2009] IRLR 154, EAT. It is not always necessary to answer the first and second questions in that order. In many cases it is preferable to answer the "reason why" question, first.

148. Discrimination arising from disability is governed by s 15 Equality Act 2010. Under s 15, unfavourable treatment does not require a comparator. It is to be measured against an objective sense of that which is adverse compared with that which is beneficial: see e.g. *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] IRLR 885. The EHRC Employment Code advises that this means that the disabled person "must have been put at a disadvantage". If there is unfavourable treatment, it must be done because of something arising in consequence of the person's disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. The unfavourable treatment will be "because of" the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment: *Pnaiser v NHS England* [2016] IRLR 170; *Charlesworth v Dransfields Engineering Services Ltd* [2017] UKEAT 0197_16_1201. It is a defence for the employer to show that the treatment is a proportionate means of achieving a legitimate aim. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory effect and the need for the treatment. The EHRC Code advises that a legitimate aim is one that is legal, not itself discriminatory, and one that represents a real, objective consideration.

149. Harassment is governed by s 26 Equality Act 2010. There are three elements to the definition of harassment: (1) unwanted conduct; (2) that the conduct is related to a relevant protected characteristic; and (3) the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. As to (1), the conduct must be "unwanted", which means "unwelcome" or "uninvited". As to (2), the question whether conduct is related to a protected characteristic is not a question of "causation". Rather, it requires a connection or association with the protected characteristic. As to (3), the conduct must have the purpose or effect of violating the person's dignity or creating the proscribed environment. If the conduct has the relevant purpose, that is the end of the matter. However, for it to have the relevant effect, the Tribunal must consider both, subjectively, whether the individual perceived it as having that effect and, objectively, whether that was reasonable: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

150. Victimisation is governed by s 27 Equality Act 2010, which says that A victimises B, if A subjects B to detriment because B does a protected act, or A believes B has done or may do a protected act. A protected act is defined in s 27(2). It includes making an allegation that someone has contravened the Equality Act.

Unfair dismissal

151. So far as unfair dismissal is concerned, the right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996. Under s 98 the employer must show the reason for dismissal and that it is a potentially fair one, which includes a reason relating to the employee's capability for performing work of the kind for which she is employed. Capability is assessed by reference to "skill, aptitude, health or any other physical or mental quality." The reason or principal reason for dismissal is a question of fact to be determined by a Tribunal as a matter of direct evidence or by inference from primary facts established by evidence. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.

152. If the employer shows that the dismissal is for a potentially fair reason, the Tribunal must then decide whether in the circumstances the employer acted reasonably in treating it as a sufficient reason to dismiss. Reasonableness is assessed by reference to the range of reasonable responses: the Tribunal must not substitute its own view, it must decide whether a reasonable employer might have acted as this employer did. Where an employer seeks to rely on capability as the reason for dismissal, it needs to show that it had an honest belief based on reasonable grounds that the employee was incapable. In assessing the reasonableness of a dismissal on this ground, it is well-established that an employer should follow a fair procedure. This will generally involve properly investigating or assessing the employee's performance, telling the employee what the shortcomings are, warning him or her of the consequences of failing to improve, and giving him or her a reasonable chance to improve: see e.g. *James v Waltham Holy Cross UDC* [1973] ICR 398. However, there is no principle that it can never be reasonable or fair to dismiss for capability without first giving a warning and chance to improve: *James*. It may not be necessary, for example, where the employee is so incompetent that a warning is clearly not necessary, or where the employee refuses to admit or accept the shortcomings, so that it can be inferred that a warning would be pointless. There is no general obligation to redeploy an employee, or create a role for them so as to avoid dismissal if they lack capability for the role for which they are employed: *Awojobi v London Borough of Lewisham* EAT 0243/16.

153. If the incapability is caused or materially contributed to by the employer's conduct, that is relevant to whether and, if so when, it is reasonable to dismiss her for that incapability. It may be necessary to go the extra mile. But the fact that an employer has caused the incapacity in question, however culpably, cannot preclude it forever from effecting a fair dismissal: *Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust* [2019] WECA Civ 498.

