Case Nos. 1403729/2018, 1401290/2019 & 1406313/2019

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**AND**	**RESPONDENT**
Miss J. Pranczk		**Hampshire County Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held by Cloud Video Platform **on Monday, the 13th February 2023,**
Tuesday, the 14th February 2023,
Wednesday, the 15th February 2023,
Thursday, the 16th February 2023,
Friday, the 17th February 2023,
and Friday, the 24th March 2023.

Employment Judge: **Mr David Harris**

Members: **Ms Louise Simmonds**
Mr Hanif Patel

Representation:

For the Claimant: **In person**

For the Respondent: **Mr Peter Doughty (Counsel)**

JUDGMENT

1. **The claimant's claims of unfair dismissal, direct disability discrimination, discrimination arising from disability, harassment, victimisation, unauthorised deductions from pay and detriment following the making of protected disclosures are dismissed.**

2. **The claimant succeeds in her claim of unpaid notice pay and there shall be judgment for the claimant in the sum of £153.62.**

REASONS

Claim No. 1401464/2018

1. On the 30th April 2018, the claimant issued a Claim Form against the respondent claiming compensation for unpaid wages going back to 2016. That claim was dismissed by the Tribunal in the claimant's absence at a hearing on the 10th August 2018 and the claimant was ordered to pay costs. The claimant made an application for the judgment dismissing her claim to be reviewed and that application was refused on the 28th February 2019 on the ground that the purpose of the application appeared to be to provide the claimant with the opportunity to introduce new claims into the proceedings.

2. The claimant subsequently appealed to the Employment Appeal Tribunal in respect of the decisions to dismiss the claim and refuse her application for a review. By an order dated the 28th July 2020, the substantive appeal was dismissed and the appeal in respect of the costs order was allowed.

Claim No. 1403729/2018

3. On the 20th October 2018, the claimant issued a second Claim Form against the respondent claiming compensation for disability discrimination.

4. The claim was considered by the Tribunal at a Preliminary Hearing on the 3rd April 2019. It was recorded by the Tribunal that the claimant was employed by the respondent as a night care assistant. At the time of the Preliminary Hearing she was absent from work due to sickness. It was accepted by the respondent that the claimant was, at all material times, a disabled person within the meaning of section 6 of the Equality Act 2010. Directions were given for the following preliminary issues to be determined at a further hearing:

   4.1 whether the claim, or any part thereof, should be struck out as an abuse of process on the ground that the disability discrimination claim should have been brought within Claim No. 1401464/2018;

   4.2 jurisdictional issues relating to time limits;

   4.3. whether the claim, or any part thereof, should be struck out or a deposit ordered on the ground that the claim has no or little reasonable prospect of success.

5. These preliminary issues were ultimately decided at a Preliminary Hearing that took place on the 30th September 2021. The claim was dismissed in its entirety on the basis of the rule in *Henderson v. Henderson* (abuse of process arising from subsequent litigation) and, in the alternative, on the ground that the claim was out of time.

Claim No. 1401290/2019

6. On the 16th April 2019, some 13 days after the Preliminary Hearing in Claim No. 1403729/2018, the claimant issued a third Claim Form against the respondent claiming compensation for ongoing disability discrimination. On the 18th April 2019, the claimant made an application to amend Claim No. 1401290/2019 to include claims of harassment under section 26 of the Equality Act 2010 and a public interest disclosure. The application to amend was granted on the 15th May 2019.

7. By an order dated the 24th April 2019, the Tribunal consolidated Claim Nos. 1403729/2018 and 1401290/2019 and ordered that they be heard together.

8. The two consolidated claims came back before the Tribunal at a Preliminary Hearing on the 26th July 2019. There was a detailed analysis by the Tribunal of the claims as they then stood and orders were made requiring the claimant to provide further information to the respondent about her claims, requiring the respondent to make some specified disclosure and then staying the proceedings pending the outcome of the appeal in respect of Claim No. 1401464/2018.

Claim No. 1406313/2019

9. On the 17th December 2019, the claimant issued a fourth Claim Form against the respondent claiming compensation for unfair

dismissal, race discrimination, disability discrimination, notice pay and arrears of pay.

10. By an order dated the 31st December 2019, the Tribunal ordered that Claim Nos. 1401290/2019, 1403729/2018 and 1406313/2019 be consolidated and heard together.

11. Following the outcome of the claimant's appeal in respect of Claim No. 1401464/2018, the consolidated claims came back before the Tribunal on the 22nd December 2020 for a further Preliminary Hearing. An extensive list of issues was identified by the Tribunal at that hearing and the case was listed for final hearing over 5 days commencing on the 10th January 2022.

