EMPLOYMENT TRIBUNALS

Claimant: Ms Mandie Miller

Respondent: United Lincolnshire Hospitals NHS Trust

Heard at: Nottingham

On: 18 – 22 July 2022
Deliberations via CVP on 27 July 2022

Before: Employment Judge Victoria Butler
Members: Ms L Lowe
Mr A Blomefield

Representation
Claimant: Ms J Harrison, Solicitor
Respondent: Mr C Bourne, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:-

1. The Claimant's claim of unfair dismissal is well-founded and succeeds.

2. The Claimant's claim that the Respondent failed to make reasonable adjustments is well-founded in part and, therefore, succeeds in part.

3. The Claimant's claim of discrimination arising from disability is well-founded in part and, therefore, succeeds in part.

4. The Claimant's claim of harassment is not well-founded and fails.

5. The Claimant's claim of discrimination by association is not well-founded and fails.

6. The Claimant's claim of breach of contract is not well-founded and fails

7. The Claimant's claim that the Respondent breached the ACAS Code of Practice is not well-founded and fails.

REASONS

Background

1. The Claimant was employed by the Respondent from 8 April 2009 until her dismissal with effect from 27 July 2020. She claims:

   - Unfair dismissal - Section 98 Employment Rights Act 1996 ("ERA"):
   - Discrimination arising from disability - Section 15 Equality Act 2010 ("EQA"):
   - Failure to make reasonable adjustments - Section 20 & 21 EQA:
   - Harassment – Section 26 EQA:
   - Direct discrimination by association – s.13 EQA:
   - Breach of contract; and
   - An unreasonable failure to comply with the ACAS Code of Practice

2. The Claimant commenced a period of early conciliation on 26 February 2020 which concluded on 26 March 2020. She submitted her claim to the Tribunal on 26 April 2020 alleging disability discrimination. The Respondent submitted its Response on 27 May 2020. At this stage the Claimant was still employed and unrepresented.

3. The Claimant subsequently secured representation and submitted her amended claim (undated). The Respondent opposed the amendments, and an open preliminary hearing took place on 23 June 2021. During the course of the hearing, the parties agreed the amendments and case management orders were issued. The Respondent was given leave to amend its Response which it submitted on 4 August 2021.

4. The final hearing was listed between 10 – 14 January 2022 but was unable to proceed. The Respondent had failed to comply with the Tribunal's orders, and, in addition, the Respondent's Counsel was suffering from upsetting personal circumstances and felt unable to proceed. However, the Tribunal heard the Claimant's application for costs and ordered the Respondent to pay the Claimant's costs in the amount of £1,750 + VAT on account of its unreasonable behaviour in failure to comply with the Tribunal's orders.

The issues

5. The issues that we were required to determine were agreed as follows:

1 Unfair dismissal

1.1 Was the Claimant dismissed for a fair reason pursuant to s.98(2) or s98(1)(b) of the Employment Rights Act ("the ERA")?

The Respondent contends that the Claimant was dismissed for a fair reason pursuant to s.98(2)(a) of the ERA, namely for capability relating to the Claimant's health.

1.2 If so, was the decision to dismiss the Claimant reasonable in all the circumstances of the case?

1.3 In determining the above, the Tribunal must consider the following:

1.3.1 Whether the Respondent acted reasonably in treating the reason as a sufficient reason for dismissal taking into account the size and administrative resources of the employer's undertaking; and

1.3.2 Equity and the substantial merits of the case including should the Claimant have been offered the role of Ward Clerk.

2. Disability

2.1 The Claimant alleges that she was disabled by virtue of both a physical impairment and a mental impairment. The Claimant contends that her physical impairment is the long-term pain in her left (non-dominant) forearm and wrist, combined with weakness and stiffness. The Claimant contends that her mental impairment is depression and anxiety as a result of the aforementioned physical impairment.

2.2 The Respondent admits that the Claimant was at the relevant time, from 3 July 2019 onwards, disabled by reason of both her physical and mental impairment.

3. Discrimination arising from disability

3.1 The Claimant claims the Respondent treated the Claimant unfavourably with regards to two specific acts:

3.1.1 The Respondent's dismissal of the Claimant, including the Respondent's upholding its decision to dismiss at appeal; and

3.1.2 The Respondent's failure to award the Claimant the role of Ward Clerk.

Dismissal

3.2 The Respondent admits that it dismissed the Claimant.

3.3 Did the Claimant's dismissal amount to unfavourable treatment because of something arising in consequence of her disability?

The Claimant contends that the "something arising in consequence of her disability" was her inability to perform her contracted role.

3.4 If the Claimant's dismissal did amount to unfavourable treatment, was the treatment a proportionate means of achieving a legitimate aim? In determining this particular, the Tribunal will consider:

3.4.1 Was the treatment an appropriate and reasonably necessary way to achieve the legitimate aim;

3.4.2 Could something less discriminatory have been done instead;

The Claimant contends that the Respondent should have offered her a preferential interview as per clause 13.14.3 of the Respondent's Managing Attendance policy so that the role was not advertised or the Claimant required to undergo a competitive interview.

3.4.3 How should the needs of the Claimant and the Respondent be balanced?

The Respondent contends that the legitimate aim was its need to maintain an effective workforce and the Respondent contends that its treatment was proportionate because following a substantial period of sickness absence, Occupational Health advice, a redeployment process and review with the Claimant, there was no foreseeable return to work at the material time(s).

Ward Clerk Role

3.5 The Respondent admits that it did not award the role of Ward Clerk to the Claimant.

3.6 Did the Respondent's decision not to award the role of Ward Clerk to the Claimant amount to unfavourable treatment because of something arising in consequence of her disability?

The Claimant contends that the "something arising in consequence of her disability" was her inability to perform her contracted role and/or reduced ability to perform well at interview.

The Respondent contends that the decision not to award the role of Ward Clerk to the Claimant was not in any way related to the Claimant's disabilities and the Respondent puts the Claimant to strict proof.

3.7 If the Respondent's decision not to award the role of Ward Clerk to the Claimant was unfavourable treatment, was the treatment a proportionate means of achieving a legitimate aim? In determining this in particular, the Tribunal will consider:

3.7.1 Was the treatment an appropriate and reasonably necessary way to achieve the legitimate aim;

3.7.2 Could something less discriminatory have been done instead?

The Claimant contends the Respondent should have offered her a preferential interview as per clause 13.14.3 of the Respondent's Managing Attendance policy so that the role was not advertised or the Claimant required to undergo a competitive interview;

3.7.3 How should the needs of the Claimant and the Respondent be balanced?

The Respondent contends that the legitimate aim was to fill the role of Ward Clerk with the most suitable candidate, in order to maintain an effective workforce. The Respondent contends that its treatment was proportionate as each of the five candidates were scored objectively by the Respondent on the basis of their interview and there were higher scoring, better candidates for the role. Further, the Claimant did not meet the minimum threshold on all of her interview questions.

4. Reasonable Adjustments

4.1 Did the Respondent have the provision, criterion or practice ("PCP") of applying its Managing Attendance Policy from 3 July 2019 onwards? ("PCP1")

4.2 If so, did PCP1 put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? If so, how?

4.3 The Claimant contends that the substantial disadvantages were the increased likelihood of her dismissal and the increased likelihood of a failure to secure redeployment.

4.4 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 The Respondent could have given the Claimant more time to secure an alternative role;

4.5.2 The Respondent could have made adjustments to the Ward Clerk interview process namely providing additional time for the Claimant to respond to questions and/or providing the interview questions in advance and/or help with interview technique and provision of information on interview format;

4.5.3 The Respondent could have slotted the Claimant into the Ward Clerk role, without competitive interview (open to the public not just Trust employees) using the softer preferential interview/chat;

4.5.4 Offered a trial period in the role of Ward Clerk to check the Claimant's suitability in the role.

4.5.5 Offered training/coaching in the role of Ward Clerk if there were knowledge/skill gap(s).

4.6 Was it reasonable for the Respondent to have to take those steps?

The Respondent contends that it was not reasonable to have taken any of the steps suggested by the Claimant. The Respondent contends that it had provided the Claimant with significant amounts of additional time for the Claimant to seek out and secure an alternative role. The Respondent contends that even if it had provided the Claimant additional time this would not have made any difference for reasons including, but not limited to, the Claimant's significant period of sickness absence, there being no prospect of her returning to work in her contracted role and, in the absence of any job applications in the period leading to the decision to dismiss. Therefore, the Respondent's position is that it was not reasonable to wait longer before making the decision to dismiss the Claimant. The Respondent also contends that it would not have been reasonable to make adjustments to the interview process for the Ward Clerk role; the Claimant did not request any adjustments be made by the Respondent during the interview process. The Respondent further contends that it would not have been reasonable to slot the Claimant into the Ward Clerk role due to the short period of experience the Claimant had obtained in that role and the lack of evidence as to her proficiency in said role.