Breach of contract and wages

154. Breach of contract claims are governed by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. An employee can bring a breach of contract claim against an employer if it arises or is outstanding on termination of the employee's employment.

155. Complaints of unauthorised deduction from wages are governed by s 13 and 23 Employment Rights Act 1996. They can include complaints of failure to pay for accrued but untaken holiday to which the worker is entitled under the Working Time Regulations 1998. Under those Regulations, workers are entitled to 4 weeks' paid annual leave (pursuant originally to the Working Time Directive) and 1.6 weeks' additional leave (pursuant originally to domestic law). Case law establishes that a worker can, in some circumstances, carry part or all of the 4 weeks' leave forward, for example, they are prevented by sickness from taking it in the leave year in which they accrued it. That only applies to the 4 weeks' leave and not to the additional 1.6 weeks' leave.

Application of the law to the facts

156. As noted above, there were almost 7000 pages of documents in this case and 9 witnesses. The Tribunal's detailed findings of fact are set out above. We can deal with the issues much more briefly, because many of them turn on the findings of fact. The Claimant's counsel did not make submissions, in writing or orally, on the holiday pay and expenses claims. His submissions on the discrimination and victimisation claims did not address the list of issues or the specific claims as advanced. They referred to matters that were not claims before the Tribunal, such as failures to make reasonable adjustments. The Tribunal considered each claim in the list of issues on the basis it understood the Claimant to be advancing it.

Direct disability discrimination

157. The Respondent did refer the Claimant to a capability/conduct hearing. However, that was not less favourable treatment because of disability. As explained in detail in the findings of fact above, the Tribunal found on the evidence that Dr Massey concluded that the Claimant had a case to answer. That was based on a detailed investigation report, itself based on extensive written evidence and witness interviews. There was plainly material identified that might support the conclusion that the Claimant had a case to answer. Further, Dr Massey concluded that none of the other courses of action under the CCIHA Policy (no action, remedial action and referral to NCAS) was appropriate, for the reasons he explained. The Tribunal accepted his evidence that he considered referral to a capability panel the only possible option in the circumstances and that he would have treated a non-disabled person in the Claimant's position in the same way.

158. There was some delay in investigating the Claimant's Second and Third Grievances. However, the Tribunal found that the Claimant had not proved facts from which it could be inferred that any part of the delay was less favourable treatment because of disability. To the extent that Mrs Robson, Mrs Grice, Dr

Hughes, Dr Pollock and Mrs Laban were involved, as explained above the Tribunal accepted their evidence that they would have treated someone without the Claimant's disability in the same way. As regards the approach overall, as set out in detail above:

158.1 The Second Grievance was initially allocated to Ms Allred. She was unable to meet the Claimant to discuss it because of the Claimant's ill health – the Claimant was signed off on 15 March 2018, the day before she sent the grievance. Ms Allred started interviewing other witnesses in the meantime. The delay at this stage was because of the Claimant's ill health.

158.2 The Second Grievance was duplicated in the third category of concerns in the Third Grievance. The Third Grievance was 98 pages long. It took around five weeks for Sir Andrew Cash to process it, take legal advice, determine how it should be addressed and write to the Claimant. That explains the time taken prior to 12 June 2018.

158.3 Given that the Claimant was expressing concerns about HR, it was decided to ask an external HR consultant to address both the Second Grievance and the third category of concerns in the Third Grievance. That was a decision in the Claimant's interest and is the reason why Ms Allred's investigation was abandoned. Terms of reference were prepared and Mrs Grice was identified and appointed within a few weeks. Again, that is a reasonable timescale given the complexity of this part of the grievance and the inevitable time taken to identify and appoint a suitable, external investigator. The subsequent delays in progressing this part of the Third Grievance, and the eventual lack of a final outcome, were because the Claimant was not well enough to participate and not for any other reason.

158.4 The second category of concerns in the Third Grievance was to be dealt with concurrently with the capability process. Delays in progressing the capability process led to delays in addressing those concerns. The delays in progressing the capability process were all because of the Claimant's health, as set out in detail above.