12. Further directions for the final hearing and clarification of the issues were given at the Preliminary Hearing on the 30th September 2021 at which Claim No. 1403729/2018 was dismissed.

13. Ultimately, the final hearing listed for 5 days did not go ahead on the 10th January 2022. The final hearing took place over the course of 6 days commencing on the 13th February 2023. On the first day of the final hearing, the respondent made an application to adjourn on the ground that it was not ready for the final hearing to take place. That application was refused. Evidence was then heard over the course of 4 days from the 14th February to the 17th February 2023 and a deliberation day took place on the 24th March 2023 following receipt of written closing submissions from both parties.

<u>The issues at the final hearing</u>

14. By the time of the final hearing, there were two claims that remained to be determined: namely, Claim Nos. 1401290/2019 and 1406313/2019. The case management of the proceedings had

identified the following issues as requiring determination at the final hearing. The parties agreed at the start of the final hearing that this was the list of issues to be determined at the final hearing and no requests or applications were made by either party to expand upon the list of issues.

Agreed List of Issues

The claimant was employed by Hampshire County Council within Solent Mead Care Home as Care Assistant between 4 October 2021 and up until her dismissal on 19 July 2019.

The claimant brings the claims of unfair dismissal, wrongful dismissal, direct disability discrimination, direct race discrimination, discrimination arising from disability, harassment, victimisation, unlawful deduction of wages and the suffering of a detriment following the making of a protected disclosure.

This list of issues has been compiled by reference to the case management orders dated 22 December 2020 and 30 September 2021 (the latter CMO is dated 30 October 2021 in error as the hearing took place on 30 September 2021).

The claimant previously brought proceedings under case number 1401464/2018. Those proceedings and a subsequent application for reconsideration were dismissed by the Tribunal on 6 October 2018. The claimant appealed to the Employment Appeals Tribunal who dismissed the appeal on 30 April 2020.

The claimant brings proceedings under a further three case numbers: 1403729/2018, 1401290/2019 and 1406313/2019. These cases have ben consolidated by the Tribunal with the head case number being that of 1406313/2019.

The claimant brings the claims of direct disability discrimination, discrimination arising from disability and victimisation within the claim number 1403729/2018[1].

The claimant brings updating claims of direct disability discrimination, discrimination arising from disability and victimisation within claim number 1401290/2019.

The claimant applied on 18 April 2019 for amendments to claim form 1401290/2019 to include claims of harassment and detriment following the making of protected disclosures and this was granted on 15 May 2019. Judge Gray's CMO of 22 December 2020 did not include the claim for detriment following the making of protected disclosures but the parties agree that it is to be included as discussed at CMO on 30 September 2021 and it is therefore included in this list of issues.

The claimant brings updating claims of direct disability discrimination, discrimination arising from disability, victimisation and harassment and claims of direct race discrimination, unfair

[1] The list of issues fails to mention that Claim No. 1403729/2018 was dismissed by order of the Tribunal on the 30th September 2021. The parties are nevertheless agreed that the list of issues applies to the remaining extant claims: namely, Claim Nos. 1401290/2019 and 1406313/2019.

dismissal, wrongful dismissal and unlawful deduction of wages within claim number 1406313/2019.

Issues

1. **The claimant alleges that the respondent's discriminatory actions started during the claimant's first long-term sickness (October 2016-February 2017), continued throughout her employment, causing the claimant's second long-term sickness due to depression (in August 2018) and lasted until the claimant's dismissal (July 2019). The claimant alleges the respondent:**
   - **(1) acted oppressively intense and intimidating Managing Sickness disciplinary procedure amounting to harassment (January-March 2019);**
   - **(2) scheduled grievance meeting at 10pm, while the claimant off sick with depression (as a second meeting on that same day – 16 January 2019) as humiliation and harm;**
   - **(3) failed to amend worker's pattern (and sickness record) which constituted breach of contractual obligations (affected pay calculation) – Public disclosure claim (January and July 2019);**
   - **(4) did not permit return to work (01 July 2019);**
   - **(5) disregarded medical assessment that claimant fit to return to work (GP – June 2019, Occupational Health Physician – July 2019);**
   - **(6) unfairly dismissed claimant (19 July 2019);**
   - **(7) did not provide fair reference after dismissal (October 2019).**

Unfair dismissal

1. **Was the claimant dismissed?**
2. **What was the reason for the dismissal? The respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s. 98(2) of the Employment Rights Act 1996.**
3. **Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?**
4. **Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?**
5. **Did the respondent adopt a fair procedure?**
6. **If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?**
7. **The claimant alleges that the respondent:**
   - **(1) Did not act reasonably when disregarding medical advice and assessment (from GP on 28 June 2019; from Occupational Health Physician on 11 July 2019) that claimant is fit to return to work on phased return basis.**
   - **(2) Did not consider alternative role, duties and/or redeployment for claimant as advised by medical**

assessment and did not put in place any arrangements while claimant was signed off sick.