The Claimant contends she did make enquiries about roles but told there were not any (see pages 463). Moreover, the Claimant has experience of the Ward Clark role as she had undertaken this role from 08 May 2013 to 12 November 2013 and then undertaken the role intermittently from 2013 onwards (see pages 726, 730 and 739). The Claimant was also undertaking the Ward Clerk role from 16 December 2019 to 12 January 2020. It is unclear when the role of Ward Clerk first became a vacancy, but the vacancy was on hold (admin freeze) for at least 4 months prior to it being released for advert on 15 May 2020. No consideration was given to waiting for this role to be available to allow the Claimant to undertake this role. The ward clerk role was advertised on or around 15 May 2020 when the Claimant was on her notice period which started on 4 May 2020. The Claimant was not informed about the role but when she saw it was advertised, she applied and was refused initially an interview but then the Claimant was invited to a competitive interview once she contacted HR about her application. The Claimant was not asked what adjustments should be made to the interview

process notwithstanding the pro forma (page 354) and email of 15 June 2020 timed 14:56 from the Claimant page 519 and the equal opportunities form submitted by the Claimant.

4.12 Did the Respondent have the provision, criterion or practice ("PCP") of a requirement to attend work as a health care support worker at a certain level in order to avoid receiving warnings and a possible dismissal ("PCP3")

4.13 If so, did PCP3 put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? If so, how?

4.14 The Claimant contends that the substantial disadvantages were the increased likelihood of her dismissal and the increased likelihood of a failure to secure redeployment.

4.15 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.16 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.16.1 Provide the Claimant with notes of any meeting she attended or that were held in her absence regarding PCP 3 in a timely manner.

4.16.2 The Respondent could have given the Claimant more time to secure an alternative role;

4.16.3 By applying/modifying the redeployment policy and/or clause 13.14 of the Managing Attendance policy;

4.16.4 The Respondent could have made adjustments to the Ward Clerk interview process namely providing additional time for the Claimant to respond to questions and/or providing the interview questions in advance and/or help with interview technique and provision of information on interview format;

4.16.5 The Respondent could have slotted the Claimant into the Ward Clerk role, without competitive interview (open to the public not just Trust employees) using the softer preferential interview/chat;

4.16.6 Offered a trial period in the role of Ward Clerk to check the Claimant's suitability in the role.

4.16.7 Offered training/coaching in the role of Ward Clerk if there were knowledge/skill gap(s).

4.17 Did the Respondent have the provision, criterion or practice ("PCP") of not providing employees subject to the managing attendance policy with notes of meetings that were held under this policy ("PCP4")

4.18 If so, did PCP4 put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? If so, how?

The Claimant contends that her memory is affected by her anxiety and she needs written notes in order to marshal her thought process. Further by extension the further substantial disadvantages are the increased likelihood of her dismissal and the increased likelihood of a failure to secure redeployment.

4.19 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.20 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.20.1 Provide the Claimant with notes of any meeting she attended or that were held in her absence regarding PCP 3 in a timely manner.

5. Harassment

5.1 Did the Respondent subject the Claimant to unwanted conduct related to her son's disability that had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

The Respondent accepts that the Claimant's son was, at the relevant time, from 3 July 2019 onwards, disabled for the purposes of section 6 of the Equality Act 2010.

The Claimant contends the unwanted conduct was the Respondent's dismissal of her.

5.2 In deciding whether the unwanted conduct has the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, the Tribunal must take into account:

5.2.1 The Claimant's perception;

5.2.2 the other circumstances of the case; and

5.2.3 whether it was reasonable for the conduct to have that effect.

6. Associative Discrimination

6.1 Did the Respondent treat the Claimant less favourably because of the disability of another person?

The Claimant seeks to rely on the disability status of her son and contends that the less favourable treatment is the Respondent's dismissal of her.

7. Polkey

7.1 If the Tribunal finds that the Claimant's dismissal was procedurally unfair, should any compensation payable to the Claimant be reduced to reflect that the Claimant would have been dismissed in any event?

8. Breach of Contract

8.1 Did the Respondent breach the Claimant's contract by way of underpayment of the Claimant's wages from May 2017 through to her dismissal?

The Claimant relies on page 100 of the bundle as this is a variation to the Claimant's contract of employment (page 79 and 97) as the Claimant's hours were increased to 30 hours on 1 April 2016. The Claimant has not been paid correctly since her hours were increased in 2016 as the Claimant has been paid for 23.44 hours and not 30 hours a week.

9. ACAS Code or Practice

9.1 Did the Claimant or Respondent unreasonably fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures?

The Claimant relies on her grievance of 3 March 2020 (page 465) which the Claimant contends the Respondent failed to deal with. The Claimant contends that the Respondent breached paragraphs 32-34, 40, 41-46 of the Code.

The Respondent contends that the Claimant agreed at the capability hearing on 9 March 2020, together with her union representative Laura McManus, that the contents of her grievance would be used as her mitigation for the capability process, which they were. Accordingly, the Respondent denies that it unreasonably failed to comply with the Acas Code.

9.2 If so, should there be an uplift or reduction in any compensation of up to 25%?

The hearing

6. The case was heard on Monday 18 July to Friday 22 July 2022 inclusive. We reconvened on 27 July 2022 to conclude our deliberations.

7. We were presented with a joint bundle of documents and a supplementary bundle of documents from the Claimant ("SB"). Unfortunately, the Respondent included various unnecessarily redacted documents in the bundle (despite the Claimant requesting unredacted copies on numerous occasions before the hearing) which proved unhelpful. The Respondent provided unredacted copies on order as necessary.

8. We also had typed witness statements and an agreed list of issues. The parties were unable to agree a chronology of events before the hearing but presented an agreed version at the same time as written submissions.

9. The first morning was a reading morning and the hearing commenced at 2pm. At the outset, Mr Bourne made an application to exclude transcripts of covert recordings made by the Claimant from the bundle. He submitted that they had only been disclosed the week before the hearing, albeit conceded there was nothing new in them that the Respondent had not already addressed and, therefore, there was little prejudice to it. Ms Harrison confirmed that the Respondent's solicitors had had the transcripts in their possession since April 2022. Given that i) the Respondent had the transcripts months before this hearing but failed to make any representations in a timely manner and ii) Mr Bourne conceded there was little prejudice to the Respondent in allowing the Claimant to rely on them, we rejected the application.

10. The Claimant requested additional breaks during the hearing which we accommodated as required.

11. References to page numbers in these Reasons are references to the page numbers in the bundles.

The evidence

12. The Tribunal heard evidence from:

On behalf of the Claimant:

- the Claimant
- Ms Julie Chapam (previous Assistant Manager)

On behalf of the Respondent:

- Ms Emma Kisby (previous Employee Relations Advisor)
- Ms Lisa Vickers (previous Deputy General Manager – Cardiovascular Medicine Clinical Business Unit)
- Ms Deborah Pook (previous Divisional Managing Director of Medicine)

13. Ms Harrison explained that the Claimant was very anxious and struggled with her memory from time to time. This was apparent when she gave evidence, but we found her to be an honest witness overall. Our only reservation was she was quick to blame '*server issues'* to explain her lack of response to communications from the Respondent which did not suit her case

14. We found the Respondent's witnesses were also honest and credible.

15. Overall, there were little facts in dispute in this case.

The facts

Background

16. The Respondent is an NHS Trust which runs hospitals in Louth, Lincolnshire, Lincoln County, Boston and Grantham.

17. It has a comprehensive Managing Attendance Policy which provides that it is appropriate to make Occupational Health referrals to seek medical information or advice in appropriate cases. It states that a referral must be made where the absence is because of work related stress (page 112).

18. The policy sets out the procedure for long term absence which is defined as a period of medically certified absence which is continuous for at least 28 days (page 124).

19. Regular long term absence meetings should be held and return to work meetings must be undertaken on the employee's return.

20. The section on redeployment provides:

"Permanent redeployment

This will be explored when an employee is no longer able to continue to work in their substantive post due to their medical condition. The OH department will provide this advice.

The Trust will actively seek permanent redeployment opportunities for a period up to 12 weeks maximum, which will only be extended in exceptional circumstances. This will include:

> *Ensuring the employee is met with on a regular basis (minimum monthly) to discuss the redeployment process. This will involve the manager highlighting the potential redeployment opportunities and required support and will detail the responsibilities of both the manager and the individual. Records of these meetings should be maintained and signed by both parties.*
>
> *Completing the trust pro-forma (available on the intranet) in consultation with the individual and including OH advice.*
>
> *Ensuring that HR are aware that redeployment is being sought, the duties the employee is capable of and that the individual is at risk of ill health termination.*

Suitable posts that become vacant can be held back from advertising until consideration has been given to this as a possible redeployment opportunity. Where this is the case:

> *The employee should be offered a preferential interview for positions at the same band and below where they meet the person specification. Or*

Where the post is at a higher band, the post will be advertised and the employee will have to apply and be considered with other candidates.

Explore the possibility at an early stage of undertaking work activities in an area/ role which OH has recommended redeployment to. This would provide the employee with an insight into the duties of a role, and the ability to demonstrate experience in the roles they are seeking redeployment to.

Notify the individual that there is no legal right to redeployment. Where the redeployment is unsuccessful progression to termination of employment will follow.

The maximum normal period for seeking permanent redeployment is 12 weeks, but where redeployment is unlikely to be possible progression to ill health termination may be appropriate at an earlier point in the process.

……..” (page132 – 134).

21. A preferential interview entails a ‘*soft touch’* approach to the interview process if the employee meets the minimum criteria in the job description. The recruiting manager will have a discussion with the employee rather than a formal competitive interview. Any training needs will be discussed, and a trial period offered.

The Claimant’s employment

22. The Claimant commenced employment with the Respondent on 8 April 2009 as a Housekeeper which fell within Band 1. In February 2011, she became a Healthcare Support Worker (“HCSW”) which fell within Band 2. Her duties included physically assisting nurses, doctors and other healthcare professionals to deliver high-quality patient centred care on the Carlton Coleby ward. She would also undertake the duties of Housekeeper and Ward Clerk from time to time to assist when needed.