159. The Respondent did dismiss the Claimant. However, as explained in the detailed findings of fact, the Tribunal was quite satisfied that the Claimant was dismissed because the capability panel concluded that there were serious concerns about her capability and that there was no realistic prospect of her being remediated back into work. They would have reached the same conclusion regardless of disability.

Discrimination arising from disability

160. The Respondent did treat the Claimant unfavourably by referring her to a capability/conduct hearing and by dismissing her. Further, the Claimant's sickness absence(s) were something arising in consequence of her disability. The Tribunal therefore considered whether the Claimant's sickness absences were an effective cause of or significant influence on the unfavourable treatment.

161. The Tribunal found that the Respondent did not refer the Claimant to a capability/conduct hearing because of her sickness absence; her sickness absence was not an effective cause of that decision. As set out above, she was referred because Dr Massey concluded that she had a case to answer in respect of capability and that none of the other courses of action under the CCIHA Policy (no action, remedial action and referral to NCAS) was appropriate, for the reasons he explained. The Claimant's sickness absence did not feature, directly or indirectly, in his reasoning.

162. However, the Tribunal found that, while it was not the sole cause, the Claimant's sickness absence was an effective cause of the decision to dismiss her. She was dismissed because the capability panel concluded that there were serious concerns about her capability and that there was no realistic prospect of her being remediated back into work. The panel's reasoning in concluding that there was no realistic prospect of the Claimant being remediated back into work was that there was a substantial risk that any programme of remediation back into work would suffer the same problems as arose at the PCT and the dental hospital, both in relation to performance and behaviour. The panel concluded that the Claimant lacked the necessary insight and willingness to accept and learn from constructive criticism and that without that, further remedial action would be bound to fail. However, as Dr Hughes accepted in cross-examination, they also placed weight on the time that had passed, in concluding that a remediation process was even less likely to succeed now than five years earlier. A significant part of the time that had passed was because of the Claimant's sickness absence. Mr Barker accepted in cross-examination in respect of the appeal against dismissal that the Claimant's sickness absence had impacted on the possibility of remediation. The Tribunal therefore concluded that the Claimant's sickness absence was an effective cause of the decision to dismiss her.

163. However, the Tribunal found that dismissing the Claimant was a proportionate means of achieving a legitimate aim. The aim of providing safe and effective care to patients was plainly a legitimate one. The Tribunal agreed that in order to provide safe and effective care to patients, it was necessary for the Respondent to ensure that its senior community dentists could demonstrate good verbal communication skills towards patients (many of whom have learning difficulties); show appropriate communication towards colleagues; be able adequately to communicate with, supervise and teach dental students; show an ability to accept constructive criticism and advice from colleagues/senior colleagues; and demonstrate competent and appropriate clinical practice at all times.

164. No less discriminatory alternative was identified at the time or at the Tribunal hearing that could have been done instead. The relevance of the Claimant's sickness absence in the decision-making process was to the possibility of remediating her back into work as a senior community dentist. The time that had passed made remediation even less likely to succeed than in 2012. Delaying the capability process yet further would not have addressed that issue. Indeed, it would have extended the period for which the Claimant was not practising and was becoming de-skilled. Further while the length of the Claimant's absence was a factor in the decision whether she could be

remediated back into practice in 2019, it seemed to the Tribunal that the main factors, as set out in the outcome letter, were that the return to work programme had not been successful in enabling the Claimant to return to unsupervised practice in 2012 and that the panel could not identify any realistic avenue for remediation, in the Respondent or elsewhere, in 2019. The panel concluded that the Claimant lacked the necessary insight and ability to learn from constructive criticism and that without those attributes, any further remedial action would be "bound to fail." No realistic alternative was suggested to the Tribunal. In closing submissions Mr Patton referred to finding the Claimant a job in community dentistry, having another return to work programme, and finding her a job at a lower level, as is done for numerous dental students every year. The Tribunal did not consider that those were available alternatives. A proper and appropriate return to work programme had been tried. It did not put the Claimant in the position of being able to return to her clinical role, or any unsupervised clinical role. It was reasonable to conclude that this should not be attempted again. There were limited jobs in community dentistry, and the Claimant was not able to work in any unsupervised clinical role without a successful remediation programme. Most graduating dental students do not go into community dentistry and the Respondent is not responsible for high street dental practice.