(3) Furthermore, claimant will say that during Final meeting (part 1) on 05 July 2019 Stephen Cameron (Chair of Final meeting) questioned the reason and/or grounds on which claimant raised discrimination claim. It would appear, that in his opinion, claimant did not have protected characteristic. That could indicate prejudice by the relevant decision-maker. Simultaneously, claimant was given Sickness Absence Record listing twice absence due to depression (with exaggerated number of sickness days).

Wrongful dismissal: notice pay

1. **What was the claimant's notice period?**
2. **Was the claimant paid the correct amount for that notice period?**

Disability

1. **The respondent accepts that the claimant is a disabled person for the purposes of section 6 of the Equality Act ("EA") 2010 from 1 August 2018. The respondent does not accept that the claimant was a disabled person for the purposes of section 6 of the EA prior to the 1 August 2018.**
2. **The claimant will say that it was accepted by respondent that the claimant was at all relevant times a disabled person for the purposes of the Equality Act 2010 by reason of anxiety and depression. Respondent itself stated on 25 May 2018 that claimant's manager, Tina Britton, failed to follow correct Managing Sickness Procedure, as well as failed to consider reasonable adjustments in accordance with Equality Act 2010 (on claimant's return to work in March 2017)**

Direct disability and/or race discrimination (s. 13 Equality Act 2010)

1. **The claimant describes themselves as a disabled person (by reason of anxiety and depression) and Polish.**
2. **Claimant will name as comparators her colleagues, also Night Healthcare Assistants, who have been off sick long-term, allowed to return to work on previous positions, and/or have been offered phased return to work, one of them redeployed on dayshifts: Sarah Boyce (cardiovascular problems); Kelly Bush (contagious illness – shingles); Sylwia Narloch (pregnancy related); Tara Glass-Lane (two long periods of illness, one of them due to stress).**
3. **Did the respondent do the following things:**
   - **(1) dismiss the claimant on the 19 July 2019?**
   - **(2) did not allow the claimant to return to work on 1 July 2019, in spite of positive medical assessment (with recommendation of phased return).**
4. **Was that less favourable treatment?**
5. **If so, was it because of race and/or disability?**

6. **Claimant will ask the Tribunal to consider that she was subjected to direct discrimination on basis of her disability and/or race contrary to section 13 Equality Act.**

<u>Discrimination arising from disability (s. 15 Equality Act 2010)</u>

1. **The claimant alleges that the respondent:**
   (1) **failed to provide reasonable adjustments (phased return to work), did not consider alternative employment, did not allow claimant to return to work and dismissed her due to disability-related sickness in July 2019.**
2. **If so, was that unfavourable treatment?**
3. **If so, was it because of something arising from the claimant's disability?**
4. **If so, was the treatment of a proportionate means of achieving a legitimate aim?**
5. **The respondent will say if the Tribunal finds that the respondent did treat the claimant unfavourably because of something arising from her disability that any action taken was a proportionate means of achieving a legitimate aim, namely, to ensure the claimant's health and welfare in addition to the provision of a safe and appropriate care service for service users in Hampshire.**
6. **Claimant will ask the Tribunal to consider that she was subjected to discrimination arising from disability for which there is no justification contrary to section 15 Equality Act.**

<u>Harassment related to disability (s. 26 Equality Act 2010)</u>

1. **Did the respondent do the following things:**
   (1) **act in a hostile and intimidating way at the dismissal meetings on the 5 July 2019 and 19 July 2019, including Mr S. Cameron shouting and threatening the claimant;**
   (2) **claimant will say that she felt pressurised to attend the meeting related to her grievance scheduled for 16 January 2019 at 10pm.**
   That meeting was firstly scheduled by respondent on 10 December 2018 as informal, however, in exceptionally formalised way: outside of place of work; with large employer's representation; with presence of HR adviser who put untruthful statement to ET; besides the issue of frequency of meetings (after meeting on 30 November 2018).
   Claimant sent to respondent a list of concerns (03 December 2018). Respondent conducted meeting in claimant's absence (10 December 2018) without addressing concerns, then decided to reschedule meeting. The meeting was postponed for over a month (37 days) and rescheduled by respondent on exactly 3 months and a day after the grievance date.
   (3) **The response to grievance from 15 October 2018 was severely delayed. First letter dated 07 February 2019 did not address all issues; claimant received further letter**

dated 28 February 2019 (stamp of 01 March 2019) – meaning over 4 months after grievance.

