Case Number: 3303588/2019
3312597/2020
3305267/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs L Marshall	**v**	**East & North Herts NHS Trust**

Heard at: Bury St Edmunds (by CVP) **On**: 6, 9, 10, 13, 14, 15 & 16 June 2022 & in chambers on 5, 6 & 7 October 2022

Before: Employment Judge KJ Palmer
Mrs J Costly
Mr B Smith

Appearances
For the Claimant: In person
For the Respondent: Ms C Jennings, Counsel

RESERVED JUDGMENT

It is the unanimous Judgment of this Tribunal as follows:

1. The claimant's claims of direct disability discrimination under s.13 of the Equality Act 2010 fail and are dismissed.

2. The claimant's claims in discrimination arising from disability under s.15 of the EqA 2010 fail and are dismissed.

3. The claimant's claims for reasonable adjustments under s.20 and s.21 of the EqA 2010 fail and are dismissed.

4. The claimant's claims in harassment under s.26 of the EqA 2010 fail and are dismissed.

5. The claimant's claims in victimisation under s.27 of the EqA 2010 fail and are dismissed.

6. The claimant's claims for a detriment pursuant to a protected disclosure under s.47B of the Employment Rights Act 1996 fail and are dismissed.

7. The claimant's claim for automatic unfair dismissal under s.103A of the Employment Rights Act 1996 fails and is dismissed.

8. The claimant's claim for unfair dismissal under s.94, s.98 and s.111 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

1. This matter came before us today listed to take place by Cloud Video Platform for a ten-day hearing to determine the claimant's claims lodged in three separate applications to the Employment Tribunal all consolidated to be heard at the same time. Sadly, due to lack of resource we were only able to devote seven days hearing to this matter which had originally been listed for ten. We were able to get to the point at the end of the seventh day where all the evidence had been heard and we then, with the agreement of the parties, ordered that written submissions should be made and pursuant to those written submissions the Tribunal convened for a three-day discussion to give judgment. This is a Reserved Judgment. It is unfortunate that it has taken so long for this Judgment to be finalised and sent to the parties. The Tribunal met to deliberate over this Judgment in August of 2022 but sadly one member of the Tribunal fell ill and it was not possible to complete those deliberations until some months later. The Judgment then had to be typed and faired leading to further delay. The claimant was employed by the respondent from 10 May 1999 until she was dismissed purportedly by reason of redundancy on 4 January 2021 At all material times pertinent to these proceedings the claimant was employed as a surveillance nurse.

2. The claim before this Tribunal consists of three claims presented to the Tribunal, all consolidated and heard together.

3. Those three claims are as follows:

   3.1 Case no. 3303588/2019 presented to the Tribunal on 1 February 2019 ("First Claim")

   3.2 Case no. 3312597/2020 presented to the Tribunal on 20 October 2020 ("Second Claim")

   3.3 Case no. 3305267/2021 presented to the Tribunal on 1 April 2021 ("Third Claim")

4. The claims were consolidated and have been subject to Case Management. The most recent Case Management was before EJ Laidler on 20 July 2021.

5. In EJ Laidler's summary of that Case Management Hearing which was a Preliminary Hearing conducted by telephone an extensive list of issues was recorded as having been agreed between the parties. EJ Laidler set out the

list of issues broken down into claims appearing in each of the first, second and third claims. The list of issues is extensive and runs to some 21 pages.

6. Across the three claims now consolidated, the claimant pursues a suite of claims. These are:

   6.1 Unfair dismissal under s.111 of the Employment Rights Act 1996;

   6.2 Automatic unfair dismissal under s.103A of the Employment Rights Act 1996;

   6.3 Detriment for having made a protected disclosure under 47B of the Employment Rights Act 1996;

   6.4 Direct disability discrimination under s.13 of the Equality Act 2010;

   6.5 Discrimination arising from disability under s.15 of the Equality Act 2010;

   6.6 Claim for reasonable adjustments under s.20 and s.21 of the Equality Act 2010.

   6.7 Claim for harassment under s.26 of the Equality Act 2010;

   6.8 Claim for victimisation under s.27 of the Equality Act 2010.

7. It is undeniable that there is some considerable repetition of some of the claims across the three applications to the Tribunal. This is particularly so with respect to the claims for discrimination arising from disability (s.15 EqA 2010) and the claim for reasonable adjustments (s.20 and 21 EqA 2010).

8. In constructing this Judgment, the Tribunal is not proposing to go through each presented claim and deal with each claim in those presented claims in sequence. The claims are consolidated and the Tribunal will deal with the claims across the three claims by reference to the nature of the claim.

9. The Tribunal feels that it must say that this was a particularly difficult claim to manage by Cloud Video Platform. The claimant's first language is not English. The Tribunal was faced with a bundle running to some 2,826 pages and heard evidence from nine witnesses. It is the Tribunal's view that this is a case which more properly should have been dealt with in person.

10. As mentioned above, there was a vast bundle before the Tribunal running to some 2,826 pages. The Tribunal does question whether a bundle of this size was necessary. The majority of the bundle was not relevant to the determination of the issues before the Tribunal.

11. However the claimant is unrepresented and we appreciate how difficult it was for the claimant to represent herself in such a complex series of claims.

12. The claimant's evidence was split into three witness statements covering some 195 pages. There were also eight witnesses for the respondent.

13. The Tribunal in making findings of fact has confined itself to those factual aspects relevant to the issues it has to determine. That amounts to only a small proportion of the evidence that we heard. In all, the Tribunal heard evidence from the claimant and for the Respondent from Karen Cameron, Keeley Cooper, Rachel Corser, Andrea Holloway, Ian McCabe, Alison Porch, Josie Potts and Lorraine Williams.

14. We do not seek to repeat verbatim the issues set out in EJ Laidler's Case Management Summary of 20 July 2021 however, in the conclusions to this Reserved Judgment each and every claim is set out and dealt with. The Tribunal has not in this Judgment set out in exhaustive detail every aspect of the law in respect of each and every claim save for a reference to the key parts of the statutory law and some relevant uthorities.

The claimant's claims

15. As explained above, the claimant brings a suite of various claims ranging across three ET1s presented between 1 February 2019 and 1 April 2021. There is some overlap in those claims.

Disability Discrimination

16. In the case management summary the claimant is said to rely on the following impairments as amounting singly or in combination to a disability within the meaning of the Equality Act s.6:

    16.1 Anxiety and depression

    16.2 Chronic fatigue syndrome (CFS)

    16.3 Poor vision due to early stage cataracts.

17. It is worth mentioning that these are the three impairments set out as being impairments relied upon in support of the claimant's claims and disability discrimination in EJ Laidler's detailed summary.

18. However, during the course of the seven day hearing at no stage either when giving evidence or in explaining the nature of her claims did the claimant suggest that she was relying on CFS or poor vision due to early stage cataracts. Counsel for the respondent, Ms Jennings, was at great pains in cross-examination to take the claimant to each and every one of her claims in disability discrimination, direct discrimination, discrimination arising from disability and her claims in reasonable adjustments and ask her what was the disability she relied upon. In every single case the claimant said anxiety and depression.

19. The respondents accept that at the relevant time the claimant was disabled by reason of stress, anxiety and depression and chronic fatigue. They only accept knowledge relating to stress, anxiety and depression and not chronic fatigue save for in respect of the third claim. However, it is clear that as stated in her evidence the claimant feels that chronic fatigue is something that naturally arises out of stress, anxiety and depression despite the fact that we

have no medical evidence before us to demonstrate this. As we have detailed it is clear that the claimant does not in reality seek to rely upon anything other than stress, anxiety and depression in respect of all her disability discrimination claims. We have therefore dealt with the claim on that basis. If and insofar as any other claims did exist over and above this which is not clear then they are dismissed on withdrawal.

20. The claimant's claims in direct discrimination EqA s.13 the claimant says she was treated less favourably because of her disability as follows:

    20.1 The respondent failed to shortlist her for a Band 7 post for which she applied in June 2018.

    20.2 The respondent failed to appoint her to a Band 6 post for which she applied in August 2018.

    20.3 The respondent failed to provide her with training or career development opportunities in the form of rotation into an IPC role at any time between the dates of September 2016 and the present date (5 December 2019 – first claim).

    20.4 The respondent failed to provide the claimant with training or career development opportunities in the form of a placement and training modules related to an infection control degree or masters between the dates of September 2016 and 5 December 2019.

Comparators - actual

21. The claimant relies on the following actual comparators being other Band 6 or Band 7 nurses in the same employment:

    21.1 Rachel Lee – commenced IPC course September 2016.

    21.2 Lorraine Williams – commenced IPC course September 2016.

    21.3 Marisa Mae Cometa – commenced IPC course September 2018.

Comparators - hypothetical

22. Plus any hypothetical comparator including the claimant if she had not been a disabled person.

Discrimination arising from disability EqA s.15

23. Did the respondent know or ought it reasonably to have known that the claimant had the disability during the relevant period?

24. The claimant says she was subjected to unfavourable treatment as follows:

    24.1 The respondent failed to provide her with training or career development opportunities in the form of rotation into an IPC role at any time between the dates of September 2016 and 5 December 2019.

24.2 The respondent failed to provide the claimant with training or career development opportunities in the form of a placement on training modules related to an infection control degree or masters between the dates of September 2016 and 5 December 2019.