23. The Claimant was contracted to work 23.88 hours per week.

24. The Claimant had excellent annual appraisals and an unblemished disciplinary record, and this remained the case until her dismissal with effect from 27 July 2020.

25. In 2012, the Claimant broke her wrist and worked full-time as a Ward Clerk for five months until she was able to return to her substantive role.

26. On 3 March 2016, the Claimant’s line manager at the time, Ian Holdich, drafted a letter ‘*to whom it may concern’* stating that the Claimant would be increasing her hours to 30 per week from 1 April 2016 (page 100). It is not clear who the recipient was intended to be, but it was never acted on and the Claimant did not increase her hours.

The Claimant’s absence

27. In or around May 2016, the Claimant was dealing with an extremely stressful personal situation. As a result, she was absent from work due to anxiety, stress and depression from 16 May 2017. During this time, Mr Holdich did not put any pressure on her given the circumstances she faced, and she subsequently said of him: “*I couldn’t ask for better support ……”* (page 304).

28. The Claimant was looking forward to her return to work. However, on 6 November 2017, she fell from her loft and fractured her wrist in two places as well as losing a tooth and getting a black eye. This led to a further period of absence.

29. On 23 November 2017, Mr Holidch and Charlotte Allmond (HR Advisor) held a long-term absence meeting with the Claimant. It was agreed that they would meet again once she had seen Occupational Health. The Claimant was in so much pain at the meeting that Mr Holdich contacted the fracture clinic himself and asked for someone to look at her wrist, for which she was extremely grateful.

30. Circa ten days later on 3 December 2017, the Claimant's son fell from height out of a window. He was placed into a coma with extensive injuries. It was not known at this point whether he would survive. Thankfully he did, albeit suffered brain damage. The Claimant kept Mr Holdich informed of events via Facebook messenger, and they kept in touch via this medium. Again, Mr Holdich did not proactively contact her knowing the level of stress she was suffering (para 40 Claimant's statement).

31. When the Claimant's son was out of danger, she requested that he be transferred from a Nottingham hospital to Lincoln hospital which forms part of the Respondent. The Claimant was unhappy with the care he was receiving and complained to the Chief Executive. At the time, she was his full-time carer.

32. On or around 4 April 2018, the Claimant attended a long-term absence review with Mr Holdich and it was clear at that stage that it was unfeasible for the Claimant to return to her HSCW role because of her wrist (page 7SB). Accordingly, Mr Holdich referred her to Occupational Health, and she attended an appointment on 22 June 2018.

33. The Occupational Health Advisor confirmed that the Claimant was permanently unfit for her HSCW role and recommended permanent redeployment to sedentary duties and a phased return to work (page 202).

34. The Respondent did not make any contact with the Claimant after this report (although the Claimant had been in touch with HR to request forms for an early ill-health retirement ("IHR") application). Accordingly, she e-mailed Mr Holdich on 9 August to complain saying that she was '*blown away'* by his lack of care and interest in her health. She said there had been no contact with her between December 2017 and June 2018, nor had the Respondent offered any help with redeployment (page 205).

35. In response, Mr Holdich explained that meetings had not taken place earlier because he did not want to add to her stress but confirmed that another meeting would be arranged (page 205).

The 4 September 2018 meeting

36. On 14 August 2018, Mr Holdich invited the Claimant to attend a meeting on 4 September 2018 to discuss the issues raised in her e-mail (page 207).

37. The Claimant replied on 1 September 2018 confirming her attendance and thanking him for his patience and support during her earlier absence (page 207).

38. The formal support meeting took place and Mr Holdich was supported by Tracey Robson, Employee Relations Advisor. Unbeknown to Mr Holdich and Ms Robson, the Claimant recorded the meeting. From the transcript, it is evident that all options available to the Claimant were discussed with her, namely temporary and permanent redeployment, IHR and the termination of her contract.

39. Ms Robson confirmed that the first port of call was to get her back to work. The Claimant confirmed that she could not return to her HSCW role and as such, temporary redeployment was ruled out. Ms Robson explained the permanent redeployment process in that the Claimant would be put '*at risk'* but she would receive preferential treatment for any available roles if she met the job specification. She would not have to face a competitive interview unless there were others '*at risk'* who were interested in the same role. However, if an alternative role could not be secured, the Claimant was at risk of having her employment terminated.

40. Mr Holdich raised the Claimant's experience of being a Ward Clerk and Ms Robson said that if she was interested in redeployment then she could shadow a Ward Clerk. They were keen to support her return to work.

41. Ms Robson also explained fully the IRH process to the Claimant and gave her some time to think about the options (pages 16–30).

42. Thereafter, the Claimant e-mailed Ms Robson thanking her and requesting further information about IHR so she could weigh up her options (page 213).

43. The Respondent heard nothing further from the Claimant and was waiting for her to decide if she wanted to apply for IHR or seek redeployment. However, the Claimant thought the Respondent would make contact with her, so she e-mailed Ms Dobson on 11 October 2018. They had various exchanges about IHR and sick pay entitlement over the following weeks (pages 214 – 222).

44. Thereafter, the Respondent attempted to arrange a further meeting with the Claimant, but she was unable to attend on the various dates proposed. In the meantime, Ms Robson left the Respondent and Emma Kisby, ER Advisor, took over the case.

<u>The 30 January 2019 meeting</u>

45. A meeting was eventually arranged for 30 January 2019 which was chaired by Mr Holdich with Ms Kisby present. The Claimant confirmed that she was permanently unfit for any work at present and there was no role available that she could fulfil. Accordingly, she wanted to apply for IHR. Ms Kisby explained that if she was permanently unfit for any work then the Respondent would have to find a way forward in respect of her continued employment and that the capability process would run alongside the IHR process.

46. Mr Holdich explained that IHR was an independent process and, if the Claimant applied, she could hand in her notice and leave, hand in her notice and remain on the bank staff or a formal capability meeting would be convened where it was possible that she would be dismissed by reason of capability.

47. Ms Kisby explained the capability process and how it could be an emotive experience

for the Claimant having to describe her personal circumstances and health with an unfamiliar Panel. The Claimant asked Ms Kisby what she would do personally, and Ms Kisby said that she would hand in her notice. This was said in the context of both a personal capacity and with the Claimant's emotional wellbeing in mind.

48. They had a further discussion about benefits that the Claimant might be entitled to and she was provided with the government website link so she could decide whether to resign or face dismissal. This was an entirely supportive conversation to facilitate the Claimant to fully understand her options and no pressure was placed on her to make a decision.

49. Ms Kisby requested the IHR forms the next day and her notes of the meeting were sent to the Claimant on 1 February 2019 (pages 242-244).

The 3 July 2019 capability hearing

50. The Claimant was invited to a formal capability meeting on 17 May 2019 and was advised that one outcome could be the termination of her employment. She was unable to secure representation, so the meeting was rearranged for 3 July 2019 (page 273).

51. In the meantime, on 21 June 2019, the Claimant's application for IHR was rejected (page 295).

52. In advance of the hearing, Mr Holdich prepared a report which set out the background to the Claimant's absence history, a timeline of events, the Occupational Health report and other relevant correspondence (pages 275 – 284).

53. The hearing was chaired by Ms Lisa Vickers (General Manager), alongside Ms Bernadine Gallen (Quality & Safety Manager) with Sheila Donaldson from ER to support. The Claimant was represented by her union representative, Lauren McManus, who prepared a statement of case on her behalf (pages 296-301). Within the statement, Ms McManus highlighted that the Claimant had only received one set of minutes from meetings to date and that the Respondent had failed to comply with its Managing Attendance Policy.

54. Their unanimous decision was that the Attendance Policy had not always been adhered to and there had been a missed opportunity for the Claimant's re-deployment. Further, at times communication with the Claimant had been poor, as was documentation supporting contact with her.

55. Accordingly, Ms Vickers made the following recommendations: 1) that the Claimant be referred to Occupational Health again; 2) if she was fit for permanent redeployment then she would be placed on the redeployment register for twelve weeks; 3) that her payroll queries would be answered; and 4) that she has continuous ER support (pages 309-310).

56. On 27 August 2019, the Claimant attended a further Occupational Health appointment. The adviser confirmed that she was unfit for her substantive role and recommended a less physically demanding role such as office based or a Ward Clerk with a trial period (pages 314-315).

57. Thereafter, the Claimant and Ms Kisby remained in e-mail contact, mainly relating to the Claimant's payroll queries. Ms Kisby advised the Claimant that Ms Donna Gibbs was now Matron on the Carlton Coleby ward and Ms Sarah Foster was the Sister. The Claimant was also asked to provide dates to attend a meeting to discuss the Occupational Health report. In the meantime, the Claimant confirmed that she was looking at the Respondent's vacancy list (page 321).

58. The Claimant had accrued annual leave whilst off sick and, with her agreement, Ms Kisby recorded her as being on annual leave for the period 1 October 2019 – 26 November 2019 primarily to ensure that she would be in receipt of full pay (pages 322, 323, 325 & 335).

59. On 7 October 2019, the Claimant sent a copy of Mr Holdich's letter dated 1 April 2016 (regarding an increase in her hours to 30 per week) to Ms Kisby and asked for her pay entitlements to be calculated on 30 hours (page 321). Ms Kisby replied on 15 October 2019 confirming that she had been paid for 23.8 hours since November 2013 and not 30 hours from April 2016 (page 320).