165. In the absence of a less discriminatory alternative, the Tribunal considered that dismissing the Claimant was an appropriate and reasonably necessary way to ensure that safe and effective care was provided to patients. Detailed and serious concerns about the Claimant's capability had been considered and upheld by the capability panel on the basis of extensive evidence from numerous professional colleagues in different settings. On the basis of those matters, the Claimant was not in a position to provide safe and effective care to patients, whether in her role or in any unsupervised role. Neither delay nor further remediation would realistically change that. It was therefore appropriate and reasonably necessary to dismiss the Claimant. The needs of the Respondent to be able to provide safe and effective patient care outweighed the undoubted discriminatory impact on the Claimant in those circumstances.

Harassment

166. As explained above, the Tribunal found that Dr Massey referred the Claimant to a capability/conduct hearing because he concluded that she had a case to answer and that none of the other courses of action under the CCIHA policy was appropriate. That had nothing to do with disability and this was not conduct that related to disability. This complaint of harassment therefore does not succeed.

167. As set out in detail in the findings of fact and referred to in relation to direct discrimination above, there was delay in investigating the Claimant's Second and Third Grievances. In a sense that delay did relate to disability because it was caused by the Claimant's ill health and inability to participate in the grievance process as a result. However, the Tribunal found that it was not unwanted conduct, for that very reason. The Claimant did not want to participate at that time because of her ill health. That was confirmed by OH

advice. Even if the conduct had been unwanted, it plainly did not have the proscribed purpose. The purpose of the delay was to wait until the Claimant was fit enough to participate. Nor did the conduct have the proscribed effect. Even if the Claimant felt that it did, that would not have been reasonable, given that the delay was on OH advice and to enable the Claimant to participate in the process. At the time, the Claimant's principal involvement was in asking for meetings or hearings to be postponed, not in asking for matters to be progressed.

168. It may be that the Claimant's real concern, although not articulated as such in this complaint, is the decision not to deal with the Third Grievance before dealing with the capability process. Even if that were the complaint, the Tribunal would have found that the decision not to delay the capability process until after the Third Grievance had been resolved was not "related to disability." It was simply about progressing matters in the most timely and proportionate way. The capability process had been extremely protracted, and had already been delayed substantially to enable the First Grievance to be addressed (from August 2011 to November 2012) and then for another year at least because of an episode of ill health triggered by the appeal outcome.

Victimisation

169. There is no dispute that each of the matters relied on by the Claimant in these proceedings was a protected act, namely:
    169.1 Complaining of unlawful race and disability discrimination in her first grievance;
    169.2 Complaining of unlawful race and disability discrimination in her appeal against the outcome of the first grievance;
    169.3 Complaining of unlawful race and disability discrimination in her second grievance of 15 March 2018;
    169.4 Complaining of unlawful race and disability discrimination in her third grievance of 9 May 2018;
    169.5 Bringing Employment Tribunal claim 1809290/2018.

170. The Tribunal noted that the Claimant did not rely on her verbal complaint about WR to Mr Bateman in early 2009 as a protected act in these proceedings. The Tribunal drew this to the attention of the Claimant and her counsel a number of times during the Tribunal hearing.

171. We have already dealt with the first three detriments (referring the Claimant to a capability/conduct hearing, delay in investigating the Second and Third Grievances and dismissing the Claimant) in relation to direct discrimination above. For broadly the same reasons, the Tribunal found that none of those matters was victimisation either. We accepted the witnesses' evidence about their reasons for proceeding as they did and, as explained in the findings of fact, we accepted their evidence the none of the protected acts had any bearing on their decisions.