(4) Claimant will say that respondent contacted her on multiple occasions (49 times) with most of the contacts between December-March 2019. Claimant was contacted mainly by Manager, Tina Britton, and Service Manager, Stephen Kirwan; rarely by Assistant Unit Manager, Sarah Lewis and Receptionist F. Olden; also by Occupational Health and Wellbeing.

(5) Respondent scheduled meetings on: 30 November 2018, 10 December 2018, 16 January 2019 at 10pm, 01 February 2019 (rescheduled for 07 February) and 11 March 2019. Separately claimant attended three appointments with Occupational Health and Wellbeing on 16 January 2019 at 10m, 28 January 2019 and 06 March 2019; followed by 18 April 2019 with OH Physician.

(6) During all that time claimant was signed off sick with depression, awaiting and undergoing the treatment (includes antidepressants, ITALK workshops and CBT abroad). The contacts and frequency did not change/or stop, even when claimant complained on 19 February 2019 about the deluge of e-mail and letters.

(7) Claimant will say that respondent disregarded report from Occupational Health Nurse (28 January 2019) as well as sick note from GP (28 January-10 February 2019) both confirming that claimant had viral upper respiratory tract infection. In spite of medical advice, respondent scheduled and proceeded to conduct the meeting within the sickness note, in the absence of the claimant.

(8) Claimant will say that respondent falsely declared corrections of documents as completed and did not provide any confirmation as requested 'gesture of goodwill'. The meeting scheduled for 11 March 2019 was conducted in the absence of claimant.

2. Claimant will ask the Tribunal to consider that in the events described above she has been subjected to harassment contrary to EqAct 2010 s26 and 40(1) and/or direct discrimination contrary to EqAct 2010 s13 and s39(2)(d).

3. If so, was that unwanted conduct?

4. If so, did it relate to the claimant's protected characteristic, namely disability?

5. If so, did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6. If not, did it have that effect?

<u>Victimisation (s. 27 Equality Act 2010)</u>

1. Did the claimant do a protected act?

2. The protected acts – the grievance – it is agreed that the correct date of the grievance is 30 January 2018 not 9 February 2018. The

respondent denies that this was a protected act for the purposes of the 2010 Act as the respondent contends that the claimant did not raise any allegations of discrimination pursuant to the 2010 Act.

3. **The Tribunal claim dated 30 April 2018 (claim number 1401464.2018) the respondent accepts that this is capable of being a protected act for the purposes of the 2010 Act. The respondent however denies that the claimant suffered any detriment by reason of any protected acts including as referred to below.**
4. **Did the respondent do the following things:**
   - **(1) dismiss the claimant on the 19 July 2019?**
   - **(2) Claimant will say that respondent further victimised her by dismissing her on 19 July 2019 because she brought further grievances on 20 October 2018 and 16 April 2019. Reflective statement of Mr Cameron (Chair of Final meeting) includes phrases "high potential for further grievance claims" and again "further potential for additional grievance claims". It is reasonable to say, that grievances constituted a substantial/important factor in respondent's decision and had significant influence on the outcome.**
   - **(3) Claimant will also say that none of her colleagues (comparators) had been dismissed due to long-term illness and none of them brought previously a grievance or claim to the Employment Tribunal. Respondent refused to disclose documents concerning the above to conceal actions.**
   - **(4) Claimant will say that during the Final meeting respondent demanded that claimant will provide assurances to her employer, meaning as of her future 'good attendance' and also that 'problems between parties (i.e. grievances) were resolved'. Claimant's health problems were resolved and she was assessed by medical professionals as fit to return to work (phased return). Concerning other seasonal (viral) infections it would be unreasonable to request/expect claimant to come to work in residential settings while (hypothetically in future) unwell with viral infection.**
   - **(5) Concerning grievances, Mr Cameron (Chair of Final meeting) said that he can confirm that the grievances are 'resolved'. Claimant was asked to prove to respondent that parties could 'move on', as 'everything is resolved', contrary to ongoing claims. Claimant understood that as clear expectation, that she should withdraw her claims, if she wanted to stay employed by respondent.**
   - **(6) Furthermore, claimant will say that respondent victimised her by dismissing her because she repeatedly put requests to correct wrong data existing on the on-line SAP system, related to work pattern (affected pay**

calculation/wages) and sickness record (disciplinary matters – managing sickness).
The matters fulfilling Public disclosure conditions were included in grievances 30 January 2018, 15 October 2018 and 15 April 2019, as well as discussed during grievance meeting 16 January 2019, as well as Final meeting (part 1) on 05 July 2019.