60. On 17 October 2019, Ms Kisby sent the Claimant a copy of the current vacancy list (page 320).

The 25 October 2019 meeting

61. On 25 October 2019, the Claimant attended a meeting with Ms Foster and Ms Kisby to discuss the Occupational Health report. They discussed her health more generally and she confirmed that she could undertake administrative roles.

62. It was agreed that the Claimant would return after her annual leave and shadow the Ward Clerk on Carlton Coleby to learn the skills needed and assess what her abilities were. The Claimant was also advised that her redeployment period would end on 17 January 2020 and, if she was unable to secure permanent employment by then, a capability hearing would be arranged which could result in her dismissal.

63. The Claimant was also e-mailed a redeployment pro-forma to complete (page 343).

64. No formal minutes were taken of this meeting, but a letter dated 26 November 2019 was sent to the Claimant setting out their discussions (pages 359 – 360). Furthermore, the Claimant covertly recorded the meeting.

65. The Claimant completed the pro-forma on 19 November 2019 within which she stated that she would need help with interviews and researching posts (pages 352-354).

The Claimant's return to work

66. The Respondent expected the Claimant to return to work after the end of her annual leave in November 2019 but given that a clear start date had not been communicated to her, she did not return as anticipated.

67. Ms Kisby e-mailed the Claimant on 6 December 2019 to ascertain why she had not returned to work. She replied on 11 December 2019 and expressed her frustration that she had not received any minutes from the meeting and that a return-to-work date

had not been communicated to her. She explained that she was suffering from extreme anxiety which affected her memory. She also raised her query about the 30 hours again and requested that it be concluded (page 362).

68. Ms Kisby replied to the Claimant the same day confirming that minutes of support meetings were not taken but that a letter confirming the outcome had been sent to her. However, to assist, Ms Kisby set out her notes which formed the basis of the outcome letter and repeated her earlier findings in October about the 30 hours. She asked the Claimant to contact Ms Foster urgently the next day to arrange a phased return to work and explained that her absence following annual leave would be recorded as unpaid or annual leave in the absence of a fit note (pages 365-366).

69. In the meantime, Ms Foster had been trying to telephone the Claimant, but her phone was constantly engaged. It emerged during the preparation for this hearing that the incorrect number was recorded on the Respondent's database. It is not clear how or why the error occurred, but it was no more than an error.

70. On 16 December 2019, the Claimant began a phased return to work at weekends and shadowed the Ward Clerk. Ms Foster did not conduct a return-to-work interview and had little contact with the Claimant because she worked during the week

71. At some point shortly thereafter, the Ward Clerk announced that she would be retiring in the early part of 2020.

72. On 22 December 2019, the Claimant e-mailed Ms Kisby and asked if her redeployment period could be extended as the Ward Clerk vacancy would not arise until April 2020. Ms Kisby replied saying that she would struggle to extend it by two-and-a-half months. She also asked the Claimant is she could attend a redeployment meeting on 9 January 2020 (page 379).

73. Ms Kisby asked her line manager, Ms Donaldson, if the Claimant's redeployment period could be extended until April 2020 who confirmed that it could not (page 381).

74. On 2 January 2020, Ms Foster chased the Claimant to see if she could attend the meeting on 9 January 2020 (page 382).

75. On 4 January 2020, the Claimant sent a lengthy e-mail to Ms Gibbins, Ms Kisby and Ms Foster. She said that she had been welcomed back to the Carlton Coleby ward and settled in well, albeit she was troubled that Ms Foster had not taken the time to have a full conversation with her since her return. The main thrust of her e-mail was that she considered herself disabled for the purposes of the EQA and asked that she be allowed to apply for the Ward Clerk role by way of reasonable adjustment. She highlighted that she had spent a lot of time during her sick leave '*waiting for things to go forward'* and that within that time the Attendance Management policy had not been adhered to. Against that background, waiting a further two-and-a-half months for the Ward Clerk role to become vacant was reasonable (pages 387- 389). The Claimant also made a subject access request within the e-mail.

76. On 6 January 2020, the Claimant asked for the meeting on 9 January 2020 to be rescheduled (page 386). Accordingly, it was re-arranged for 17 January 2020.

77. On both 14 and 15 January 2020, the Claimant's partner phoned to explain that she was unwell and unable to attend for work (pages 392-393). Ms Foster attempted to contact the Claimant by 'phone but it was still engaged.

78. On 16 January 2020, the Claimant e-mailed Ms Foster to say that she was too anxious to attend work or the re-deployment meeting on 17 January 2020 (page 393).

The Claimant's re-deployment review on 17 January 2020

79. Ms Foster and Ms Kisby reviewed the Claimant's re-deployment in her absence. Ms Foster confirmed the outcome in a letter of the same date in which she also responded to the Claimant's e-mail dated 4 January 2020. Ms Foster acknowledged and apologised that she had only met the Claimant briefly once but explained this was because she worked on weekdays and the Claimant had chosen to work at weekends during her phased return. However, she would roster the Claimant during the week going forwards.

80. Ms Foster also confirmed that the Claimant's redeployment period had ended and, given that there was not a vacancy for a Ward Clerk at that time, she was unable to do the role on a permanent basis. However, she explained that when the incumbent retired "*the vacancy will be advertised through the normal process and you are most welcome to apply, there will be no preferential treatment given as the 12-week redeployment process ends today (17th January 2020) but this does not mean you cannot apply*".

81. Finally, Ms Foster explained that because the Claimant had not secured another role, she would be put forward to a capability hearing which could result in her dismissal (pages 394-395).

82. Accordingly, on 20 January 2020, the Claimant was invited to a capability hearing on 6 February 2020 (pages 396-397).

83. On 26 January 2020, the Claimant complained to the Respondent about her treatment more generally and said that she felt discriminated against. She confirmed her intention to obtain a further fit note which would be backdated from the beginning of her '*work stress'* (page 398). The Claimant obtained her fit note for work-related stress accordingly (page 407).

84. On 28 January 2020, Ms Kisby contacted the Respondent's recruitment department to ascertain which vacancies the Claimant had applied for since July 2019. Given that her name did not appear on any searches, it was correctly assumed that she had not applied for any (page 400).

85. On 29 January 2020, a 'Capability Report' was prepared for use at the Claimant's upcoming capability hearing (pages 402 – 458).

86. On 24 February 2020, the Claimant was invited to attend a capability hearing on 9 March 2020 and reminded that an outcome could be the termination of her employment (pages 460-461).

87. On 29 February 2020, the Claimant made enquiries about a vacant administrative role

(page 463). This was the first vacancy she had expressed any interest in outside the Ward Clerk role. On 2 March 2020, she was provided with more information about it by e-mail and was advised that a tour/visit of the department could be arranged if she so wanted (page 71SB). The Claimant received this e-mail but did not pursue the vacancy any further because she was only interested in applying for the Ward Clerk role and that role alone.

The Claimant's grievance

88. On 3 March 2020, the Claimant submitted a grievance to Ms Kisby. She stated that "*there has been a failure with my redeployment on multiple levels starting with no Return To Work interview which should have included provision of Disability Leave, failure to make reasonable adjustments (redeployment extension), discrimination arising from disability, potential victimisation, as well as multiple threats of dismissal both verbally and in writing, even though I am known to suffer from long term anxiety and now work related stress*".

89. She went on to explain that in her view the redeployment process should have been extended until the Ward Clerk role became available but also that she felt the "'*contract of care' has been irrevocably damaged, and I no longer believe that I will be treated fairly even if offered the Ward Clerk position".*

90. The Claimant confirmed that she was suffering with work related stress and that her GP had doubled her medication and that she would '*welcome the chance to talk this through at a convenient time and place. I would like to be accompanied to the meeting by Laura McManus, Trade Union Representative for Employees United Union' (*page 465).

91. On receipt, Ms Kisby asked the Claimant if her letter was intended to be raised as separate to the capability process or as mitigation for the upcoming hearing given that the content related to the capability process (page 464). The Claimant did not reply.

The capability hearing on 9 March 2020

92. The capability hearing proceeded on 9 March 2020, chaired again by Ms Vickers and the same panel. The Claimant was represented by Ms McManus. It was agreed that the Claimant's grievance would be dealt with as her mitigation in the capability process and Ms McManus addressed all the points raised in it.

93. After hearing the management case and the Claimant's representations, the Panel unanimously concluded that the management support received by the Claimant on her return to work did not meet with that expected by the Respondent in accordance with its Managing Attendance Policy.

94. Accordingly, the Claimant was offered a further eight-week redeployment period with clearly defined expectations for both the Claimant and the management team to assist her in a return to work and securing a permanent role. It was also explained that the Ward Clerk role was on hold as part of financial restrictions for administrative recruitment which were in place across the Respondent (pages 467 – 469).

After the capability hearing

95. Thereafter, the Claimant submitted further sick notes and did not return to work or attend well-being meetings. In the meantime, the Claimant was sent the vacancy list weekly, and Ms Foster offered to assist her with any vacancies (pages 483, 494, 497).

96. Ms Foster continued to try and contact the Claimant by 'phone but it was engaged each time because, still unbeknown to her, the number on the system was incorrect.