24.3 The respondent failed to shortlist her for a Band 7 post for which she applied in June 2018.

24.4 The respondent failed to appoint her to a Band 6 post for which she applied in August 2018.

24.5 The claimant was sent home and instructed to take sick leave by her manager, Ian McCabe, on 21 September 2019.

24.6 The respondent failed to provide her with training or career development opportunities in the form of rotation into an IPC role at any time between 1 February 2019 and 20 October 2020.

24.7 The respondent failed to provide the claimant with training or career development opportunities in the form of a placement on training modules relating to an infection control degree or masters between 1 February 2019 and 20 October 2020.

24.8 The respondent failed to shortlist the claimant for a Band 8 post for which she applied in or around November 2019 and failed to appoint her to that role.

24.9 The respondent failed to slot the claimant into a vacant IPC post for which she was qualified on or around 5 August 2020.

24.10 The Respondent placed her at risk of redundancy.

24.11 The Respondent dismissed her.

24.12 The Respondent failed to offer suitable alternative employment.

Something arising

25. The claimant relies on taking periods of sick leave between 20 January 2017 and 27 April 2017 and between 20 January 2017 and 20 October 2020.

26. The claimant relies on making complaints from 27 April 2017 to 20 October 2020 which arose from poor working conditions causing or exacerbating her impairments. The respondent does not agree to this as being something that arose in consequence of the claimant's disability.

27. The claimant was sent home on 21 September 2019 because she allegedly raised her voice and engaged in erratic behaviour which to the extent to which this is admitted is an accurate description of what happened was a symptom of or caused by her disability.

Reasonable adjustments EqA s.20

28. The claimant says the respondent applied the following PCPs:

    28.1 Requiring the claimant to work at a poorly ventilated and poorly lit station;

    28.2 Requiring the claimant to continue to work in her substantive post;

    28.3 Requiring the claimant to manage her workload without the support of the dedicated team of surveillance nurses and administrative support as set out in the PHE protocol,

    28.4 Failing to rotate the claimant to an IPC role.

    28.5 If so, did any PCP put the claimant at a substantial disadvantage in comparison to persons who are not disabled?

    28.6 The claimant says the PCPs above put her at a substantial disadvantage in comparison with persons who are not disabled in that:

    She was placed at a higher risk of aggravating the symptoms of her anxiety and depression.

    28.7 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at a substantial disadvantage?

    28.8 Did the respondent fail to take such steps as it was reasonable to take to avoid any such disadvantage?

    28.9 The claimant contends that the respondent should have:

        28.9.1 Moved the claimant to an alternative workstation in the same post within a reasonable time frame;

        28.9.2 Rotated or redeployed the claimant to an alternative IPC post and consequently a different workstation; and

        28.9.3 Provided the claimant with the support of a team of dedicated surveillance nurses or administrative support in her role as SSSN.

    28.10 We such steps reasonable and would they have overcome the substantial disadvantage relied upon?

<u>Victimisation EqA s.27</u>

29. The claimant carried out a protected act or acts related to disability and she was subjected to a detriment or series of detriments because of those protected acts:

    The protected acts relied upon are as follows:

29.1 On 31 May 2018 the claimant filed a grievance relating to:

29.1.1 Equality of opportunities;

29.1.2 Her working conditions; and

29.1.3 A failure to make reasonable adjustments.

This grievance also included the allegations of various breaches of the EqA.

29.2 On 14 November 2019 the claimant filed a grievance relating to one or more of the following:

29.2.1 Inequality of opportunities;

29.2.2 Breaches of the EqA; and various other breaches.

29.3 On 28 November 2019 the claimant filed a grievance in relation to one or more of the following:

29.3.1 Inequality of opportunities and various breaches of the EqA;

29.4 On 1 February 2020 the claimant filed a grievance relating to one or more of the following:

29.4.1 Inequality of opportunities and breaches of the EqA generally.

29.5 On 3 August 2020 the claimant filed a grievance relating to one or more of the following:

29.5.1 Inequality of opportunities and breaches of the EqA 2010 generally.

29.6 The claimant presented a claim to this Tribunal for disability discrimination on 1 February 2019.

29.7 The claimant presented a claim for disability discrimination to this Tribunal on 20 October 2020.

29.8 Pursuant to these alleged protected acts related to disability the claimant argues she was subjected to a detriment or series of detriments because of that protected act or acts. These are:

29.8.1 The respondent failed to appoint her to a Band 7 post in June 2018 because she carried out that protected act.

29.8.2 The respondent failed to appoint her to a Band 6 post in August 2018 because she carried out a protected act.

29.8.3 The respondent failed to appoint the claimant into a vacant Band 8 post in November 2019.

29.8.4 The respondent failed to slot the claimant into a vacant Band 6 IPC post in or around 5 August 2020.

29.8.5 Being placed at risk of redundancy.

29.8.6 Being dismissed.

29.8.7 Not being offered alternative employment.

29.9 Did the respondent subject the claimant to the above detriments because they believed she may do a protected act?

Harassment under s.26 of the Equality Act 2010

30. The claimant complains of the following treatment:

30.1 Being told by Ian McCabe on 30 January 2019 that the claimant "did not qualify" to undertake an IPC Training Course.

30.2 Being told by Lorraine Williams on 25 June 2020 that the claimant did not deserve to undertake IPC University Training.

30.3 Being told on multiple occasions between 2016 to 2019 and on 20 January 2020, 25 June 2020 and 30 July 2020 that the claimant did not require IPC training.

30.4 Being asked by Ian McCabe on multiple occasions in 2017-2019 if the claimant was looking for work elsewhere.

31. Did the respondent subject the claimant to the treatment alleged above?

32. If so, did the treatment amount to unwanted conduct that had the purpose or effect of violating the claimant's dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

33. The claimant says the conduct did have that purpose because in each case the respondent was aware or reasonably should have been aware that the claimant was a disabled person and that the treatment complained of could therefore violate her dignity or create an intimidating, hostile, degrading, humiliating or offensive environment.

34. Having regard to all the circumstances including the perception of the claimant, can the alleged harassment by the respondent be reasonably considered as having the alleged effect?

35. The claimant says that the conduct did have the effect because in each case the claimant reasonably perceived the respondent's conduct in each case to violate her dignity or create an intimidating, hostile, degrading, humiliating or offensive environment and it did have that effect.

36. If so, were the matters related to the claimant's disabilities?

37. It is worth mentioning at this stage that EJ Laidler in the preliminary hearing and case management discussion reminded the claimant of the wording of s.26 and how it would be necessary for her to establish that any unwanted conduct related to a relevant protected characteristic. EJ Laidler went on to say that it was not for her to determine the case at that stage having not heard the evidence but that the claimant might like to give consideration to some of the allegations she makes under this category of claim and consider whether or not they could amount to unwanted conduct and, more particularly, could they be said to be related to her disability.

<u>Detriment for having made a protected disclosure (47B Employment Rights Act 1996)</u>

38. Did the claimant make a protected disclosure or disclosures?

39. The claimant relies on the following as amounting to a protected disclosure:

    39.1 The claimant stated on 14 April 2015 and 14 May 2015 and again in or around June 2020 that certain infections were reportable to the National PHE Surveillance Service contrary to the PHE protocols and that they had not been reported.

    39.2 If so, did the protected disclosures amount to a disclosure of information?

    39.3 If so, were the protected disclosures qualifying disclosures in that the claimant reasonably believed the disclosure tended to show one or more of the matters referred to in s.43B (ERA) as follows:

        39.3.1 That the respondent had failed, was failing and was likely to fail to comply with its legal obligations of common law and by statute (s.43B)(b) and/or

        that the health and safety of any individual has been, is being or is likely to be endangered (43B)(d) and/or

        that information tending to show these matters had been, was being and was likely to be deliberately concealed (s.43B(f)).

    39.4 In relation to any alleged protected disclosure that the claimant is alleging, did the claimant in her reasonable belief make the disclosure in the public interest?

    39.5 If so, did the claimant suffer the following detriments?

        39.5.1 The claimant was denied nursing and/or administrative surveillance support to improve the orthopaedic service; and

        39.5.2 The claimant was placed at risk of redundancy.

39.5.3 If so, in respect of each alleged detriment, was it done on the ground that the claimant had made a protected disclosure or disclosures?

Unfair dismissal (s.111 Employment Rights Act 1996)

40. Was the reason for the claimant's dismissal a potentially fair reason having regard to s.98(2) of the Employment Rights Act 1996? The respondent relies on the reason as being redundancy.

41. Did the respondent act fairly in dismissing the claimant having regard to s.98(4) of the Employment Rights Act 1996?

Automatic unfair dismissal (s.103A Employment Rights Act 1996)

42. Did the claimant make a protected disclosure?

43. The claimant relies on the following as amounting to a protected disclosure or disclosures:

43.1 The claimant told the Nursing Director, Angela Thompson, on 14 April 2015 and on 14 May 2015 and then IPC lead, Ian McCabe, at a time when infection rates within the Trust were alarmingly high that some infection cases which were being wrongly labelled as not reportable.

43.2 In or around June 2020 the claimant told IPC lead, Lorraine Williams, that certain infections were reportable to the National PHE Surveillance Service under the PHE protocols and they had not been reported.