(7) Furthermore, claimant will say that respondent did not provide fair reference after her dismissal. Respondent merely confirmed period of employment, job title and reason for dismissal; no other information was included. It made claimant's search for alternative employment/job much more difficult. It is reasonable to assume that that was exactly respondent's motivation.

5. If so, did the respondent subject the claimant to detriment?
6. If so, was it because the claimant had done the protected acts?

<u>Unauthorised deductions from pay</u>

1. Did the claimant work or was she available to work so that the wages paid to the claimant up to her dismissal date (19 July 2019) were less than the wages she should have been paid/
2. Was any deduction required or authorised by statute?
3. Was any deduction required or authorised by a written term of the contract?
4. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
5. Did the claimant agree in writing to the deduction before it was made?
6. How much is the claimant owed?
7. Claimant will say that unauthorised deductions (of wages) were directly related to wrong work pattern existing on the on-line SAP system. That SAP work pattern was different from work pattern (rolling rota) claimant was obliged to work, and which was held by Manager in a separate folder.
8. In claimant's opinion that also confirms ground of her Public disclosure claim under ERA 1996.

<u>Detriment following the making of a Protected Disclosure</u>

1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?
2. The claimant says she made qualifying disclosures on the below occasions in relation to there being wrong data on the IBC system regarding sickness record and work patterns. The claimant states she delivered printouts confirming existing wrong data on multiple occasions. Claimant repeatedly requested to correct data and discussed that with respondent.

(1) April 2017 – informally with Deputy Manager Iris King while notifying accident (burn to hand);

(2) 05 July 2017 – formally with Manager Tina Britton during Stage 1 Managing Sickness meeting (records);

(3) 16 January 2019 – with Service Manager Stephen Kirwan during grievance meeting at 10pm (records);

(4) 05 July 2019 – with Head of Reablement, Chair of Final meeting Stephen Cameron (records);

(5) included in grievance letters: 30 January 2018; 15 October 2018; 15 April 2019.

3. Were the disclosures of 'information'?

4. Did she believe the disclosure of information was made in the public interest?

5. Was that belief reasonable?

6. Did she believe it tended to show that:

(1) a criminal offence had been, was being or was likely to be committed;

(2) a person had failed, was failing or was likely to fail to comply with any legal obligation;

(3) the health or safety of any individual had been, was being or was likely to be endangered;

(4) information tending to show any of these things had been, was being or was likely to be deliberately concealed.

7. If the claimant made a protected disclosure, did the respondent do the below things as a result of such protected disclosure:

(1) sickness record showing exaggerated/inflated number of sickness days due to so-called glitch in IT program, which wrongly calculated one night shift as two separate days off sick. That was affecting Managing Sickness Absence (disciplinary procedure).

(2) Respondent 'added' to claimant's sickness record almost entire length of her first episode of depression (total number of shifts over 5 months). It is reasonable to assume that that would have an influence on decision-maker.

(3) Respondent deliberately concealed documents related to the issues raised by claimant and never produced any evidence of corrections.

(4) During the Final meeting on 05 July 2019 claimant delivered printout of wrong data for July 2019, after notification of her return to work was entered into on-line SAP system (employee's profile). It means, that at the time of her dismissal the data as still incorrect, in spite of being declared by respondent as corrected (the evidence was never given to claimant).

(5) That wrong data caused also unlawful deductions from wages after claimant's dismissal.

(6) As a result of claimant's repeated requests, or one of the reasons, respondent dismissed claimant on 19 July 2019. Therefore it fulfils conditions stipulated in Protected disclosure under Employment Rights Act 1996.

Remedy

Unfair dismissal.

1. The claimant does not wish to be reinstated and/or re-engaged.
2. What basic award is payable to the claimant, if any?
3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
4. If there is a compensatory award, how much should it be? The Tribunal will decide:
   (1) What financial losses has the dismissal caused the claimant?
   (2) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
   (3) If not, for what period of loss should the claimant be compensated?
   (4) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
   (5) If so, should the claimant's compensation be reduced? By how much?
   (6) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?
   (7) If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce their compensatory award? By what proportion?

Discrimination or victimisation

1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
2. What financial losses has the discrimination caused the claimant?
3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
4. If not, for what period of loss should the claimant be compensated for?
5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8. **Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?**
9. **Should interest be awarded? How much?**
10. **Claimant does not wish to be reinstated and/or re-engaged.**
11. **Claimant will also ask that respondent provide fair written references.**

The evidence at the final hearing

15. The Tribunal read and considered a hearing bundle that ran to 680 pages. During the course of the hearing, the claimant added a page to that bundle, which consisted of an email that she had sent to her then Manager, Tina Britton, on the 5th February 2019. In addition, the Tribunal also had regard to further contemporaneous documents that the claimant filed and served by email on the 1st March 2023.