97. On 31 March 2020, Ms Foster e-mailed the Claimant to see how she was and to arrange a support meeting. The Claimant replied, copying in Ms Kisby, saying that she was still unable to return to work and '*the relationship between me and the trust is still broken and untenable'*. She also said that she hoped that her grievance would '*be adhered to so we could possibly be able to move forward when we are able to*" (page 483).

98. Ms Kisby responded to the Claimant's comment about the grievance and said: "*as agreed in the hearing, the grievance submitted previously was used as part of your mitigation in said hearing so therefore we consider this closed*" (page 482).

99. Thereafter, the Claimant failed to make further contact with the Respondent and Ms Foster wrote to her to see if she was ok and asked her to make contact (pages 486-487).

100. On 17 April 2020, the Claimant was invited to attend a capability hearing on 4 May 2020 "*to discuss the progress made since your Capability hearing in March 2020, to review the redeployment process, your medical condition and the impact this has on your role*". She was advised that a possible outcome of the meeting was the termination of her employment (page 490 – 491).

101. On 20 April 2020, the Claimant e-mailed Ms Foster and thanked her for keeping in touch and enquiring how she was. She confirmed that she had submitted a further sick note, was still looking at vacancies and would be in touch about a telephone support meeting (page 494).

102. On 28 April 2020, the Claimant e-mailed Ms Kisby and Ms Foster explaining that she had experienced problems with her internet server and had not been receiving e-mails. She confirmed receipt of the hearing pack but needed to seek alternative representation at the upcoming capability hearing (page 497).

103. Ms Foster replied and also asked the Claimant if she could be of any assistance in applying for vacant posts (page 497).

<u>The final capability hearing</u>

104. The capability hearing proceeded on 4 May 2020 chaired by the same panel and the Claimant attended via Skype accompanied by a different union representative, Mr Saqib Hussain. The Claimant covertly recorded the hearing.

105. Mr Hussain provided a statement for use at the hearing and confirmed that the Claimant wanted mediation with Ms Foster and Ms Kisby and the redeployment period to be re-set to give her a fair chance of securing the Ward Clerk role. He explained the most recent re-deployment window had been lost to the Claimant because of the

'*mistrust*' that existed between her, Ms Kisby and Ms Foster. It was this "*mistrust and feeling of fear and anxiety in relation to these two parties that led to [the Claimant] raising a grievance on 3rd March 2020, which I am led to believe was incorporated into the Capability Hearing of 9th March – if that is not the case, please let us know*".

106. Mr Hussain also said that it would be a reasonable adjustment to give the Ward Clerk role to the Claimant and that keeping it on hold amounted to indirect discrimination (pages 504-505).

107. After listening to the Claimant's and management's respective positions, the Panel adjourned to consider their decision. They were surprised at the Claimant's position about a breakdown in trust between her, Ms Foster and Ms Kisby, particularly given her most recent e-mail to Ms Foster thanking her for her support. Furthermore, the Claimant was still keen to secure the Ward Clerk role which would be under Ms Foster's management.

108. The panel considered the Claimant's current position which was that she remained off sick after the previous capability hearing on 9 March 2020 and had not provided any evidence that she would be fit to return to work in the foreseeable future. In total, the Claimant had been absent for 948 days, returning to work briefly on a phased return for 26 days. She had also had the benefit of 20 weeks on the redeployment register but had not applied for any roles in that time.

109. However, the panel failed to refer the Claimant to Occupational Health for a further assessment which it is required to do under the Managing Attendance policy given that her recent absence was due to work-related stress.

110. It took the decision to dismiss the Claimant with notice and Ms Vickers was of the understanding that the Claimant would be entitled to a preferential interview if she was interested in any roles during her notice period. The panel was mindful that the Claimant felt that her relationship with Ms Foster had broken down and agreed to her suggestion of mediation to remove any barriers to a return to work if she could secure a role during her notice period.

111. Ms Vickers also asked HR to enquire if it was possible to release the Ward Clerk role and expected HR to take matters forward in this regard as she had no further involvement in the Claimant's case.

112. Ms Vickers confirmed the outcome of the panel's decision in a comprehensive letter dated 4 May 2020, received by the Claimant on 6 May 2020. Within the letter, Ms Vickers confirmed that the Ward Clerk role was still frozen, but the Claimant would still receive, and be eligible to apply for, any vacancies during her notice period. The Claimant was advised of her right to appeal but not that she would be entitled to a preferential interview (pages 506 - 509).

113. The fact that the Claimant had complained about her son's care in one of the Respondent's hospital played no part in the panel's decision to dismiss her.

<u>The Ward Clerk role</u>

114. On 15 May 2020, the Claimant noticed that the Ward Clerk role was being advertised

both internally and externally. It is not known if this was in consequence of Ms Vicker's request or because there had been a successful application to unfreeze it from the ward more generally. Either way, the Respondent did not notify the Claimant that the vacancy had been released.

115. The Claimant began her application that day but was struggling to complete it so e-mailed Ms Foster asking for support from both her and Ms Kisby. Ms Foster responded (although her e-mail has not been included in the bundle) and in reply the Claimant asked: "*will I get some extra help with this as I am disabled and my sick absence will need to be addressed accordingly as this will give me equal opportunity for my application to be considered realistically*" (page 519).

116. On 18 May 2020, Ms Kisby replied enquiring what the Claimant's difficulty was with the application form and explained that her absence record would not be reviewed until after the role was offered and that her situation would be reviewed accordingly. She finished her e-mail saying: "*Happy to help*" (page 519).

117. The Claimant submitted her application without seeking help from Ms Kisby but e-mailed her the following day saying that she had been unable to complete certain details (page 518). Ms Kisby reviewed the application for her and confirmed that her qualifications and training experience were missing (page 518). Accordingly, Ms Kisby contacted the recruitment team and requested that they make an exception to allow the Claimant to apply again, despite the deadline having passed, which was granted.

118. The Claimant re-submitted her application form on 30 May 2020. She completed the equal opportunities monitoring form and confirmed that she had a disability and that she wished to be considered under the Guaranteed Interview Scheme if she met the minimum criteria in the job specification. The form provides that reasonable adjustments would be made for candidates who have a disability (pages 563a – b).

119. On 2 June 2020, Ms Kisby and Ms Donaldson had an exchange of e-mails within which Ms Donaldson advised Ms Kisby to keep an eye on the shortlisting for the Ward Clerk role and that she should consider any training needs the Claimant may have. Ms Donaldson also stated that the Claimant should get a preferential interview. Ms Kisby queried if this was correct because the Claimant was not in a redeployment period. Ms Donaldson replied saying "*I know but I would say yes – happy to have a view from [Karen Taylor*]" (page 521a). There is no record of such a view being sought from Karen Taylor or any response if it was. Accordingly, the prevailing view was that the Claimant should be offered a preferential interview.

120. On 5 June 2020, the Claimant received two e-mails from the Recruitment team - one stating that she had not been shortlisted for the Ward Clerk role and another saying she had and inviting her for an interview on 17 June 2020. The first e-mail was in response to her defective application and not her subsequent one. The Claimant had not appreciated this and e-mailed the Respondent to express her frustration (pages 528 – 529).

121. Despite the Claimant meeting the essential criteria for the role in practice, she was not offered a preferential interview.

122. On 9 June 2020, the Claimant submitted her appeal against the decision to dismiss her (pages 585 – 590).

123. On 15 June 2020, the Claimant e-mailed Ms Kisby complaining that her earlier grievance had not been dealt with, that her SAR was incomplete and raised Mr Holdich's 2016 letter again. She also said that she was unable to attend her interview for the Ward Clerk role on the scheduled date (page 528).

124. Ms Kisby replied explaining again that her grievance had been dealt with in the 9 March 2020 capability hearing and suggested that she contact recruitment to change her interview date. Ms Kisby also offered assistance with the SAR and repeated her earlier explanation in respect of Mr Holdich's letter (page 527).

125. Ms Foster intervened on the Claimant's behalf and arranged for her interview to be conducted on 18 June 2020 (page 526). The Claimant was not asked if she required any adjustments for the interview, nor did she request any.

126. The Claimant attended her interview but was suffering from stress, anxiety and her physical impairment on the day which affected ability to perform well. She was also at a disadvantage to other internal candidates having received 'hardly any' management updates during her various absences (para 102 of her statement). She was unsuccessful in securing the role.

127. On 1 July 2020, the Claimant was invited to attend an appeal hearing on 15 July 2020, chaired by Ms Deborah Pook, Divisional Managing Director of Medicine (pages 582-583).

128. On 7 July 2020, the Claimant requested feedback from her interview which Ms Foster duly provided on 9 July 2020 (pages 573 – 574).

The Claimant's appeal

129. On 10 July 2020, the Claimant submitted an amended appeal letter pointing out exactly which elements of the Managing Attendance Policy she thought had been breached (pages 607-611).

130. The Claimant remained unwell and requested that her appeal be dealt with in writing. The panel convened on 15 July 2022 as scheduled and heard the management case as well as considering both letters of appeal submitted by the Claimant.

131. Ultimately, the panel decided to uphold the decision to dismiss her. Ms Pook sent a lengthy outcome letter dated 23 July 2020 confirming the same (pages 636 – 642).

132. The Claimant's employment terminated with effect from 27 July 2020.

The law

Unfair dismissal

133. Section s.98 ERA provides:

"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
…….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

134. In cases of dismissal arising from long-term absence it is appropriate for the Tribunal to consider whether in all the circumstances of the case a reasonable employer would have waited longer before dismissing the Claimant; whether the Respondent consulted with the Claimant and took her views into account; and, whether it took steps to discover the Claimant's medical condition and likely prognosis.