43.3 Complaints were made in writing to the IPC lead, Ian McCabe and Lorraine Williams, on:

43.3.1 13 October 2019;

43.3.2 13 January 2020;

43.3.3 24 January 2020;

43.3.4 28 February 2020;

43.3.5 4 March 2020;

43.3.6 24 April 2020;

43.3.7 11 May 2020

43.4 All of these were reporting health and safety issues related to the claimant's working environment.

43.5 If so, did the protected disclosures above amount to a disclosure of information? The respondents do not accept that they did amount to

a disclosure of information within the meaning of the relevant section of the Employment Rights Act.

43.6 If so, were the protected disclosures qualifying disclosures in that the claimant reasonably believed the disclosure tended to show one or more of the matters referred to in 43B ERA 1996 as follows:

43.6.1 that the respondent had failed, was failing and was likely to fail to comply with its legal obligations of common law and by statute (s.43B)(b) and/or

43.6.2 that the health and safety of any individual has been, is being or is likely to be endangered (s.43B)(d) and/or

43.6.3 that information tending to show these matters had been, was being and was likely to be deliberately concealed (s.43B)(f).

43.6.4 If so, was the disclosure in the public interest?

43.6.5 If so, was the reason or the principal reason for the claimant's dismissal because the claimant had made the protected disclosures?

Jurisdiction – Out of Time

44. Across the suite of the claimant's claims there are some issues relating to whether some of those claims may or may not have been submitted within the relevant time limits.

45. In respect of those claims it is necessary for the Tribunal to determine whether they were submitted in time or out of time and if out of time whether time should be extended on either the not reasonably practicable principle or the just and equitable principle?

Findings of fact

46. The factual matrix surrounding this case is extremely complex. Throughout that factual matrix the claimant pursued multiple grievances in respect of which there were multiple outcomes. The detail of those grievances and indeed a great many of the documents included in the vast bundle before the Tribunal, running to some 2,840 pages, are not relevant to the issues before the Tribunal.

47. The respondent explained to us that the inordinate size of the bundle was largely due to the claimant's request to include documentation, much of which the respondent considers to be irrelevant to the issues in dispute.

48. Moreover, the claimant's witness statement is split into three parts and runs to some 195 pages and deals in great detail with many years of grievance and complaints going back to 2014 which are also not relevant to the issues before the Tribunal.

49. We have therefore tried to confine ourselves to relevant areas and facts which are relevant to the issues to be determined.

50. The Tribunal finds itself in agreement with the respondent's submission that the true source of all of the claimant's unhappiness can be traced back to 2014. The claimant has been employed since 1999. However, in 2014 the respondent closed the hospital rendering the claimant at risk of redundancy. She was transferred into a new role but not the role of IPC nurse. This sparked an ire and anger in the claimant which spawned a series of grievances at the time. This sense of grievance has continued and in the Tribunal's judgment has spawned the claims that are now before us. The claimant argued that in 2014 she was essentially promised that the role she was redeployed into would be a stepping-stone or staging post for becoming an IPCC nurse. She believes this was essentially her right and that she was owed this by the Trust. Much of what has come since then arises out of this belief. The claimant believes that she was essentially promised an IPC role by Helen O'Connor in 2014.

51. This was of course some five years before the first of the claimant's claims were lodged. Helen O'Connor was no longer working for the Trust at the time that the first claim was lodged. Nothing which took place at the time of the claimant's redeployment can be relevant to the issues before this Tribunal. It does, however, perhaps serve to explain the claimant's motivation for pursuing claims which she has.

52. The claimant's employment commenced in May 1999 when she was a nurse team manager at the QE2 hospital. This was a Band 7 role. There was a reorganisation in the autumn of 2014 and in October of the same year the claimant began work as a surgical site surveillance nurse.

53. It was in the autumn of 2014 that following a reorganisation the claimant began as a Surgical Site Surveillance Nurse. This is a Band 6 appointment. It is at this time that the claimant argues that she was promised that ab appointment in this role would lead to an eventual appointment as an Infection Control Nurse. It appears that much what appears in this claim arises from the claimant's view that she was promised that there would be a natural progression from one role to the other and that she feels that shew is "owed" by the Trust. The individual at the time who she believes promised her this progression was Helen O'Connor. Bearing in mind this is some eight years before these proceedings were heard none of that evidence is relevant to the issues before this tribunal but it may serve to illustrate as background evidence, why the claimant is so exercised about becoming an IPCC Nurse. The tribunal need make no finding as to whether such a promise was made and it does not do so. However, on the evidence we have heard, the claimant has demonstrated a particular tendency to misinterpret and inflate conversations she has had to her benefit and we think it unlikely that such a promise was ever made.

54. It is worth mentioning that we were not impressed generally with the evidence of the claimant. She has great difficulty in focussing on the factual issue at

hand and has an alarming tendency to conflate issues which are wholly unconnected.

55. She often misinterprets comments made to her by others and where there is conflict in the evidence we find the evidence of the other witnesses from whom we heard to be more reliable.

56. We were particularly impressed with the evidence of Lorraine Williams. We felt that Ms Williams gave her evidence clearly and concisely and with certainty. We have no reason to doubt anything she told us. The same can be said of Ian McCain and the other respondent witnesses from whom we heard. The claimant had enormous difficulty in confining herself to the issue in hand and seemed unable to understand that by continually asserting a point which is contradicted by other clear evidence it does not ultimately render her point any more likely to be true.

57. The claimant worked as a surveillance nurse from 2014 up to her dismissal. The role of an IPC nurse and surveillance nurse are distinct roles. An IPC nurse is responsible for proactively preventing infections across the Trust. Such a nurse provides ward based support, expert advice, risk assessment surveys, ward based audits, outbreak management support and trains and educates trust staff, volunteers and works with other staff at the Trust to develop policies and guidance. It is a collaborative and supportive role. A surveillance audit nurse is entirely different. A surveillance nurse does not necessarily need to be included within an IPC team structure. Whilst at the respondent the claimant did sit in with the IPC Team when she was by her role required to be in an office. A surveillance nurse could sit within the Surgical Division. The role of the surveillance nurse is to review and audit information relating to infections for particular surgical procedure. A surveillance nurse will evaluate and interpret data collecting and produce reports for feedback to relevant teams, committees and national audit. We had a copy of the claimant's job description in the bundle in front of us.

Facts pertinent to the claimant's claims in direct discrimination under s.13 of the Equality Act

58. The claimant says she was treated less favourably because of her disability as follows:

<u>The respondent failed to short list her for a Band 7 post for which she applied in June 2018.</u>

59. This was the role that Ms Williams applied for and was successful in respect of. We heard evidence from those involved in the selection process, principally, Mr McCabe. We have seen the scores attributed to that application and can see no evidence to suggest that in any way the claimant's scores were influenced by her disability. In fact, she was not by any means at the bottom of the scores and scored favourably well. The claimant's position is that the failure to shortlist her was an act of direct discrimination. Mr McCabe was the shortlisting manager for that role. Rachel Corser assisted him. The tribunal heard evidence from both of them. A scoring matrix

for the eight candidates was before the tribunal. Three candidates were shortlisted; the claimant was not one of them. She did not score in the top three candidates albeit that she was by no means the worst candidate in terms of score. All candidates were anonymised so it would have been difficult , if not impossible, for Mr McCabe and Ms Corser to have deliberately discriminated against the claimant. The claimant argues that the scoring matrix was a sham and fabricated after the event. What we understand the claimant means by this is that the document provided to us was a typed spreadsheet produced after the event. Mr McCabe accepted that this was the case and that he had transposed scores after a paper and pencil exercise into a Word document following the claimant's request. We see nothing sinister in that. The Claimant produced no cogent evidence to support her conspiracy theory.

60. There is absolutely no evidence at all to suggest that the claimant was not shortlisted because of her disability.

61. The respondents, in their submissions, point out that even on the claimant's own case, on any analysis, this cannot be the case. She argues that she was not the only one disadvantaged by sham scoring during that exercise in her witness statement. Her witness statement suggests that Mr McCabe deliberately wanted to appoint Ms Williams for the role and that therefore the claimant and others were disadvantaged as a result. By that argument the claimant could not have been omitted from the shortlist because of her disability.

62. In any event, there is simply no evidence to support the claimant's assertions.

63. The claimant also argues that the decision to fail to appoint her to a Band 6 post for which she applied in August 2018 was an act of direct discrimination. In this instance the claimant was shortlisted for interview and was interviewed. She was interviewed by Ian McCabe, Lorraine Williams and Amy Owen. The scoring matrix for this exercise was also before us. The scores were agreed between the three interviewers. The claimant was the lowest scoring candidate. The tribunal heard evidence form Mr McCabe and Ms Williams.

64. We agree with the respondent in that there is nothing from any of the evidence before us to suggest that the reason for the claimant's lack of appointment to the role was anything to do with her disability.

65. The claimant also pursues a direct discrimination claim on the basis that she says she was failed by the respondent in that they did not provide her with training or career development opportunities in the form of rotation into an IPC role at any time between September 2016 and 5 December 2019. She also says that the respondent failed to provide her with training or career development opportunities in the form of a placement on training modules related to an Infection Control degree or Masters between the dates of September 2016 and 5 December 2019. She claims that both of these failures constitute direct disability discrimination.

66. Interestingly, the claimant did not put this to any of the respondent's witnesses in evidence. The evidence before us revealed that the claimant was a surgical site surveillance nurse and we accept the respondent's assertion that therefore no IPC training was required for that role. IPC training was required for the IPC role. The Trust should not be expected to support a surveillance nurse who wished to undertake IPC training.