172. Turning to the remaining detriments, the second category complaints in the Third Grievance were rejected in the dismissal letter dated 29 August 2019. As

explained in the findings of fact, the Tribunal found on the evidence that the capability panel would have reached the same conclusions in respect of those aspects of the Third Grievance regardless of any protected act. The grievance was rejected because the panel found that the complaints were not well-founded. The fact that the Claimant had done protected acts had nothing to do with it.

173. Likewise, as explained in the findings of fact, the Tribunal found on the evidence that the grievance appeal panel rejected the appeal against the outcome in respect of that part of the Third Grievance because they did not consider it well-founded. The appeal panel were not aware of most of the protected acts and the complaints of discrimination in the Third Grievance itself had nothing to do with their decision to reject the appeal.

174. Finally, as explained in the findings of fact, the Tribunal found on the evidence that the capability appeal panel rejected the Claimant's appeal against dismissal for the reasons set out in their outcome letter, because they did not consider it well-founded. This had nothing to do with any protected act the Claimant had done.

Unfair dismissal

175. The Tribunal had no hesitation in finding that the reason for the Claimant's dismissal was capability. The reason for dismissal is a question of fact on the evidence and the Tribunal's reasons for accepting the evidence of Dr Hughes and Dr Pollock are explained in detail in the findings of fact above. They had an honest belief that she lacked capability, as explained in detail in their outcome letter. The Tribunal found that their reasons fell within the definition of capability in s 98 Employment Rights Act 1996. They related to the Claimant's capability for performing work of the kind for which she was employed, assessed by reference to skill and aptitude. This is one of those cases where the borderline between conduct and capability is at play, but the Tribunal found that the reason was properly characterised as capability.

176. That brings us to the question whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal found that it did. There were reasonable grounds for concluding that the Claimant lacked capability, and the Respondent followed a fair process. Dismissal was within the range of reasonable responses. Again, we have set out detailed findings of fact above about the investigation process, the evidence, the capability hearing and the capability appeal hearing. In reaching the conclusions below we referred in detail to those findings. We do not set them out again.

177. The basis of Claimant's unfair dismissal complaint was not well-articulated. In her detailed and helpful closing submissions, counsel for the Respondent identified a number of the grounds of unfairness that were apparently relied on by the Claimant. The Tribunal identified some further points from its notes of the evidence and cross-examination. We considered all of those matters, alongside the Claimant's submissions. Our conclusions were as follows.

177.1 Clearly, the initial investigation, leading to the 2010 Investigation Report, was flawed. But that was put right following the Claimant's First Grievance. A fresh and comprehensive second investigation was conducted by Dr Anderson and his colleagues. It was reasonable for the 2010 Investigation Report to be included in the material provided to them. Indeed, the investigation terms of reference agreed by the Claimant's BDA representative in 2014 required the Case Investigator to review that report. It was absolutely clear that Dr Anderson had not simply adopted what was in the 2010 Investigation Report. The investigators had used it to understand the chronology, but had clearly carried out a very thorough second investigation, leading to a detailed investigation report and extensive supporting appendices. That is summarised above. It was reasonable for Dr Anderson to decide not to re-interview all the witnesses from 2009, but to ask them to check and sign the statements they had made at that time, on the basis that this was likely to be more reliable after such a delay.

177.2 Therefore, while the material before the capability panel included the 2010 Investigation Report, the basis of the referral to the capability panel and of their consideration of the issues was Dr Anderson's subsequent report and supporting evidence. Further, the capability panel themselves heard first-hand from a number of the witnesses.

177.3 The second investigation gave the Claimant every reasonable opportunity to consider the evidence, provide her own version of events and address the matters of concern. OH advice was taken throughout about the Claimant's ability to participate and the process was significantly delayed until she was well enough to do so. The Claimant was provided with all relevant documents in sufficient time before the investigation meeting took place. She was given reasonable opportunity to access and comment on patient records. She was supported by BDA and DDU representatives throughout.

177.4 There was extensive delay between the initial raising of concerns in 2009 and the Claimant's dismissal in 2019. Part of that was caused by the conducting of a flawed first investigation, and then consideration of the Claimant's grievance about that, leading to a fresh investigation. However, after that, the delays were primarily down to the Claimant, either because of her ill health and inability to attend meetings or participate in processes; or because of the time taken to agree minutes or complete other steps. That is not meant to be a criticism of the Claimant, but it is part of the context: when the capability panel came to be considering the extensive delay, for the most part the Respondent had done all it could to expedite matters.