16. So far as witnesses were concerned, the Tribunal heard oral evidence from the following witnesses called by the respondent:

    16.1 Mr Stephen Kirwan who is employed by the respondent as a Service Manager. Mr Kirwan's written witness statement stood as his evidence-in-chief. He was then cross-examined by the claimant.

    16.2 Mr Stephen John Cameron who is employed by the respondent as Head of Reablement. Mr Cameron's written witness statement stood as his evidence-in-chief. He was then cross-examined by the claimant.

    16.3 Mrs Karen Ashton who is employed by the respondent as Assistant Director. Mrs Ashton's written witness statement stood as her evidence-in-chief. She was then cross-examined by the claimant.

17. After hearing oral evidence from the respondent's three witnesses, the claimant gave oral evidence. Her written witness statement stood as her evidence-in-chief. She was then cross-examined by Mr Doughty.

The Tribunal's findings of fact

18. When approaching the task of making its findings of fact, the Tribunal assessed the reliability and credibility of the witnesses from whom it heard oral evidence. Regrettably, the claimant did not impress the Tribunal in that regard. There were many occasions when she refused to answer straightforward questions that were put to her by Mr Doughty and on a number of occasions, she raised her voice in objections to the questions, which were not unreasonable, that were being put to her. She struck the Tribunal as being both defensive and argumentative. Whilst making allowances for the fact that English is not the claimant's first language, the claimant's frequent failure to answer questions that were put to her appeared to the Tribunal to be deliberate. There were many occasions when the claimant had to be interrupted and asked to answer the question that had been put to her. There were also a number of occasions when the claimant was unwilling to make what appeared to be reasonable concessions. She maintained her stance that Ms Cannon had committed perjury in her witness statement to the Tribunal in the first set of proceedings but all she could point to in that regard was a paragraph in the witness statement that seemed to the Tribunal to be uncontentious. She maintained her stance that the timing of the rescheduled grievance meeting at 10pm on the 16th January 2019 was done with malicious intent on the part of the respondent when it was clear from the evidence that she was ultimately responsible for the timing through what she had said, and not said, to Mr Kirwan about the timing. She maintained in her oral evidence that Ms Britton should not have proceeded with the sickness absence meeting on the 7th February 2019 because Ms Britton knew she had a viral infection whereas the contemporaneous documents showed a different reason being given by the claimant for not attending the meeting. The claimant indicated that she was in possession of an email that supported her account but when that email was disclosed by the claimant during the course of the hearing (placed at page 357A in the hearing bundle), it did not support the claimant's account as

she said it would. In relation to the proposed sickness absence meeting on the 1st March 2019, the claimant's position in her oral evidence was that that date should not have been chosen because Ms Britton knew that the claimant would be in Poland at that time. The documentary evidence in fact showed that the claimant booked to go to Poland after that meeting had been arranged. When reflecting on the claimant's evidence, the Tribunal was driven to the conclusion that her account of events, where it differed from the respondent, could not be treated as reliable. The respondent's witnesses, on the other hand, appeared to be straightforward and doing their best to assist the Tribunal in understanding the chronology of events that had led to the claimant's dismissal. Their evidence, based on their recollections, was consistent with the contemporaneous documents in the hearing bundle. For those reasons, where there were disputes in the evidence, the Tribunal preferred the evidence of the respondent's witnesses.

19. The Tribunal's findings of fact are as follows. The claimant, who is from Poland, commenced employment with the respondent as a Night Care Assistant at Solent Mead Residential Care Home on the 4th October 2012. She initially worked a 15-hour week over a fixed 4-week rota. In September 2015, her hours of work increased to 20 hours per week. In November 2015 the claimant completed training for the role of Relief Night Care Coordinator and from early 2016 onwards she did overtime work in that role. As a Night Care Assistant, the claimant worked night shifts at the care home. The last overtime shift that she was offered was on the 29th September 2016. It was shortly after that that the claimant began to suffer with anxiety and depression. The claimant was quite open about the cause of her mental ill-health. She stated that her anxiety and depression at that time were due to difficulties in her personal life. Her mother was seriously unwell with bowel cancer, her son had moved out of the family home, she was suffering from some pre-menopausal symptoms and she had lost her dog. She also attributes some of her mental health problems to the alienation that she felt living in the UK after the Brexit referendum in June 2016.