67. It is perhaps telling that the three actual comparators sited by the claimant Rachel Lee, Lorraine Williams Marisa Mae Cometa all went on IPC course training but they were all IPC nurses. It is therefore not a surprise that they did so. The claimant also cites a hypothetical comparator that is a site surveillance nurse who did not have her disability.

68. We are bound to say that having heard evidence we can see nothing to support the suggestion that the decision not to send the claimant on IPC training or not to provide her with career development opportunities in the form of such training is in any way connected to her disability. The reason she was not is that the Trust believed entirely justifiably that they were not required to as she was not an IPC nurse.

69. Much the same can be said on the alleged failure to rotate the claimant into an IPC role at any time between the dates mentioned. This was not put to any of the respondents' witnesses by the claimant. We heard no evidence to suggest that such a failure was in any way sinister or connected with the claimant's disability.

<u>The claimant's claims under s.,15 of the Equality Act for discrimination arising from disability</u>

70. In all of these claims set out above the claimant relies on the something arising from her disability as being the taking of sick leave. This is from January 2017 onwards. She had various periods of sick leave including from January to February 2017, June 2017 to August 2017, November 2017 to February 2018, May 2018 to June 2018, September 2018 to November 2018, May 2019 to July 2019, September 2019 to October 2019, November 2019 to December 2019 and January 2020 to April 2020. She also relies on raising complaints from April 2017 concerning poor working conditions which she says were exacerbating her health conditions. The claimant confirmed that the only disability she seeks to rely upon in respect of these claims is stress, depression and anxiety.

71. The respondents accept that sick leave arose in consequence of the claimant's disability. They do not accept that it arose in consequence of raising complaints about the IPC Room. They argue that such complaints could not be "something arising " from her disability as the whole of the IPC Team complained about the conditions in the room for the same reasons.

72. The evidence we have heard from Mr McCabe, Lorraine Williams and the other respondent witnesses leads us to conclude that there is simply no evidence to support the claimant's assertions that her sickness absence influenced any of the decisions taken by the respondent or indeed that it was

viewed in a negative light. All evidence is to the contrary. The claimant was always supported with phased returns to work and sometimes with temporary redeployment. She was never subjected to a sickness absence or capability process. The tribunal can find no support in the evidence for the unfavourable treatment the claimant alleges she says is a result of her sickness absence.

73. The claimant alleges that there were 13 acts of unfavourable treatment because of the something arising in consequence of her disability.

74. We have listened carefully to the evidence of the respondents before us and indeed the evidence of the claimant. Nowhere can we find a single shred of evidence to support the assertion that the decisions relied upon as being acts of unfavourable treatment were reached by the respondent because of the claimant's sickness. For the avoidance of doubt, we also do not consider that any of those acts were motivated by the fact that the claimant complained about the conditions in the IPC Team office, whether or not that amounts to something that can be defined as "something arising" from her disability. All of the acts relied upon were given cogent reasons by the respondent's witnesses as to why something was or was not done. The fact that the claimant was not happy with a particular act or omission does not of itself mean that it was in any way related to her sickness. The claimant makes no more than a bare assertion that anything that she says essentially prevented her from achieving her goal as an IPC nurse must therefore have been tainted and amount to unfavourable treatment because of her sickness arising out of her disability. There is simply no evidence to support that bare assertion and the claimant has put nothing before us which convinces us that there is a link between the two.

Jurisdiction

75. The respondents ask us to consider that in any event, irrespective of the points raised above in evidence, that one of the allegations under the heading of discrimination airisng form disability, set out in the claimant's second claim, namely that the respondent failed to shortlist the claimant for a Band 8 post for which she applied in November 2019 and further, that the respondent failed to appoint her to that Band 8 post, are out of time and the tribunal has no jurisdiction to hear that claim. The claimant made this claim for the first time in March 2021 within further and better particulars, some 16 months after the act complained of and after her first two tribunal claims were issued. The respondents ask us to consider that there was no continuing course of conduct . They also point out that the claimant advanced no evidence to assist us in determining whether we should extend time on the just and equitable principle pursuant to s.123 of the Equality Act.

76. We are bound to say that failure to shortlist and the failure to appoint can only be acts that amount to single acts.

77. The failure to secure that role is, of course, a continuing consequence but it is not a continuing act on the basis of the authorities and the principles set out in the leading authority of Hendricks V Metropolitan Police Commissioner [2002] EWCA Civ 1686. Therefore, this claim must be out of time and the

tribunal has no jurisdiction to hear it. The Claimant also failed to advance any evidence at all on this issue.

78. The claimant's claims for discrimination arising from disability spill over into her third claim and she argues that the unfavourable treatment she relies upon is being placed at risk of redundancy, being dismissed and not being offered alternative employment.

79. Having listened to the evidence, principally of Lorraine Williams, we agree with the respondents' submission that the claimant was and ultimately dismissed pursuant to a reorganisation. We see no evidence to support any assertion that that process was influenced or connected to the claimant's sickness. The claimant's sickness had in fact come to an end at the time of the reorganisation and the claimant was back at work. The respondents say that the claimant appears to be running a "but for" type argument that but for her absences the respondents would not have released it had processes in place which had embedded surveillance into the daily practice of orthopaedics. Having heard and considered the evidence of Lorraine Williams we do not consider that in any event this was the case. Lorraine Williams took the view that a reorganisation was necessary really as a result of what had taken place during the course of the pandemic. Many surgeries had been postponed during the pandemic and it was only natural that at the end, or near the end, there was going to be some reassessment of how best to manage surveillance. We accept entirely Lorraine Williams' evidence that she reviewed the situation and determined that the way in which surveillance could best be achieved was through embedded surveillance and audit within the clinical nurse function. It was a commercial decision taken pursuant to that assessment that it was unnecessary to have a single nurse being responsible for surveillance and audit for three particular operations. She took the view that clinical nurses could take on the responsibility of reviewing and auditing infections in their respective services; for example, reporting on cardiac or breast surgery. We see no evidence to suggest that these decisions were taken as a result of the claimant's sickness absences.

80. The same can be said of the suggestion that the fact that the respondents were unable to offer the claimant suitable alternative employment was unfavourable treatment because of the claimant's sickness. There is just no evidence to support this. In fact, the evidence suggests that the claimant was not engaged in the possibility of redeployment to an alternative position she actively avoided such engagement and admitted under cross examination that this was the case. The truth is of course that the claimant was only interested in an IPC role as she had been since 2014.

<u>The claimant's reasonable adjustments claim under the Equality Act s.20</u>

81. The claimant pursues a variety of claims under s.20 and these appear in the claimant's first and second claims. These are set out above. The PCPs relied upon by the claimant are repetitive from the first to the second claim. She says those PCPs put her at a substantial disadvantage in comparison to persons who are not disabled and that the respondents failed to take such steps as were reasonable to avoid the disadvantage as set out above. In its

conclusions the tribunal deals with these claims but evidentially it is important for the tribunal to find facts.

82. The IPC Team was based in a windowless room but the claimant's role only required her to be in that room 50% of the time. So it is wrong to say that the claimant was required to work in that room. To an extent she was but not for the whole of her working time.

83. On the evidence before us, the claimant has not established any disparate effect upon her. She says that this put her at a higher risk of aggravating her symptoms of anxiety, depression and stress but there is no evidence to support this.

84. The claimant has failed to show that if such a PCP did exist and amounted to a PCP, that it put her at a substantial disadvantage in comparison with people who were not disabled. This is because all other members of the IPC Team complained about the lack of a window and ventilation. None of the symptoms the claimant reported suffering from as a result of being in the room were naturally linked to anxiety, stress and depression. They were the same symptoms that all the others were suffering who were not disabled. This is admitted by the claimant in her own evidence.

85. The Occupational Health reports obtained throughout the claimant's employment in February 2017, May 2017, June 2017, February 2018, June 2018 and November 2019 do not support the fact that the room was having an impact on the claimant's disability.

86. There is, in any event, strong evidence that the respondent did all it could to improve the claimant's working conditions. The claimant was offered many alternatives and was in fact, on more than one occasion, moved to other rooms where she could work. For example, she was, in June 2019, allocated a workstation in room 7A. She agreed, at one of her many grievance appeal meetings, that this was a suitable alternative place to work. Sadly, by November 2019, the claimant expressed a dislike for room 7A and she was moved to room 11A, a ward sister's office. She did continue to work there until she went off sick. Returning in April 2020 the claimant refused to return to work due to her perceived risk of covid 19 and an office space at Wiltron House became available due to administrative staff working from home during the first national lockdown. The claimant did under cross examination, accept that she was grateful for the Wiltron House move and accepted it was very hard for the Trust to find her an alternative office. We find that the respondents did all they reasonably could to move the claimant to an alternative workstation in the same post. Redeployment was also considered but the claimant made it clear she was not interested in this.

87. In reality, the only thing that would have satisfied the claimant would have been a rotation into an IPC nurse role but there is little logic in this in respect of the claimant's claims as the IPC nurses worked in the very room the claimant complains of. We accept the respondent's assertions that in fact, those IPC nurses were in that room as often and for the same length of time if not more than the claimant.

88. The second PCP the claimant relies upon is the requirement to continue to work in her substantive post. In her second claim she expands this and adds the wording "rather than rotate to an IPC role". The respondents accept that his amounts to a PCP. The claimant was employed to do this job and was required to do it. The claimant's difficulty however, on the evidence, is demonstrating how this requirement put her, as a disabled person, at a substantial disadvantage in comparison with persons who are not disabled. She argues that this requirement placed her at a higher risk of aggravating her symptoms of anxiety, depression and stress. We have heard no evidence to support this. There is also no evidence that the respondent was aware of any likely disadvantage.