135. We have had regard to the following cases: Sainsburys Supermarkets Ltd v Hitt [2003] ICR 111; Midland Bank v Madden [2000] IRLR 288, Jhuti v Royal Mail Ltd [2018] ICR 982: West Midland Co-Operative Society v Tipton [1986] ICR 192; W Devis & Sons Ltd v Atkins [1977] ICR 662; O'Hanlon v Post Office Ltd UKEAT/0202/12/LA [2013] All ER (D) 50 (Mar); Iceland Frozen Foods Ltd v Jones [1983]ICR 17; Whitbread plc v Hall [2001] ICR 699, IRLR 275; K Spencer v Paragon Wallpapers Ltd [1976] IRLR 373; Whitbread plc V Hall [2001] ICR 699; Royal Bank of Scotland v McAdie [2007] IRLR 895; Bevan Harris v Gair [1981] IRLR 520, EAT; Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60; and Portal Limited v Gates [1980] Lexis Citation 208.

Discrimination

Burden of Proof

136. Section136(2) EQA provides:

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

137. The guidance on the burden of proof set out in *Igen Ltd v Wong [2005] IRLR 258* still applies (all references to sex discrimination apply equally to the protected characteristics):

> (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to below as '*such facts'*.
>
> (2) If the Claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
>
> (4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
>
> (5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
>
> (8) Likewise, the Tribunal must decide whether any provision of any relevant

code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.

(10) It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

138. We have also had regard to the following case: Dunn v Secretary of State for Justice and another [2018] EWCA Civ, [2019 IRLR 298.

Discrimination by association

139. Section 13 EQA provides:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

140. The Claimant does not have to possess the relevant protected characteristic herself.

141. We have had regard to the following cases: Nagarajan v LRT [1999] IRLR 572; Essop v Home Office [2017] 3 All ER 551 and CLFIS (UK) v Reynolds [2015] IRLR 562.

Reasonable adjustments

142. Section 20 EQA provides:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*

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

……."

143. Section 21 provides:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

……."

144. The EHRC Employment Code ("the Code") confirms that the term 'provision, criterion or practice' is capable of covering a wide range of conduct, noting: '*The phrase… is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions'* — para 4.5.

145. The Code also provides: '*It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made*'. – para 6.32

146. We have also had regard to the following cases: Environment Agency v Rowan [2008] IRLR 20, ICR 218; Newham Sixth Form College v Saunders [2014] EWCA Civ 734; Project Management Institute v Latif [2007] IRLR 578; Linsley v Revenue and Customers Commissioners [2019] IRLR 604; Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12, [2013 EqLR 791; Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960, EAT; Fareham College Corporation v Walters [2009] 991; Archibald v Fife Council [2004] UKHL 32, IRLR 651, [2004] ICR 954; Royal Bank of Scotland v Ashton [2011] ICR 632; Noor v Foreign and Commonwealth Office UKEAT/0470/10, [2011] ICR 695, [2011] EqLR 448, EAT; Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Romec v Rudham [2007] All ER (D) 206 (Jul), EAT; Cosgrove v Ceasar and Howie [2001] IRLR 653, EAT; Southampton City College v Randall [2006] IRLR 18; and, Robinson v Department of Pensions [2020] EWCA Civ 859.

Discrimination arising from disability

147. Section 15 Equality Act 2010 ("EQA") provides:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

148. We have had regard to the following cases: Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT; Pnaiser v NHS England [2016] IRLR 170,; Nagarajan v London Regional Transport [1999] IRLR 572; Hensman v MoD UKEAT/0067/14/DM; Hardy and Hansons plc v Lax [2005] ICR 1565; City of York Council v Grosset UKEAT/0015/16 (1 November 2016, unreported); O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547; Birtenshaw v Oldfield [2019] IRLR 946; Department of Work and Pensions v Boyers UKEAT/0282/19/AT; and, Chief Constable of West Midlands v Harrod [2015] ICR 1311.

Harassment

149. Section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); and

(b) the conduct has the purpose or effect of: -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

150. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

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

151. The test contains both subjective and objective elements. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

152. We have had regard to the following cases: Urso v Department of Pensions [2017] IRLR 304 and Coleman v Attridge Law [2008] IRLR 722.

Breach of contract

153. A claim for breach of contract is brought under the Employment Tribunals Extension of Jurisdiction Order 1994 which provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or

is outstanding on the termination of the Claimant's employment

154. We have had regard to the following cases: RTS Flexible Systems v Molkerei Alois Muller [2010] UKSC 14, [2010] 3 All ER 1, Global Asset v Aabar Block [2017] EWCA Civ 37; O'Neill v Avic International [2019] EWHC 165 (QB) at para [78]; Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 at 262; Dunlop Pneumatic Tyre Co v Selfridge & Co [1915-15] All ER Rep 333; Edwards v Skyways, Kingswood v Anderson and Barbudev v Eurocom Cable [1964] 1 all ER 494.

Submissions

155. We had the benefit of written submissions from both representatives. We have considered all the points made and all the authorities relied on where appropriate, even when no specific reference is made to them.

156. We refer to relevant parts of those submissions as appropriate below.

CONCLUSIONS

Unfair dismissal

157. The Claimant was dismissed in her absence on 4 May 2020 at the capability hearing chaired by Ms Vickers. We are satisfied that the reason for her dismissal was capability, namely her inability to return to work after lengthy periods of absence. This is not disputed by the Claimant.

158. The Claimant had extensive absence from 16 May 2017 until her dismissal. Her first period of absence related to her distressing personal circumstances and the Respondent was fully supportive of her at this time. The Claimant's line manager, Mr Holdich, recognised the stress she was under and left her alone so to speak, an approach which was welcomed by the Claimant and for which she thanked him.

159. When the Claimant was due to return, she fell and broke her wrist. Shortly thereafter, her son was involved in a tragic accident which left him brain damaged. Again, Mr Holdich did not proactively contact the Claimant about her absence knowing the level of stress she was under, but they kept in contact via Facebook Messenger. We are entirely satisfied that his lack of contact with the Claimant in the early stages, save the meeting on 23 November 2017, was simply borne out of his desire not to place the Claimant under any further stress given the difficult circumstances she was dealing with. Again, the Claimant was grateful for this approach and thanked Mr Holdich for the same.

160. When the Claimant's son was out of danger and at the Lincoln hospital, Mr Holdich invited the Claimant to a long-term absence review on 4 April 2018. He referred her for an Occupational Health assessment, the conclusion being that she was unfit to return to her HSCW role because of her wrist.

161. Mr Holdich failed to make any immediate contact after receipt of the report, and we accept from the documents that he was still seeking to avoid placing any further pressure on her given she was her son's full-time carer at the time. However, when

Claimant complained about the lack of contact, he promptly arranged a follow-up meeting on 4 September 2018.

162. The Claimant covertly recorded this meeting, and the transcript shows that Mr Holdich and Ms Robson went through all the options available to her, including IHR and how the redeployment process would work. The Claimant was, therefore, aware at this early stage that if redeployment was not successful, her employment could be terminated.

163. The Claimant was given some time to think about her options and, after weighing up applying for IHR against redeployment, she chose to apply for IHR. She confirmed her decision at the subsequent meeting on 30 January 2019. Mr Holdich made it clear that IHR was an independent process and if she applied, she could resign or face a capability meeting. The Claimant asked Ms Kisby what she would do in a personal capacity and Ms Kisby said she would resign. However, we are satisfied that Ms Kisby said this would be *her* decision in the Claimant's circumstances and against the backdrop of explaining that the capability process would be stressful. It was not intended to put any pressure on the Claimant either way. In fact, in furtherance of the Respondent's desire to support the Claimant in her decision making, it provided her with the link to various government benefits, so she was fully informed.

164. Given that the Claimant had chosen to apply for IHR and not to resign, she was invited to attend a formal capability hearing on 3 July 2019 chaired by Ms Vickers. Ms Vickers and the Panel concluded that the Respondent had not adhered to the Managing Attendance Policy and recommended that the Claimant be placed on the redeployment register for twelve weeks and re-referred to Occupational Health.

165. Whilst the Claimant was on the register, she was entitled to a preferential interview if she met the minimum criteria in the job specification. However, during this time the Claimant did not apply for any roles despite having access to the Respondent's vacancies on-line.

166. On 25 October 2019, the Claimant attended a further review meeting to discuss the Occupational Health report and it was agreed that she would return to work in December 2019 and shadow the existing Ward Clerk. The Claimant was advised that her redeployment period would end on 17 January 2020 and was sent a copy of the redeployment pro forma, which had not been done previously. The Claimant duly completed it and confirmed that she would need help with interviews and researching available posts.

167. On her return, the incumbent Ward Clerk announced that she would be retiring, and the Claimant was keen to take over her role, having undertaken it for a short period in the past. She asked if the redeployment period could be extended as the vacancy would not arise during her existing period, but her request was declined.

168. We accept that the Claimant had little contact with Ms Foster during her brief return and no return-to-work interview was conducted in breach of the Managing Attendance Policy. However, we are satisfied that this was simply because the Respondent accommodated her request to undertake her phased return to work at weekends whereas Ms Foster worked during the week.

169. A further redeployment meeting was scheduled on 17 January 2020 which the Claimant did not attend because she was too anxious. The review took place in her absence and thereafter she was invited to a further formal capability hearing on 9 March 2020 chaired by the same panel.