177.5 It was reasonable for Sir Andrew Cash to decide that the capability process should not be put on hold while the Second and Third Grievances were addressed. The capability process had been extremely protracted, and had already been delayed substantially to enable the First Grievance to be addressed. There was substantial overlap between the second category of concerns in the Third Grievance and the matters the subject of the capability process and it was reasonable to conclude that it was proportionate to address the two together. That was within the terms of the Grievance Procedure. The

Claimant's preference was for the Second and Third Grievances to be dealt with first, and her GP argued for that to happen, but that did not make it unreasonable for Sir Andrew to take a different view. The capability panel dealt with their part of the Third Grievance first, so that the capability process could have been halted if the grievance had been upheld in such a way as to undermine the capability process.

177.6 It was reasonable for the capability panel to proceed in the Claimant's absence on 23 April 2019. The whole process had been subject to extensive delays and it was reasonable for them to conclude that it needed to be brought to a conclusion. They weighed all the relevant evidence and reached a decision that was reasonably open to them. The factors in favour of proceeding included: the delays, which meant that some of the allegations were now 10 years old and that Dr Massey might become unavailable; the expert OH advice that the Claimant's health would not resolve until these matters were concluded, and indeed that they were positively detrimental to her health; the fact that the Claimant had BDA and DDU representation; the fact that the hearing had already been postponed twice, from April 2018 and October 2018; and NCAS advice. The factors in favour of postponing again included: the advice from the Claimant's GP that she needed time for her condition to improve so that she could properly and effectively represent herself; and the obvious importance of giving the Claimant the opportunity to address the issues in person or through a representative, if possible. The Tribunal considered that the factors in favour of postponing again were not such as to make it unreasonable for the capability panel to take a different view. Furthermore, the Claimant had given detailed written accounts at the investigation stage and been interviewed twice by Dr Anderson. In addition, the capability panel took the unusual step of sending their draft decision to the Claimant for her comments after the hearing, to try and mitigate against the fact that she was not present at the hearing.

177.7 There were reasonable grounds for the capability panel to conclude that the Claimant lacked capability to perform her role as a Senior Community Dentist. The definition of capability in the CCIHA Policy includes incompetent clinical practice; inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk; inability to communicate effectively; and ineffective clinical team working skills. There was documentary evidence before the capability panel relating to clinical practice, including relevant patient notes (from 2 June 2009, patient complaints and Dr Vora's concerns). There was extensive evidence from a range of professional colleagues in a range of settings, identifying both specific clinical, communication and team working issues and more general such concerns. We have referred to some of the written material and to what a number of people said, in writing and in person to the panel, in the detailed findings of fact above. The concerns and the evidence relevant to each were carefully analysed in Dr Massey's schedule, provided to the Claimant on 27 February 2018. Of course, the Claimant disputed their accounts and put forward her own, detailed account, giving a different version of events. However, it was plainly within the range of reasonable responses for the

capability panel to prefer, as they did, the consistent evidence from a number of colleagues in different organisations to the Claimant's account.

177.8 The Claimant's position, then and now, that this fundamentally stemmed from her making complaints about WR and from animosity towards her from Dr Bateman and others as a result, was wholly implausible. It was reasonable for the capability panel to conclude that the range and extent of concerns, made by professional colleagues in a number of different settings, were not orchestrated or influenced by WR. The Tribunal accepted the evidence of Dr Massey and Dr Pollock that the decision to refer the Claimant to a capability panel and the decision to dismiss her were unaffected by any views of Dr Bateman or others. If the panel had decided the Claimant should return to work, that would have had to happen. The Tribunal also accepted the evidence of Dr Hughes that there was no evidence before the panel to suggest collusion between the witnesses. There was nothing to suggest evidence of an intention to lead the investigation in a certain direction and Ms Heyes's comment simply reflected the fact that you would expect a degree of corroboration if the concerns were well-founded. The Tribunal noted, in that context, that Dr Throssell had rejected entirely the part of the First Grievance that made allegations about WR and others.