89. The claimant never complained in any of her many grievances, of which there were seven, that continuing to work in her role put her at a substantial disadvantage because of her disability. None of the occupational health reports support this. It is telling that the claimant never applied for any other roles at any time, other than the role of IPC nurse.

90. Evidentially, there is nothing to support the disparate effect the claimant is required to show in such a claim.

91. The third PCP, essentially repeated in both claims, was that the claimant was required to manger her workload without the support of a dedicated team of surveillance nurses and administrative support as set out in the PHE Protocol. This is really simply dealt with in the Protocol in that having viewed the PHE Protocol, which was before the tribunal, no such requirement is set out. The respondents accept that the claimant was required to manage workload without a dedicated team of surveillance nurses but there was simply no requirement for them to do so. The Lister Hospital was small, its surveillance was limited to three surgeries in orthopaedics and the workload was such that it required one dedicated resource.

92. In any event, there is simply no evidence to convince us that the claimant can establish, on the balance of probabilities, that if this amounted to a PCP it put her, as a disabled person, at a substantial disadvantage in comparison with persons who were not disabled. None of the occupational Health reports support this. This was not raised in any of the claimant's seven grievances and it is difficult to image how any duty could arise.

<u>The claimant's claim for unfair dismissal</u>

93. This is contained in the claimant's third claim. This is unfair dismissal under s.111 Employment Rights Act 1996. The respondents argue that the reason for dismissal was redundancy which is a potentially fair reason and that applying the various tests under s.98, the dismissal was fair. The claimant asserts that there was no genuine redundancy situation and it was a sham, orchestrated to facilitate her exit. She argues a separate protected disclosure, unfair dismissal, under s.103A.

94. It is necessary for us to make certain findings with respect to the motivation for the reorganisation and the redundancy process and the process followed.

Evidence from the respondent was principally given by Lorraine Williams. She was the IPC lead and the claimant's line manager. It was she who considered that it was necessary to have an IPC Team restructure to ensure that resource was efficiently being used.

95. We were very impressed with Ms Williams' evidence. It was in May and July that she discussed her thoughts concerning a possible IPC Team reorganisation with Stephen Tai, who is the T & O Consultant and SSI Consultant Lead. She also discussed her plans with Michelle Murphy, General Manager for Surgery and Rachel Corser, Director of Nursing. In conjunction with Claire Mooney, HR Business Partner, Ms Williams drafted a consultation paper setting out proposed changes to the Surgical Site Surveillance Service. She finalised this paper in July 2020. She concedes that she may have started drafting that paper in May 2020 and did not finish it until July 2020. The main impact on staff arising from the proposed reorganisation was the removal of the claimant's role from the structure.

96. She gave evidence that it was necessary, after the paper was finalised, for it to be submitted to the Trust Partnership Board on 7 August for approval. The consultation was launched on 12 August 2020. She points out that whilst the paper envisaged the claimant's role being removed the majority of the work involved had already been absorbed by other staff.

97. The claimant was informed of the consultation paper on 12 August 2020. She made great play of not having been involved in the drafting of this paper prior to that but Ms Williams gave evidence, which we accept, that the reason for this was a perfectly sound one. She had to wait for the Trust Partnership to ratify the consultation process and it would have been wholly wrong of her to approach the claimant about a consultation process which might result in the claimants redundancy if the board subsequently did not approve it and no such consultation then took place. During August and September 2020 Ms Williams discussed the consultation process with the claimant and entered into significant correspondence with her answering a range of questions which the claimant raised.

98. Claire Mooney met with the claimant on 16 and 17 Septemebr pursuant to meetings in August and the claimant submitted a response to the consultation document on 18 September. This is a lengthy document. This was considered in one to one meetings with the claimant. Ms Williams then drafted a consultation outcome document in September 2020. And between September and December the claimant was sent a list of redeployment opportunities. The claimant made it clear however that she was not interested in engaging in any such redeployment. She was more concerned with focussing on the consultation process and why she had been selected.

99. On 13 October 2020 the claimant was informed that her post was at risk of redundancy. She was given 12 weeks' notice that her employment would terminate on 4 January 2021 if suitable alternative employment could not be found before then. Her employment duly terminated in accordance with that notice.

100. The claimant relies on a "conspiracy" or "sham" argument. That is that the whole process was undertaken simply to remove her from her role.

101. Having heard Ms Williams' evidence and witnessed the cross examination of her we do not believe that there is any evidence to support the claimant's theory in this respect. We accept Ms Williams' argument that due to the pandemic and other factors; the claimant's work had diminished. The requirement for the claimant to carry out work of the nature of which she did had diminished. The requirements had not ceased entirely but had largely been absorbed within the orthopaedic team. This was even accepted by the claimant under cross examination.

102. We can find no cogent evidence, other than the bare assertions of the claimant that the decision taken to pursue a consultation process which ultimately resulted in the claimant's dismissal by reason of redundancy, was a sham. The process was detailed and consultation with the claimant was extensive. Very many lengthy points raised by the claimant were dealt with during the process of that consultation. It is difficult to imagine how Ms Williams and those assisting her could have done more.

103. Evidence is abundant that the respondents did all that they could to assist the claimant in finding suitable alternative employment by redeployment but the claimant made it clear that she was simply not interested.

104. We consider it significant that Ms Williams undertook the review of the IPC service shortly after taking up the post of PC Lead and that she had recently completed her Masters with a focus on Quality and Improvement and that this was a key focus when she came into the role. We accept Ms Williams' evidence that she did not in any way single out Surgical Site Infection Service as the claimant alleges.

105. We consider that the consultation was detailed and meaningful.

106. The claimant was asked for her views on the future of the service in April 2020. The claimant seems to think that she should have been involved in the drafting of the consultation paper. We do not accept that this was reasonable or necessary for the respondent to involve her in this process. She was involved before and in detail once the consultation paper had been produced and ratified. The claimant was not responsible for a commercial decision and therefore was not entitled to be involved in it.

107. We accept the respondents' submission and consider it significant that much of the query and enquiries raised by the claimant during the consultation process were irrelevant to the consultation itself. The claimant continued to be fixated on historic complaints and grievances. Irrespective of this the respondent engaged with her meaningfully and respectfully on every mater. The claimant's lengthy and largely irrelevant written response to the consultation was fully engaged with by the respondent.

108. The claimant did not present an alternative to the proposal save that she suggested it was wrong that the work had been, or could be, successfully absorbed elsewhere. Over and above that, the claimant's challenge to the

redundancy, as did most of her complaints and most of her claims before this tribunal focussed and fixated exclusively on her complaint that she was not involved in the review of the IPC service and that she had not been slotted into an IPC nurse role in the summer of 2020 prior to the consultation.

109. Dealing with this desire to be slotted in and the argument that a failure to slot her in was a significant factor in her unfair dismissal claim, we need to make some findings as to that IPC nurse role.

110. In fact, two IPC nurse roles came up in June and August 2020. The claimant asserts they were being hidden and kept secret from her by Ms Williams. We do not accept that this was the case. The roles were advertised just as previous IPC nursed roles had been. The claimant did not apply for them. She accepted under cross examination that she was not looking at such vacancies.

111. Given the difference between the roles it was not incumbent upon the respondent to ringfence or otherwise slot the claimant into such a vacancy. The claimant's role and the role of an IPC nurse were not broadly similar. This is a misapprehension which the claimant labours under and is a theme running throughout the myriad of her claims before this tribunal. It is simply not the case that the claimant's role and that of an IPC nurse were the same or similar.

112. As the respondents point out to us in submissions, during the summer of 2020 when covid was at its height, the IPC nurses were busier and more patient facing than ever. The claimant readily accepted under cross examination that she did not want to be a clinical nurse or on wards at the time. She was concerned that she might contract covid 19. She accepts that this was the reason she located to Wiltron House. Therefore, it would have been of no practical value for her to have been offered one of those roles in any event. She accepted this in evidence.

113. Looking at suitable alternative employment more broadly, as set out above, the claimant had plenty of opportunity to look at redeployment elsewhere but studiously avoided doing so. She was provided with weekly meetings from mid October 2020 but deliberately did not engage with those meetings and was uninterested in seeking alternative employment, a fact which she has admitted. She chose to disengage with the process in November 2020 and ignored the attempts to encourage her to continue. Yet after this time she was still sent vacancy lists.

114. The claimant was only interested in an IPC nurse role, nothing else.

115. There is no evidence to suggest that the respondents failed to reasonably explore suitable alternative employment for the claimant.

<u>The claimant's claims arising from alleged protected disclosures under s.47B of the Employment Rights Act 1996</u>.

116. The claimant pursues claims arising out of alleged protected disclosures in both her second and third claims.

117. In respect of the claimant's claims that she suffered a detriment for having made a protected disclosure, the protected disclosures that the claimant relies upon is that in April 2015 and May 2015o and again in or around June 2020, she stated that certain infections which had been reportable to the National PHE Surveillance Service had not been reported contrary to the PHE protocol.

118. She relies on the same alleged protected disclosures in respect of her automatic unfair dismissal claim under s.103A of the Employment Rights Act save for she expands upon that. In that 103A claim she also relies on alleged disclosures to Ian McCabe and cites specifically complaints made in writing to both Ian McCabe and Lorraine Williams on various dates in 2019 and 2020.