170. The Claimant remained absent with work-related stress and did not return. We find the Claimant's position on this is somewhat difficult to reconcile. On the one hand she complained of a breakdown in trust between her, Ms Foster and Ms Kisby yet on the other was still keen to secure the Ward Clerk role which would report to Ms Foster.

171. The outcome of the 9 March 2020 hearing was a further extension to the redeployment period by eight weeks. Within that period, the Respondent actively sought to assist the Claimant with searching for a permanent role, but we find that she failed to engage in the process. She had her heart set on the Ward Clerk role, which was on hold due to a Trust-wide freeze on administrative roles, and that role alone. This is borne out by the fact that that she did not apply for any other roles during her twenty-week redeployment period.

172. The final capability hearing took place on 4 May 2020. By this stage, the Claimant had been absent for circa sixteen weeks with work-related stress. This was an entirely different reason to her previous absences and the Claimant was not referred to Occupational Health as per the Managing Attendance Policy which provides that a referral *must* be made if this is the reason for absence.

173. Ms Vickers and the panel took the decision to dismiss the Claimant given that she had been absent for a period of nine hundred and forty-eight days since May 2017, had not applied for any roles during twenty weeks of redeployment and provided no evidence that she was able to return to work in the foreseeable future.

174. We are satisfied that Ms Vickers and the panel had acted entirely reasonably in the period up to the final capability hearing. They recognised that there had been failures to adhere to the Managing Attendance Policy, more particularly regarding redeployment. They took steps to remedy those failures with a view to allowing the Claimant opportunity to seek alternative employment and avoid dismissal. They cannot be criticised for the steps they implemented, and their actions are demonstrative of their consultation with the Claimant and willingness to take her views into account.

175. At the point of the decision to dismiss, the Ward Clerk role was still frozen, and the Claimant had failed to apply for any other vacant roles. She did not help herself in this regard by holding out for the Ward Clerk role alone.

176. Furthermore, her absence to date was extensive and we accept that the Claimant had not provided any evidence that she was able to return to work in the foreseeable future.

177. However, the Panel failed to recognise that her most recent period of absence was for work-related stress (and, therefore, unrelated to her previous absences) nor did it obtain any up-to-date medical advice to discover more about her condition and the prognosis despite the Managing Attendance policy providing that a referral to Occupational Health must be made in these circumstances.

178. In the absence of any up-to-date medical advice, we are satisfied that it was

unreasonable to dismiss the Claimant at this stage without waiting any longer. We cannot speculate what the medical advice might have been, but a reasonable employer would have waited until it was in receipt of the same.

179. Turning to the Ward Clerk role, we are satisfied that this was the only role of interest to the Claimant and the Respondent was acutely aware of her interest in it. When it became available circa nine days after her dismissal, the Respondent failed to notify her of its release. The Respondent was unable to explain if the role was released in consequence of Ms Vickers' request for it to be 'unfrozen' for the Claimant or otherwise. Regardless, we are satisfied that a reasonable employer would have waited to ascertain if the role could be 'unfrozen' before taking the decision to dismiss.

180. Further, the Respondent failed to give the Claimant a preferential interview despite the e-mail exchange between Ms Kisby and Ms Donaldson and Ms Vickers' understanding that she should have one. Ms Kisby gave evidence that the Claimant met the minimum job specification and as such, we are satisfied that given her previous experience in the role and her most recent shadowing, she would at the very least have been offered a trial period, if not secured it on a permanent basis. Had the Claimant been afforded the opportunity for a preferential interview, her dismissal may have been avoided.

181. For these reasons, the decision to dismiss the Claimant fell outside the range of reasonable responses and her unfair dismissal claim succeeds.

Polkey

182. Given that the Respondent failed to obtain up-to-date medical information and offer the Claimant a preferential interview, we reject the Respondent's *Polkey* argument that compensation should be reduced because she would have been dismissed in any event. The Respondent has failed to provide any evidence to persuade us that she would have been dismissed at a future point even if it had taken those steps.

Discrimination arising from disability

183. The Claimant's disabilities are the physical impairment of long-term pain in her left forearm and wrist and the mental impairment of depression and anxiety consequent of her physical impairment. Both impairments are conceded as disabilities by the Respondent from 3 July 2019 onwards.

184. The Claimant does not plead that her work-related stress amounts to a disability.

Dismissal

185. The first element of the Claimant's claim is that the less favourable treatment was her dismissal and the something arising in consequence of her disability was her inability to perform her contracted role.

186. We are satisfied that the Claimant's dismissal amounts to unfavourable treatment and the Respondent does not seek to argue otherwise. However, we observe that the Claimant fails to address the causative link between her inability to carry out her role and her dismissal with necessary detail other than to simply affirm her view that she has established a prima facie case of discrimination.

187. We acknowledge that there is a link between the Claimant's inability to perform her contracted role and her ultimate dismissal, but we find that the causal link is remote, or alternatively broken, for the following reasons.

188. The Claimant's contracted role was that of HCSW, but she was unable to fulfil those duties since breaking her wrist on 6 November 2017. On 22 June 2018, Occupational Health confirmed that she was permanently unfit to perform it and the position did not change thereafter. The Respondent did not dismiss the Claimant until two years later and the Claimant subsequently returned to work, albeit briefly, in December 2019.

189. The Claimant was also able to apply for alternative roles but chose not to. By way of example, there was a potentially suitable administrative role as evidenced at page 71SB of the bundle. She was given the opportunity to have a tour/visit of the department but failed to pursue the opportunity any further. We do not accept her evidence that she did not receive this e-mail. Rather, she was only interested in the Ward Clerk role and had no intention of applying for any others. As we comment above, the Claimant failed to help herself by choosing not to apply for alternative roles and naturally, had she secured one, she would not have been dismissed.

190. The Claimant attended a competitive interview for the Ward Clerk role but did not meet the required capabilities on the day, which she accepts.

191. Importantly, the Claimant's absence at the time of her dismissal was due to work-related stress and from which there was no indication of a return. It was not a disability related absence. Whilst the Respondent took into account her disability related absences in the cumulative total of days' absence, it was not her disabilities that were preventing her return. It was her absence for stress which she attributed to a breakdown in trust between her and the Respondent.

192. We are satisfied that, ultimately, the Claimant was dismissed because of her failure to secure permanent redeployment and her absence from work due to work-related stress and not because she was unable to perform her contracted role. As such, the Claimant has not established a prima facie case of discrimination. Even if she had established a prima facie case, we are satisfied that these were the reasons for her dismissal and not because of something arising from her disabilities. As such, this element of her claim fails.

The Ward Clerk role

193. The Claimant claims that the Respondent's decision not to award her the Ward Clerk role amounted to unfavourable treatment and the 'something arising' was her inability to perform her contracted role and/or reduced ability to perform well at interview.

Unfavourable treatment

194. The Respondent argues that offering it to her would amount to advantageous treatment. However, we reject this argument in the context of the Claimant's circumstances. The Respondent was fully aware that the Claimant wanted the role, and she was confident that she could fulfil it having done so previously, albeit briefly, and more recently shadowed the incumbent Ward Clerk.

195. At the capability hearing, Ms Vickers made enquiries to see if it could be 'unfrozen' to allow the Claimant to apply on the understanding that she would be offered a preferential interview. The role was ultimately 'unfrozen' but, despite meeting the essential criteria she was not offered a preferential interview. Rather, the vacancy was released nine days after her dismissal and advertised both internally and to the public and the Claimant had to undergo a competitive interview.

196. The Claimant made it clear on her application form that she required adjustments at the interview which could have been in the form of providing additional time for her to respond to questions and/or providing the interview questions in advance and/or help with interview technique and provision of information on the interview format. No adjustments were made, and the Claimant did not secure the role. Had she had a preferential interview, we are satisfied that at the very least she would have been offered a trial period, if not secured it on a permanent basis.

197. In these circumstances, we are satisfied that the Respondent's decision not to award the Claimant the role amounts to unfavourable treatment.

Something arising - inability to carry out her contracted role

198. The Claimant has failed to explain any causal link between the failure to offer her the role and her inability to carry out her contracted role and, therefore, we are satisfied that she has not established a prima facie case of discrimination. She found herself in the position of applying for it because she could not do her contracted role, but she was not offered it because, in the Respondent's view, she did not demonstrate the required capabilities at the interview, which she accepts. As such, this element of her claim fails and is, therefore, dismissed.

Something arising - inability to perform well at interview

199. The Claimant also asserts that she was treated unfavourably because of her reduced ability to perform well at interview. She explains in her witness statement that she had been absent for nearly two and a half years with hardly any updates from the management team and she was suffering from stress, anxiety and her physical impairment. On the day of the interview, she was '*nervous and thirsty and my tongue was stuck to the top of my mouth and I could hardly swallow'* (para 102 of her statement).

200. The Claimant acknowledges that other candidates were better suited to the role based on a competitive interview. However, we are satisfied that the Claimant's substantial absence from work was largely because of disability related absence and such absence, with hardly updates from the management team, would undoubtedly have had an impact on her ability to respond to some of the questions, particularly about maintaining confidentiality and the Respondent's values and behaviours. Furthermore, we accept her evidence that her stress, anxiety and physical impairment affected her ability to perform well on the day. As such, we are satisfied that the Claimant was treated unfavourably because of something arising in consequence of her disability, namely her inability to perform well at interview.