177.9 The Claimant also contended at the Tribunal hearing that if Dr Bateman had not excluded her in 2009 without consulting NCAS, she would not have ended up before the capability panel as she did. The Tribunal was not persuaded by that. Dr Bateman did consult NCAS within a week of the Claimant's exclusion. NCAS had the opportunity to advise a different course of action at that stage. Thereafter, they were closely involved throughout. There is no suggestion that NCAS advised that the Claimant should not have been excluded. Further, it was evident that had the outcome of the return to work programme been that the Claimant was regarded as capable of returning to her role (or perhaps any unsupervised clinical role) Dr Massey would have made that happen. The exclusion would have been superseded at that stage. The Tribunal did not consider that the Claimant only ended up facing a capability panel because she had been excluded without NCAS being consulted. She ended up facing a capability panel because of the range and extent of concerns that were raised in 2009 before her exclusion, and the further concerns that were raised following the return to work programme, coupled with the failure of the return to work programme to put her in a position of being able to return to her role, or any unsupervised clinical role.

177.10 It was reasonable for the capability panel to take into account the evidence from the return to work programme in considering capability and remediation. The terms of reference for the investigation, agreed by the Claimant's BDA representative in 2014, explicitly required the Case Investigator to establish the relevance of the outcomes of that programme to her capability to undertake her role and the investigation report addressed that. The capability panel plainly understood that the return to work programme was not a formal NCAS assessment or

indeed any formal assessment of capability; it was a programme designed to remediate the Claimant back into practice. However, it was reasonable for the capability panel to consider that the feedback from and outcomes of the return to work programme were nonetheless relevant to the question whether the Claimant lacked capability and, if so, whether remediation was possible. It had been a six month programme at the dental hospital involving senior, experienced professionals. Their reports and other evidence were relevant to an understanding of the Claimant's standard of clinical practice, her communication and team-working skills, and her ability to improve. As Dr Massey put it, the programme could not corroborate the initial allegations, but it did give information about what could or could not be achieved to resolve them. The Claimant was not unwell during the return to work programme or in the six months leading up to it. She only became unwell again in December 2012 after the rejection of her First Grievance appeal.

177.11 The capability panel did not wrongly proceed on the basis that the Claimant's choice of a surgical approach on 2 June 2009 was inappropriate. They accepted Dr Rowe's view that it was appropriate. Their concerns were about the manner in which the treatment was undertaken. There was evidence before the capability panel that justified their findings about that incident.

177.12 The basis of the capability panel's decisions was not that any single incident had put a patient at grave risk. It was reasonable for them to conclude that this was not a pre-requisite of finding that the Claimant lacked capability and should be dismissed. It was reasonable to conclude that the volume and nature of the concerns that were raised also gave rise to legitimate concern about capability.

177.13 There were reasonable grounds for the capability panel to conclude that the Claimant could not be remediated back into the role for which she was employed. It was reasonable for them to rely on evidence from the return to work programme and to conclude on that basis that the Claimant lacked the necessary insight and willingness to accept and learn from constructive criticism. It was reasonable for the capability panel to conclude that the positive reports at the end of the return to work programme were not the whole picture and that there was evidence going the other way too. The Claimant had not been given a warning about capability concerns and a chance to improve in a standard, performance management type process, but the Tribunal concluded that this was one of those cases where a different approach was reasonable. The Claimant had the chance to demonstrate improvement during the return to work programme. She also had the chance to demonstrate insight and capacity to address the capability issues. The capability panel reasonably concluded that she had not done so.