119. The respondents aver that these cannot amount to qualifying disclosures. The claimant agreed that the alleged disclosures from 2015 were similar to the issue raised in June 2020 with Ms Williams. The tribunal saw this correspondence in the bundle. Essentially, this amounted to the claimant and a consultant disagreeing about whether a particular infection was a Surgical Site Infection and, as such, whether it was reportable. This was on the three monthly SSI report. The disagreement was escalated to Ms Williams. Further review was undertaken and, ultimately, it was reported in line with what the claimant suggested.

120. The respondents argue that this cannot amount to a protected disclosure. This is in line with a normal collaborative process and was normal practice for SSI's to be reported after final determination, discussion and consensus.

121. The tribunal makes a finding that this process was nothing more than simply a process that would be followed in the normal course of the claimant discharging her role. There seems to be nothing unusual in such a process resulting in a discussion or disagreement between the claimant and others who may be involved in determining whether such an infection was reportable. We see no evidence to suggest that these were disclosures tending to show that the respondent had failed in its legal obligations as alleged, or that the respondent was deliberately concealing such information. On the contrary, once the discussion had played out any appropriate reporting was effected.

122. Leaving that aside, even if the disclosures the claimant seeks to reply upon could be said to be qualifying disclosures, having heard detailed evidence from Ms Williams and the claimant, we find no evidence at all to suggest that the acts the claimant seeks to rely upon as detriments were in any way connected with those disclosures. We agree with the respondents that it is fanciful in the extreme to suggest that such a disclosure, should it amount to a protected disclosure, would influence the activities of Lorraine Williams some five years later.

123. The detriment the claimant seeks to rely upon was being denied nursing and/or administrative surveillance support to improve the orthopaedic service and that she was placed at risk of redundancy. There is no evidential support for this assertion.

124. As to the claimant's claim for automatic unfair dismissal under s.103A, the same applies. Nothing in the disclosures the claimant seeks to rely upon as protected, on the evidence before us, can be linked to the decision to dismiss the claimant by reason of redundancy.

The claimant's claims in victimisation under s.27 of the Equality Act.

125. The claimant pursues claims of victimisation across all three of her claims. She relies on her various grievances raised between May 2018 and August 2020 and the various claims lodged with the tribunal.

126. These are set out above. The respondent accepts that all of these are protected acts within the meaning of s.27.

127. The claimant then argues that she was subjected to a series of detriments because of these protected acts including the failure to shortlist her for a Band 7 IPC nurse role in June 2018, the failure to offer her the Band 6 IPC nurse role in August 2018, the failure to shortlist her for a Band 8 IPC lead role in November 2019, the failure to slot her into a vacant IPC nurse role in August 2020, placing her at risk of redundancy, not offering her alternative employment and dismissing her.

128. On the evidence before us, that we have heard in detail, we can find no evidence to support the assertion that any of these acts or events relied upon were in any way related to the protected acts. There is simply no evidence to connect the two. Once again, it is a bare assertion by the claimant that the two are connected.

<u>The claimant's claims in harassment.</u>

129. The claimant pursues claims in harassment in her second claim. She alleges that four acts set out above in the list of the claimant's claims amount to harassment under s.26. We heard the evidence before us from Mr McCabe and Lorraine Williams who were those accused by the claimant of the treatment concerned.

130. First, Mr McCabe denies that he told the claimant that she did not qualify to undertake the IPC training course. He said that he did not use the word "qualify" but generally he accepts that the conversation came back to IPC training in January 2019 and he explained, as he had repeatedly done before, that the Trust could not support the claimant in her undertaking IPC training as it was not required for her role. We accept his evidence in this respect.

131. With respect to the allegation that Mr McCabe and Ms Williams told the claimant on multiple occasions that she did not require IPC training, they admit this but it is in the context that the claimant felt that she was entitled to such training when she was not. This cannot amount to unwanted conduct.

132. The claimant alleges that Ms Williams told her on 25 June that she did not deserve to undertake formal IPC university training. Ms Williams denies using the word "deserve" but accepts that she may have referred again to the

claimant not needing such training in her surveillance nurse role. This cannot be unwanted conduct.

133. The claimant alleges that Mr McCabe asked her on multiple occasions between 2017 and 2019 if she was looking for work elsewhere. Mr McCabe accepts from time to time in discussions regarding IPC roles the issue of possible IPC roles in neighbouring Trusts came up. As Mr McCabe knew that the claimant was so desperate to become an IPC nurse it is not surprising perhaps that similar roles in other trusts were discussed. We accept Mr McCabe's evidence in this respect. We cannot see how these discussions can amount to unwanted conduct.

134. The respondents ask us to consider that the fourth allegation of harassment is out of time. The claimant advanced her fourth allegation for the first time in further and better particulars in March 2021 some two years after she claims the harassment took place and after her first two tribunal claims were issued. Mr McCabe left the respondent in December 2019. It is clear that there cannot be a continuing act as a matter of fact. The claimant has not asked us to consider extending time on the just and equitable principle. This claim therefore is out of time and the tribunal has no jurisdiction to hear it.

135. The claimant pursued a variety of grievances against the respondent the first one being raised on 31 May 2018. This spawned a grievance meeting on 17 August 2018 and a grievance report in November 2018. A second grievance was raised in November 2018 and a meeting in respect of that grievance took place in January with an outcome on 1 February. There was a grievance appeal hearing on 23 May 2019 with the outcome being sent to the claimant on 18 June 2019. A third grievance was raised on 28 November 2019 and a fourth on 3 February 2020. There was a fifth on 3 August 2020. There was a sixth on 30 September 2020 and a seventh on 18 November 2020.

136. For the purposes of dealing with the claimants claims it is unnecessary for us to go into the detail of these grievances. The detail is considerable and much of the toing and froing with respect of the grievances makes up the vastness of the bundle before us. The contents of the grievances are repetitive and rase consistently the individual complaints of the claimant which are and make up much of the complaints in her claims. Throughout the process whilst there were some delays in dealing with the claimant's grievances we consider that the respondents did everything they possibly could to deal properly with the claimant's grievances and follow a proper procedure. Often when a grievance outcome was forthcoming it was the very outcome which spawned the next grievance. Many of the same issues were raised again in subsequent grievances. We consider that it would have been open to the respondent on more than one occasion to argue that grievances raised had already been previously dealt with. They did not do that. They continued to deal with the claimant's grievances however repetitive as best they could. The only criticism that could be levelled is the considerable delay that it took the respondents to deal with the claimant's first grievance raised in May 2018. By the time that grievance was dealt with a second grievance had already been raised. Whilst that delay is not part of the claimant's claims before this tribunal we do not consider there is anything sinister in the delay. The

grievance was extremely detailed and the investigation process very thorough The Trust was under pressure and it is not surprising that it took a long time for the matter to be dealt with. Nevertheless, it is perhaps desirable that such grievances are dealt with more swiftly.

The law

137. Disability discrimination sections 13 and 15 of the Equality Act 2010.

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> (6) If the protected characteristic is sex—
>
> (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
>
> (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
>
> (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
>
> (8) This section is subject to sections 17(6) and 18(7).
>
> …
>
> 15 Discrimination arising from disability
>
> (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.

138. Reasonable adjustments

20 Duty to make adjustments

(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.

…….

21 Failure to comply with duty

(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.

139. Harassment

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

140. Victimisation

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

141. Public interest disclosure

43 A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H

……

43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)

…….

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

103 A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

142. Unfair dismissal

143. When considering a complaint brought under s.111(1) of the Employment Rights Act 1996 the tribunal must consider s.98

98 General.

(1) 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,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) [F5Where] 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.

144. In unfair dismissal cases the tribunal is guided by the case of Iceland Frozen Food v Jones [1983] ICR 17. This tells a tribunal that in considering whether a respondent has fairly dismissed a claimant under s.98(4) of the Employment Rights Act, the tribunal must consider whether the decision to dismiss fell within a band of reasonable responses of a reasonable employer faced with those circumstances. The tribunal must not substitute its own view as to what is or would have been reasonable.

145. In redundancy cases the tribunal is guided by the leading case of Williams v Compair Maxam Ltd [1982] ICR 156. This case sets out guidelines for the tribunal to use in assessing whether an appropriate process has been followed in redundancy cases and this assists the tribunal at arriving at a decision under s.98(4)

146. Discrimination - cases burden of proof

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

123 Time limits

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

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

……

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

Conclusions

Disability

147. The respondents accept that the claimant was a disabled person by reason of stress, anxiety and depression. Whilst in her homemade pleadings the claimant also sought to rely on chronic fatigue syndrome and poor vision due to early stage cataracts. During the course of these proceedings she made it very clear that the only disability she sought to rely upon was that of stress, anxiety and depression. The respondents accept that she was a disabled person at all materials times in respect of this disability.

148. They also accept that she suffered from chronic fatigue syndrome but to not accept that they were aware of this at all material times.

149. The tribunal takes the view that the claimant sought not to advance her arguments in respect of disability before the tribunal in so far as they relate to the chronic fatigue syndrome and the poor vision due to early stage cataracts. The claimant in evidence made it clear that she considered her chronic fatigue syndrome just a further symptom of her stress, anxiety and depression.