20. From October 2016 to February 2017 the claimant was on long-term sick leave due to her anxiety and depression, which resulted in the respondent engaging its Managing Sickness Absence Policy. She returned to work in or about March 2017 and worked her basic contractual hours. She then had the misfortune to suffer some health problems, which resulted in further absences from work. She suffered a burn to her hand in April 2017 and the following month she contracted a viral infection.

21. On the 5th July 2017 the claimant attended a formal meeting regarding her sickness record. Due to her record of absences, she was issued with a stage one formal warning, which, she was told, would stay on her file for a period of 6 months. A target was set by the respondent of "no sickness for the next 3 months". If that target was not met, the claimant was informed that further formal action may be taken against her.

22. By December 2017, the claimant's Manager, Tina Britton, was becoming concerned about the claimant's ongoing sickness record. There had been further absences from work, due to poor health, in May 2017 and October 2017.

23. On the 30th January 2018 another meeting took place regarding the claimant's sickness record. The claimant had been given notice of that meeting but she did not attend the meeting. She had also been informed that if she did not attend the meeting, then the meeting might go ahead in her absence. The outcome of the meeting was that a "Stage Two" formal warning was issued for a further period of 12 months. The claimant was also informed that should her attendance not significantly improve, then consideration would be given to a "Stage Three" formal meeting, which could result in her dismissal on the ground of medical capability. The claimant subsequently appealed against the decision to issue the Stage Two formal notice.

24. On the same date, the 30th January 2018, the claimant submitted a written grievance to her Manager, Tina Britton. The grievance concerned 8.5 hours of annual leave, which had not been carried over from the claimant's 2016/17 holiday entitlement, a missing certificate from a training course, an unpaid night enhancement, wrong recording of her work pattern, wrong number of days' absence on the system, unpaid hours for attendance at management meetings regarding her sickness and victimisation due to sickness absence.

25. There was a dispute between the parties as to how that grievance was dealt with. The Tribunal had limited evidence about this particular grievance but there was plainly a dispute between the parties as to whether the dispute had been dealt with. The claimant's main concern arising from the grievance was her perception that a witness for the respondent in Claim No. 1401646/2018, Patricia Cannon, had committed perjury in a witness statement she had made in the course of those proceedings in which she stated that the grievance had been dealt with locally by management. The claimant had interpreted Ms Cannon's statement to mean that the grievance had been upheld and it was on that basis that she asserted that Ms Cannon had committed perjury in her witness statement. The Tribunal did not hear oral evidence from Ms Cannon but the Tribunal was nevertheless satisfied that the accusation of perjury made by the claimant, which she was not willing to retract in her oral evidence, was unjustified. The Tribunal was satisfied that the grievance had been "dealt with" albeit with an outcome that the claimant disagreed with. It was of concern to the Tribunal that even though it was explained to the claimant that phrase "dealt with", as used by Ms Cannon in her witness statement, did not convey that the outcome of the grievance had been favourable to the claimant, she nevertheless refused to retract her allegation of perjury. It seemed to the Tribunal to be an example, of which more were to come, of the claimant's unbending and dogmatic manner in her evidence.

26. Returning to the chronology of relevant events, in a Supervision Record Sheet dated the 1st February 2018, it is noted that the claimant was finding the night shifts very busy but she was coping

well. She was not experiencing stress at work and was managing to get enough sleep. At a further supervision meeting on the 29th March 2018, it was noted by the respondent that the claimant was feeling fit and healthy and had no health conditions.

27. The appeal against the Stage Two formal warning was heard on the 24th May 2018. The appeal was successful and the decision to issue the Stage Two formal warning was reversed. Though the appeal had been successful, it was also decided that the earlier Stage 1 formal warning, about which there had been no appeal, be extended for a further 6 months (so that it expired on the 4th July 2018).

28. On the 25th July 2018, a meeting took place between the claimant and her Manager, Tina Britton. Minutes of the meeting were to be found in the hearing bundle starting at page 318. The meeting appears to have been amicable though the claimant raised concerns that had been the subject of the grievance that she had raised in January 2018. It must be remembered that at that time, the final hearing in the claimant's first claim (numbered 1401464/2018) was due to take place on the 10th August 2018, some 16 days later. It appeared to the Tribunal that many of the concerns that the claimant was raising at the meeting on the 25th July 2018 were concerned with that claim, substantively and procedurally. The claimant was reminded by Tina Britton that the final hearing was due to take place on the 10th August 2018 and the claimant's response was to say that she could not attend that hearing because she was going away on holiday at that time.