177.14 It was reasonable for the capability panel to decide to dismiss the Claimant even though they took the view that, if a suitable clinical role had been available at the conclusion of the return to work programme, it might have been possible to remediate the Claimant back into work. The capability panel had to make a decision as things stood in 2019. At

that stage, the position was that there had not been a suitable clinical role at the end of the return to work programme and that the Claimant had not worked in a clinical capacity since. There were clearly several reasons for that. The Claimant had been absent on sick leave for approximately half of the period in total. She and her representative agreed at the conclusion of the return to work programme that an intermediate position was appropriate at that stage and the Claimant was happy with the role that was devised at the time. She was also happy with the role that was subsequently devised in 2015, although that role evidently changed over time and the Claimant became unhappy with it. No more suitable role was identified for her after that. It appeared to the Tribunal from the OH advice that part of the picture was a desire to have the Claimant in a relatively settled and unchallenging work situation so as to facilitate her participation in the capability process and bring it to as speedy as possible a resolution. Even assuming part of the picture was also a failure on the part of the Respondent to make all reasonable efforts to identify a suitable clinical role for the Claimant during the period following the return to work programme, that could not forever make it unreasonable to dismiss the Claimant. It was one factor only. The fact of the matter was that by 2019, ten years after she was employed, the Claimant had performed the role for which she was employed for around 5 months, before being excluded because of the concerns that were raised. She had worked on the return to work programme for six months, but had not been in a position to return to her role at the end of it. She had not done any further clinical role since. It was reasonable for the capability panel to conclude at that stage that there was no realistic prospect of remediating the Claimant back into her role or any unsupervised clinical role and that the only available course of action was dismissal. The Tribunal found that dismissal was within the range of reasonable responses in those circumstances.

177.15 It was reasonable for the capability appeal panel to proceed in the Claimant's absence, even though she had not attended the capability hearing either. The appeal hearing had also been postponed twice already and the OH advice remained the same. It was reasonable for the appeal panel to take the view that there was no guarantee that the Claimant would be able to participate in a short timescale, and that the GPs recent indication that the Claimant had been referred to IAPT and SOHAS did not necessarily signify a substantial change. The April 2019 letter from her GP also said that she had been referred to IAPT.

177.16 It was reasonable for the capability appeal panel to focus on the grounds of appeal, as put forward on the Claimant's behalf by her solicitor and not to embark on a re-investigation or review of events in 2009.

178. The Tribunal considered all the points individually and cumulatively. We were satisfied that it was reasonable in all the circumstances having regard to equity and the substantial merits of the case for the Respondent to dismiss the Claimant. The procedure and the outcome were within the range of reasonable responses.

Breach of contract

179. The Tribunal found that the Respondent did not breach the Claimant's contract by failing to pay her expenses for her attendance at the conference in Manchester in May 2016 and her attendance at the Study Days in London in January 2018. The Claimant was not contractually entitled to be paid those expenses if she did not submit an expense claim. As explained in the findings of fact, the Tribunal found that the Claimant did not submit an expense claim in respect of either event, despite being reminded at the time of the need to do so.

180. Nor did the Respondent breach the Claimant's contract by failing to pay her for 14 days' accrued but untaken holiday when her employment ended. As explained in the findings of fact above, the most that the Claimant was *contractually* entitled to carry forward was five days' annual leave and she was paid in lieu of all the annual leave she had accrued in the current leave year plus five days carried forward from the previous leave year when her employment ended.

Unauthorised deduction from wages

181. Again, for the reasons explained in detail in the findings of fact, the Tribunal concluded that the Respondent did not pay the Claimant less than was properly payable to her in respect of accrued but untaken holiday on termination of her employment. We have dealt with the contractual position above. The only alternative basis for this part of the claim is the Claimant's entitlements under the Working Time Regulations and the Working Time Directive. However, the Tribunal found on the evidence that there were long periods during which the Claimant was not prevented by sickness from taking annual leave in the leave years 2015-2016, 2016-2017 and 2017-2018. Any leave that might have been carried forward from any previous year could have been taken during those periods. In the leave year 2017-2018 the Claimant evidently took her 20 days' statutory leave and the same was true of the leave year 2018-2019. Therefore, she did not have any statutory leave to carry forward into the leave year in which her employment terminated. She was paid in full for all the leave she had accrued but had not taken. The Respondent did not pay her less than was properly payable to her.

Employment Judge Davies
26 May 2022

Sent to the parties on:
27 May 2022