150. The claimant made no mention during these proceedings of any claims in respect of the disability of poor vision due to early stage cataracts but she did admit that this vision was correctable to some extent with spectacles. Whilst the tribunal does not consider that the claimant has advanced any claims on the basis of such a disability, the tribunal concludes, in any event, that there is insufficient evidence before it to determine that the claimant was a disabled person by reason of poor vision due to early stage cataracts at the material, or, indeed, any time. It is material that Ms Jennings of counsel was very specific in putting each and every one of the claimant's claims to her in cross examination and she made it clear that she was 'not seeking to rely on any disability other than stress, anxiety and depression.

151. In any event, the tribunal is bound to say that even if the claimant had argued that she was relying on the disabilities of chronic fatigue syndrome and poor vision due to early stage cataracts, and the turbinal had concluded that these amounted to disabilities at the material times, and that the respondents had knowledge of them, the tribunal would draw exactly the same conclusions as to her disability discrimination claims as it has done with respect to the admitted disability of stress, anxiety and depression.

The claimant's claims in disability discrimination – direct discrimination under s.13 Equality Act 2010

152. As set out in our findings of fact, the claimant has failed to adduce sufficient evidence to convince the tribunal that she was treated less favourably because of her disability in respect of the four acts she relies upon, namely failure to shortlist her for a Band 7 post in June 2018, failure to appoint her to a Band 6 post in August 2018, failure to provide her with training or career development opportunities in the form of rotation into an IPC role between September 2016 and 5 December 2019 and failure to provide the claimant with training or career development opportunities in the form of a placement on training modules related to an Infection Control Degree or Masters between the same dates.

153. There is nothing in the considerable evidence that has been before this tribunal to suggest that there was any connection between those events and the claimant's disability.

154. We were completely satisfied with the explanation of Ian McCabe and Lorraine Williams with respect to the Band 7 and Band 6 posts for which the claimant applied. We do not consider that there was any requirement for the respondents to assist the claimant's career development by rotating her into an IPC role or indeed, to assist career development of the claimant in seeking training modules related to an Infection Control Degree or Masters. The claimant was a surveillance nurse and the Trust responsibilities extended only to training her in that respect.

155. There was nothing sinister in the way in which shortlisting an appointment of the Band 7 and Band 6 roles was handled. We have considered all the evidence and looked at all the documentation and there is not a single shred of evidence to suggest that those decisions were in any way tainted by the claimant's disability.

156. The claimant's claims in direct disability discrimination under s.13 therefore must fail.

157. It is perhaps telling that the claimant has cited comparators who are not appropriate comparators. These individuals are IPC nurses and perform an entirely different role to that which was performed by the claimant.

Discrimination arising from disability Equality Act s.15

158. Here the claimant relies upon her sickness absence as the something arising and she argues that she was treated unfavourably because of that something arising and in this she relies on 13 separate acts.

159. These are set out above and we will not repeat them.

160. We refer to the numbering in Judge Laidler's case management summary: 6.1 - There is no evidence to suggest that any decisions taken about the claimant's training or career development were in any way as a result of the claimant's sick leave. The same can be said of 6.2. The same can be said

of 6.3 and the decision not to shortlist the claimant for the Band 7 post. We are entirely satisfied that this was conducted appropriately and that the claimant's sick leave played no part in the decision not to shortlist her.

161. As for 6.4 and the Band 6 post, once again, we are entirely satisfied that having shortlisted her and interviewed her, the reason that the claimant was not successful in being appointed to that post was because she did not do well enough at interview to merit such appointment. The decision had nothing to do with the claimant's sick leave.

162. As to 6.5, we do not consider that the decision by Ian McCabe to ask the claimant to leave work and go home on 21 September 2019 was in any way connected to her sick leave. The claimant had become extremely agitated and upset and Mr McCabe, in the tribunal's view, quite properly sought the view of Human Resources who advised him that the respondents' had a duty of care to the claimant to protect her in circumstances where she had become upset and overwrought in light of her medical conditions. They advised him that the claimant should go home for her own benefit and the preservation of her own mental health. Mr McCabe merely acceded to that advice and put it into practice. We find nothing in any of the evidence before us to suggest that his decision was based on the claimant's sick leave.

163. At 3.9.1, we do not consider that the failure of the respondent to rotate the claimant into an IPC role between 1 February 2019 and 20 October 2020 was in any way connected with her sickness absence.

164. We do not consider that the respondents failure to assist the claimant with career development opportunities in the form of placement on training modules or Masters degree relating to an infection control position between 1 February 2019 and 20 October 2020 had anything to do with the claimant's sickness record.

165. At 3.9.3, we do not consider that the respondents failure to shortlist the claimant for the Band 8 post for which she applied in November 2019, the position ultimately secured by Lorraine Roberts, had anything to do with the claimant's sickness record. She was patently not sufficiently qualified for that role a fact which she admitted herself in cross examination.

166. 3.9.3 and 3.9.4 These claims are out of time. No evidence was put by the Claimant as to whether we should exercise our discretion to extend time under s 123. They are out of time and they are dismissed as the Tribunal has no jurisdiction to hear them. In any event had they been in time we would still have concluded that the failure to short list the claimant for this role or appoint her had anything to do with the Claimant's sickness record as she was patently not sufficiently qualified for the role.

167. 4.8.1, we do not consider being placed at risk of redundancy was in any way connected to the claimant's sick leave.

168. 4.8.2, nor do we consider her dismissal was connected to her sickness. There is no evidence to support this.

169. 4.8.3, we do not accept that the claimant did not have the opportunity to secure suitable alternative employment. She deliberately by her own admission eschewed that opportunity.

170. For the avoidance of doubt we also do not conclude that the claimant is entitled to rely upon her making complaints between 27 April 2017 and 20 October 2020 concerning the working conditions in the IPC office as being a something arising from her disability. The whole of the IPC team complained about the conditions in the room for exactly the same reasons as the claimant. Those complaints were not something arising from her disability.

Reasonable adjustments

171. In respect of the claimant's claim for reasonable adjustments we refer to our findings of fact in this respect from paragraphs 81 to 92.

172. Looking at the claimant's alleged PCPs we conclude the following:

173. PCP1 – requirement to work at poorly lit and poorly ventilated workstation.

    173.1 We conclude that this does not amount to a PCP as evidence is clear that the claimant was only required to work in that office for approximately 50% of her time. She admitted this in cross examination. We conclude therefore that this cannot amount to a PCP. However, for the avoidance of doubt, even if we had concluded that it was such a requirement and did amount to a PCP, it is clear from our findings of fact that the claimant has entirely failed to establish on the balance of probabilities that this had a disparate effect upon her. There is no evidence that this placed her at a higher risk of aggravating her symptoms of anxiety depression and visual impairment. All members of the IPC Team other than the claimant were required to work in that room and they too complained about the lack of a window and ventilation. The claimant has therefore not put forward any evidence to suggest that such a PCP had a disparate effect upon her for reasons we set out in paragraph 84 and 85 of our findings of fact.

    173.2 Moreover, there is ample evidence which the claimant has freely admitted to that the respondent made every effort to accommodate her wishes and move her from that room. She was moved on several occasions and ultimately was accommodated in Wiltron House. This is something that the claimant herself in evidence admitted she was grateful for. The claimant appears to be suggesting that she should have been rotated into an IPC role but there is simply no logic in that as all IPC nurses were required to work in the very room the claimant complains of and were required to work there more fully than she herself was.

    173.3 Paragraph 86 of our findings of fact explains in summary some of the attempts the respondents made to accommodate the claimant's desire to work away from the IPC room.

173.4 Therefore, had we found that the claimant had established a PCP and that she was at a disadvantage as a result, which she has not, we would, in any event, have concluded that the respondents made all reasonable adjustments that they could to assist and accommodate her.

174. PCP 2 – the requirement to work in her substantive post.

174.1 As pointed out the claimant adds "rather than rotate to an IPC role" in her second claim. Here the respondents accept that this amounts to a PCP and the tribunal agrees. However, the requirement to do a job is something that attaches to all jobs when individuals are appointed to them. However, the claimant has not advanced any evidence to suggest that this PCP has put her at a substantial disadvantage as a disabled person in comparison with persons who are not disabled. There is no evidence before us whatsoever to support the claimant's assertion that the requirement for her to continue to work in her substantive post aggravated her symptoms of anxiety, depression and stress. Therefore, the claimant has failed to establish any disparate effect. Therefore, no duty arises on the respondent. The only adjustment the claimant wants, or wanted, is her oft repeated request to be rotated into an IPC nurse role. The Occupational Health report from February 2018 refers to her dislike for her role and her wish to become an IPC nurse but expressly states that this issue was not medical.

175. PCP 3 – the requirement to manage her workload without support of a dedicated team of surveillance nurses and administrative support as set out in the PHE protocol.

175.1 The respondents accept, and it is a matter of fact, that the claimant was required to manager her workload without the support of dedicated teams of surveillance nurses and administrative support but it is patently not true that this was contrary to the PHE protocol. Therefore the PCP alleged is incorrect. Nowhere in the PHE protocol which was before the tribunal, is it stipulated that there should be a team of surveillance nurses ands administrative support.

175.2 The claimant has failed to establish, on the balance of probabilities, that this PCP, if indeed it can be construed as a PCP, put her, as a disabled person, at a substantial disadvantage in comparison with persons who are not disabled.

175.3 In any event, the tribunal does not accept that this is a valid PCP for the reason PHE protocol has been misquoted by the claimant. Even if it was, the claimant has failed to show any evidence to support disparate effect and no duty arises.