201. The Respondent argues that not offering the Claimant the Ward Clerk role was a

proportionate means of achieving a legitimate aim, namely the need to maintain a capable and qualified effective work force. It says that this is particularly important in a case where the central purpose of the Respondent's undertaking is the care of people who are unwell and/vulnerable.

202. However, we are satisfied that the Claimant met the essential criteria for the role and should have been offered a preferential interview. Furthermore, at competitive interview she was not offered any adjustments despite confirming she needed the same on her application form. Absent these measures, the Respondent has not persuaded us that the Claimant was not capable or qualified and as such, its justification defence fails, and this element of the claim succeeds.

Failure to make reasonable adjustments[1]

PCP 1 – the application of the attendance management policy from 3 July 2019 onwards

203. The Respondent admits that the application of the attendance management policy amounts to a PCP. The Claimant argues that its application put her at the substantial disadvantages of i) the increased likelihood of her dismissal and ii) the increased likelihood of a failure to secure redeployment.

204. The Respondent accepts that it had knowledge of the Claimant's disability and that the application of the policy meant that she (and others in her position) was more likely to hit trigger points under it.

205. However, it argues that the application of the policy brings with it advantages too, namely that where a disability prevented an employee from returning to their contracted role, the procedure provided an opportunity to avoid dismissal by a process of redeployment and, therefore, it did not place the Claimant at a substantial disadvantage.

Substantial disadvantage – increased likelihood of dismissal

206. We are satisfied that persons who are disabled are more likely to have periods of absence and, therefore, more likely to be subject to the application of the attendance management policy than persons who are not disabled.

207. Whilst the policy provides an opportunity to avoid dismissal via redeployment, this is by no means guaranteed which was explained to the Claimant as early as September 2018. As such, the Claimant was put to the substantial disadvantage of the increased likelihood of dismissal following her periods of absence.

Adjustments

208. The Claimant argues that the Respondent could have given her more time to secure an alternative role as a reasonable adjustment. The Respondent says that she had twenty weeks on the redeployment register which is substantially more time than that

[1] NB: PCP 2 is abandoned

provided under the policy.

209. However, the Respondent initially failed to adhere to the policy and recognised its own failings in this regard, hence the two extensions to the Claimant's redeployment period. Whist we acknowledge that the Claimant failed to take steps to secure alternative employment, the Respondent was fully aware that the Claimant was interested in the Ward Clerk role and took steps to seek its release for her. Given that such release occurred some nine days at the most after her dismissal it would have been reasonable to allow her more time to secure the role, particularly by way of preferential interview. This is more so given that the competitive interview date was already set so it would have been for a finite period. As such, this element of the claim succeeds.

210. We are also satisfied that it would have been reasonable to make adjustments to the Ward Clerk interview process by providing additional time for her to respond to questions and/or providing the interview questions in advance and/or help with interview technique and provision of information on the interview format. The Claimant stated on her application that she required adjustments to the interview, but this was seemingly overlooked by the Respondent. The Employment Code of Practice states at paragraph 6.32 that "*It is a good starting point to conduct a proper assessment, in consultation with the employee, of what reasonable adjustments may be required….".* Given that these were all steps that could have been easily accommodated and were in our view reasonable, this element of the claim succeeds.

211. The next pleaded adjustment was slotting the Claimant into the Ward Clerk role without using a competitive interview and using the softer preferential interview/chat. Again, we are satisfied that this would have been a reasonable adjustment, particularly given that she met the essential criteria, and it was the view of HR and Ms Vickers that she was entitled to a preferential interview in any event. Furthermore, the Claimant already had experience in the role and more recent experience shadowing the role. Accordingly, this element of the claim succeeds.

212. We are also satisfied, for the same reasons as above, that it would have been reasonable to offer the Claimant a trial period and training/coaching in the role in accordance with the 'soft touch' approach to the recruitment process. Again, this element of the claim succeeds.

Substantial disadvantage – increased likelihood of failure to secure redeployment

213. The Claimant fails to explain why the application of PCP 1 increased her likelihood of failure to secure redeployment, other than asserting that it did. Absent that explanation, she has not established a prima facie case of discrimination and this element of her claim fails and is, therefore, dismissed.

214. In any case, we consider this argument overlaps somewhat with the above in that it is a consequence of the Respondent's failure to make reasonable adjustments to avoid the substantial disadvantage of the increased likelihood of her dismissal.

PCP 3 – a requirement to attend work as a health care support worker at a certain level in order to avoid receiving warnings and a possible dismissal.

215. We do not understand this PCP in the context of the case before us. The Claimant has

not explained '*what a certain level'* is, nor is it explained within the list of issues or written submissions. The Claimant was not subject to warnings given she was on long-term sick leave (save a brief spell in December 2019/January 2020).

216. Absent any clear explanation, the Claimant has not established that this PCP was firstly applied and secondly, if it was, that it put her at a substantial disadvantage compared to persons who are not disabled. As such, this element of her claim fails and is dismissed (albeit '*possible dismissal'* is a consideration as per PCP 1 above).

PCP 4 – not providing employees subject to the managing attendance policy with notes of meetings that were held under this policy

217. Neither party addresses this allegation in great detail. However, the Respondent did not provide the Claimant with notes of various meetings and this was not routinely done. As such, we are satisfied that this amounts to a policy and/or a practice.

218. However, we are not satisfied that this placed the Claimant at the substantial disadvantage because her anxiety affects her memory, and she needed the written notes to marshal her thought process. She also argues further substantial disadvantages of the increased likelihood of her dismissal and the increased likelihood of a failure to secure redeployment.

219. After each meeting, we are satisfied that the Claimant understood the discussions and outcome. On 4 September 2018, the Claimant covertly recorded the meeting, so no notes were required. The e-mail exchanges thereafter about IHR demonstrate the Claimant's understanding of the discussions in any event. The same can be said about the meeting on 4 May 2020.

220. After the meeting on 30 January 2019, the Claimant requested, and was sent, Ms Kisby's notes.

221. After the meetings on 3 July 2019, 25 October 2019, 17 January 2020, 9 March 2020, 4 May 2020 and 15 July 2020, the Claimant was provided with an outcome letter explaining the discussions/outcome. E-mail exchanges after such meetings evidence the Claimant's understanding of the same. As such, we are satisfied that the Clamant was not put to a substantial disadvantage compared to persons who were not disabled. Accordingly, this element of her claim fails and is, therefore, dismissed.

Harassment

222. The Claimant asserts that she was subject to unwanted conduct relating to her son's disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The unwanted conduct was her dismissal.

223. We agree with the Respondent's submissions that there is no reasonable basis for this claim. It accepts that the Claimant's son was disabled for the purposes of the EQA. However, the Claimant was unable to articulate the basis of her claim with any clarity at all. She accepted in evidence that she did not think she was dismissed because of her son (rather she said she was dismissed because of her disabilities) and furthermore that Ms Pook did not know about the complaints regarding his treatment. In light of the

Claimant's own evidence, her claim of harassment cannot succeed and is, therefore, dismissed.

Associative discrimination

224. The Claimant also asserts that her dismissal was less favourable treatment because of her son's disability. We apply the same rationale to this element of her claim as for the harassment claim, namely that the Claimant's own evidence undermines it. As such, the claim fails and is, therefore, dismissed.

Breach of contract

225. The Claimant relies on the letter dated 3 March 2016 '*to whom it may concern'* signed by Mr Holdich stating that she would be increasing her hours to 30 per week (from 23.88 per week) with effect from 1 April 2016. The Claimant was unable to give any credible evidence about who the letter was intended for or where it was intended to be sent, if at all.

226. However, she did not increase her hours, nor did she complain that she was not rostered or paid for 30 hours after 1 April 2016. Indeed, the Claimant worked for a year after the change was alleged to come into effect without complaint. Thereafter, her sick pay was paid based on 23.88 hours and she still failed to complain. The Claimant raised the matter for the first time on 7 October 2019, some three and a half years later.

227. Given that the Claimant did not increase her hours and or complain about the same, we are satisfied that there was no breach of contract. If there was, the Claimant affirmed the breach by continuing to work for 23.88 hours per week between 1 April 2016 and 16 May 2017, receiving sick pay on that basis thereafter and failing to complain until 7 October 2019.

228. Accordingly, her claim of breach of contract fails and is, therefore, dismissed.

Breach of the ACAS Code of Practice

229. The Claimant relies on her grievance dated 3 March 2020 which she says the Respondent failed to deal with.

230. Ms Kisby acknowledged receipt the same day and asked the Claimant if she was raising it separately to the capability hearing or if it was mitigation to be used at the hearing. The Claimant failed to reply. However, we accept Ms Kisby's evidence that it was agreed in the hearing on 9 March 2020 by the Claimant and Ms McManus that the points raised would be used as mitigation rather than a separate grievance. The minutes corroborate her evidence and show that the key points were discussed.

231. This was Mr Hussain's understanding too as evidenced by his comment that he had been led to believe that her grievance '*was incorporated into the Capability Hearing of 9th March – if that is not the case, please us know'*.

232. Given that the Claimant agreed that her grievance would be used as mitigation at the capability hearing rather than be dealt with as a separate grievance, we are satisfied that there was no breach of the ACAS Code of Practice and the claim fails.

Remedy

233. The question of remedy will be dealt with at a remedy hearing to be notified to the parties under separate cover.

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Employment Judge Victoria Butler

Date: 13 October 2022

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