176. The claimant's reasonable adjustment claims all fail for these reasons.

<u>The claimant's claims in harassment under s.26 EQA.</u>

177. The claimant advances four acts as amounting to harassment under s.26. These acts were allegedly perpetrated by Mr McCabe and Lorraine Williams. I refer to our findings of fact set out at paragraphs 129 to 136.

178. Dealing with those four acts in turn:

179. Act 1 (3.19.1 in Judge Laidler's case management summary) – being told by Ian McCabe on 30 January 2019 the claimant "did not quality" to undertake an IPC Training Course.

    179.1 We accept the evidence of Mr McCabe that he did not say this. We accept his evidence that he explained to the claimant that the Trust could not support the claimant in her undertaking IPC training as it was not required for her role. This could not amount to harassment.

180. Allegation 2 (Set out at 3.19.2 of Judge Laidler's case management summary) – being told by Lorraine Williams on 25 June 2020 that the claimant did not deserve to undertake IPC University Training.

    180.1 We accept Ms Williams' evidence that she did to say this at any stage. More particularly, on 25 June 2020. We accept Ms Williams' evidence that she, like Mr McCabe, explained to the claimant that she was not entitled or require IPC training, IPC training was reserved for those appointed to the role of IPC nurse. She was not an IPC nurse and was not entitled therefore to undertake such training. This therefore cannot amount to unwanted conduct and cannot amount to harassment under s.26.

181. Allegation 3 (3.19.3 in Judge Laidler's case management summary) being told on multiple occasions between 2016 and 2019 and on 20 January 2020, 25 June 2020 and on 30 July 2020 the claimant "did not require IPC training".

    181.1 The same applies as above. We accept the evidence of Ms Williams and Mr McCabe that they did tell the claimant that IPC nurse training was reserved exclusively for those who were already IPC nurses. This did not include the claimant. We conclude that this cannot amount to unwanted conduct and cannot therefore amount to harassment under s. 26.

182. Allegation 4 – (3.19.4 in Judge Laidler's case management summary) – B asked by Ian McCabe on multiple occasions 2017 to 2019 if the was "looking for work elsewhere"

    182.1 We accept Mr McCabe's evidence here that he was doing nothing more than enquiring as to whether the claimant was considering seeking IPC roles in neighbouring Trusts as she had made it clear to him that her sole ambition was to be an IPC nurse. It is therefore not surprising that Mr McCabe might bring up IPC burse roles in other Trusts. We do not conclude that this

    182.2 This cannot amount to an unwanted conduct or to harassment under s.26.

183. We would add that there nothing to suggest that any of the above comments were related to the claimant's disability. There is no evidence that it would be reasonable to consider such comments to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

184. The claimant's claims in harassment must therefore fail.

Victimisation under s.27 of the Equality Act

185. The claimant raises victimisation claims as set out above in her second and third claims. These are set out in EJ Laidler's case management summary detailed above.

186. The tribunal deals with the claimant's victimisation claims in respect of making findings of fact between paragraphs 125 and 128.

187. The claimant relies on essentially the various grievances she lodged and the presentation of her claims as the protected acts. This is not disputed by the respondents and they accept that the acts set out as being protected acts are indeed such. The tribunal agrees.

188. Dealing with those claims in turn.

189. The issuing of a grievance dated 31 May 2018 amounted to a protected act. Pursuant to that the claimant claims that because of this protected act the respondent did the following:

    189.1 Failed to shortlist her for the Band 7 IPC nurse role in June 2018 (Issue 11.1 in Judge Laidler's case management summary)

    189.2 Failed to offer her the Band 6 IPC nurse role after interview in August 2018 (Issue 11.2 in Judge Laidler's case management summary). The tribunal has dealt with this in its findings of fact at paragraph 59 in respect of the Band 7 IPC nurse role applied for in June 2018 of and has dealt with a finding of fact with respect to Band 6 IPC role applied for but not successfully pursued after interview in August 2018 at paragraph 63 of this judgment.

190. We have made a finding that having examined the evidence and heard evidence from those involved in the processes and seen the scoring matrixes and the shortlisting processes, there is no evidence at all to support the assertion that the decisions made in respect of these two applications had anything to do with the claimant's grievance raised in May 2018.

191. The claimant then relies on the protected acts of the further grievances and the issuing of her first claim and second claim as protected acts. The tribunal accepts that these are protected acts. The claimant then argues that because of these protected acts the respondent id the following:

    191.1 Failed to shortlist or offer her the Band 8 IPC lead role in November 2019 (Issue 3.26.1 of Judge Laidler's case management summary).

191.2 Failed to slot her into a vacant IPC nurse role in August 2020 (Issue 3.26.2 of Judge Laidler's case management summary)

191.3 Placed her at risk of redundancy (Issue 4.13.1o f Judge Laidler's case management summary)

191.4 Not offering her alternative employment (Issue 4.13.3 of Judge Laidler's case management summary)

191.5 Dismissing her (Issue 4.13.2 of Judge Laidler's case management summary).

192. Dealing with those in turn:

192.1 As set out in our findings at paragraph 128 we are clear that there is no evidence to support the assertion that the failure to shortlist her or offer her the band 8 IPC role had anything to do with the protected acts.

192.2 The failure to slot her into an IPC role had nothing to do with the protected act.

192.3 The decision to place at risk had nothing to do with the protected acts.

192.4 The claimant was offered alternative employment just not an IPC role. There was no failure to offer her alternative employment.

192.5 The dismissal was not connected in any way to the protected acts. The dismissal was by reason of redundancy.

192.6 For the above reasons the claimant's claims in victimisation have no merit and must fail.

<u>The claimant's claims under s.47B of the Employment Rights Act 1996 that she suffered a detriment pursuant to having made protected disclosures.</u>

193. We deal with this in our findings of fact between paragraphs 116 and 124.

194. The claimant relies on three alleged protected disclosures as follows:

194.1 14 April 2015 to Angela Thompson.

194.2 14 May 2015 to Angela Thompson, and

194.3 In June 2020 to Lorraine Williams.

195. These are set out at Issue 3.29 of Judge Laidler's case management summary. The claimant asserts that on these occasions she reported certain infractions were reportable to the national PHR Surveillance Service. Contrary to PHR protocols they had not been reported.

196. Paragraph 121 of this judgment we make a finding of fact that these do not amount to qualifying disclosures under s.43 of the ERA 1996.

197. In conclusion therefore there were no qualifying disclosures upon which the claimant can rely and her claims in respect of alleged detriments under 47B must fail and are dismissed.

Automatic unfair dismissal under s.103A ERA 1996

198. The claimant further claims that pursuant to the same alleged disclosures set out above and others as set out in paragraph 4.18 of Judge Laidler's case management summary, she was dismissed as a result.

199. The respondents accept that save for the three alleged disclosures above, which we have found do not amount to qualifying disclosures, the other disclosures set out at 4.18.3, do amount to qualifying disclosures.

200. The tribunal concludes that those disclosures set out at 4.18.3, (1)(ii), (iii), (iv), (v), (vi), (vii) could amount to qualifying disclosures.

201. However, there is no evidence before this tribunal which leads us to conclude the claimant's dismissal was in any way connected with nay of those qualifying disclosures.

202. In our findings of fact between paragraphs 93 and 115, we deal with the claimant's dismissal. Our conclusions in those findings make it clear that there is no evidence to link the dismissal or the process leading up to it with the qualifying acts set out above. For this reason the claimant's claim under s.103A must fail and is dismissed.

The claimant's claim for unfair dismissal

203. The claimant pursues an ordinary unfair dismissal claim under s.111 of the Employment Rights Act. We have made findings of fact in respect of this dismissal between paragraph 93 and 115 above in this judgment. We have made findings concerning the evidence we heard from Ms Williams ad the motivation for the reorganisation of the IPC Team. A detailed consultation paper was produced which gives ample justification for the commercial decision to be made. Tribunal's will not look behind a commercial decision unless there is obvious evidence that it is a sham masking other reasons. That does not exist here. We entirely accept Ms Williams' evidence as set out in paragraph 97 above. We reiterate this in our findings at paragraph 101.

204. We therefore conclude that the reason for the dismissal was a potentially fair reason under s.98 of the ERA, that is redundancy. We conclude that there was consultation and a proper process followed as we have set out in our findings at paragraph 105. The consultation was detailed and meaningful. We deal with this at paragraph 107 and 108 above.

205. We also find that there were plenty of attempts to find suitable alternative employment as we have set out at paragraph 113. We do not consider that it was necessary or appropriate for the claimant to be offered the IPC nurse roles that came up ion June and August 2020. The roles were advertised and the claimant could have applied for them. There is no obligation upon the respondents to offer these roles to her. We set this out in paragraph 110

above and in paragraph 111. At paragraph 112 we point out that it would not have been practical in any event for her to have been offered one of those roles, a fact which she, herself, accepted in cross examination.

206. We therefore conclude that there was a genuine dismissal by reason of redundancy. Here was a fair and detailed process including detailed and meaningful consultation. Adequate steps were taken to offer the claimant the opportunity of suitable alternative employment, which she studiously avoided. The decision to dismiss was therefore fair under s.98(4) of the ERA and therefore the dismissal was fair. The claimant's claim for unfair dismissal fails and is dismissed.

_____
Employment Judge KJ Palmer

Date: 11 January 2023

Sent to the parties on: 12 January 2023

For the Tribunal Office