29. On the 1st August 2018, the claimant went on long-term sick leave due to stress and anxiety. She remained on long-term sick leave until her dismissal on the 19th July 2019. The respondent has accepted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 from the 1st August 2018 onwards. Having regard to the statutory definition of disability in section 6 of the 2010 Code and the guidance given in *Equality Act 2010: Guidance on Matters to be Taken into Account in*

Determining Questions Relating to the Definition of Disability and the *Equality Act 2010 Code of Practice*, the Tribunal was not satisfied that the claimant met the statutory definition of disability prior to the commencement of the long-term sickness absence on the 1st August 2018. Though there had been periods of absence from work due to ill health, including a lengthy period of absence from October 2016 to February 2017, the Tribunal was not satisfied that prior to the 1st August 2018 the claimant had shown, the burden of proof on that issue resting upon her, that she was suffering from a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. In reaching that decision, the Tribunal had regard to the claimant's witness statement concerning the medical evidence dated the 24th May 2019 at pages 546 to 548 in the hearing bundle.

30. On the 15th October 2018, the claimant submitted a written grievance concerning discriminatory practices on the part of the respondent on the grounds of disability. The subject of the grievance was a complaint that the claimant had not been given the role of Relief Night Care Coordinator during a night shift on the 21st July 2018, that she had been banned from doing overtime work since her return to work in March 2017 and that there were ongoing irregularities in the way that her rota was organised and recorded. She ended the grievance by stating that her current health problems were "*inadvertently*" related to the incidents that she documented in the grievance that had occurred over the second half of July 2018.

31. A "Managing Sickness Absence" meeting took place with the claimant on the 30th November 2018. The record of the meeting contains the following entry:

> **Jo is off with a sick note and it finishes 20th January 2019. Phase return. How can we support Jo in coming back to work? Annual leave – would you like to take A/L? Is your GP supporting you with advice. OH – would you like to be referred for help and support.**
> **Would you want to reduce your hours?**
> **Jo's sick note runs January 2019, she would expect to return.**

> **Jo would not like to reduce her hours. Jo would benefit with phase return.**
> **Jo was phoned by OH back in 2016. She could hear other people in the background … would like to meet face-to-face but don't think it was very supportive.**
> **Jo is in contact with ITALK but feel all the support is on the phone as well … Still have annual leave to take or book any holiday but Jo would like to keep hold of it for when she gets back.**
> **Jo to come back January.**
> **Not to come in the office.**
> **In the morning will let NCC if any issues to have phase return.**
> **To keep hold of her annual leave & bank holidays.**
> **To be contacted by OH but to be supported face-to-face if possible and where they can give it (where do we meet) but is happy to be contacted by phone.**

32. On the same date, the 30th November 2018, Mr Kirwan wrote to the claimant to say that a grievance meeting had been fixed for the 10th December 2018. The claimant replied on the 3rd December 2018 stating that she would not be able to attend the meeting on the 10th December 2018 for various reasons set out in her reply.

33. Notwithstanding the fact that the claimant had informed the respondent that she would not be able to attend the meeting on the 10th December 2018, the respondent's representatives nevertheless attended at the proposed meeting. The claimant's request that Ms Cannon not attend the meeting was respected by the respondent and Ms Selby, from the HR department, attended in Ms Cannon's place. On the 11th December 2018, Mr Kirwan wrote to the claimant and requested her to provide dates and times when the meeting could go ahead.

34. On the 14th December 2018, the claimant wrote to Mr Kirwan to say that her preference for the rescheduled meeting would be "*on the date of my rota work, at my place of work*". Mr Kirwan responded by suggesting that the meeting take place at 10pm at Solent Mead Care Home, that being a time and place when the claimant would have been expected to be at work on her rota but for her ongoing sickness absence. In other words, Mr Kirwan was trying to

accommodate the claimant's request that the rescheduled meeting take place on a day of her rota at her place of work. On the 9th January 2019, the claimant queried whether the time of 10pm was a mistake. Mr Kirwan replied: "*I had meant as stated 10pm. If you would rather meet in the day following your OHU appointment that is also fine.*" It was plain and obvious to the Tribunal that Mr Kirwan was doing his best to accommodate the claimant's wishes as to the date, time and venue of the rescheduled grievance meeting. The claimant replied, stating that she was very surprised at the 10pm time for the meeting but she did not suggest any alternative time. The Tribunal was satisfied that had the claimant suggested an alternative time, Mr Kirwan would have willingly agreed to it. The Tribunal was satisfied that the reasons why the meeting took place at 10pm was because the claimant had requested that the meeting take place on a date of her rota work (bearing in mind that she worked night shifts) and because the claimant failed to offer any alternative time when invited to do so by Mr Kirwan. The Tribunal was accordingly satisfied that any part of the various claims brought by the claimant that was based upon the 10pm timing of the rescheduled meeting was misconceived and wholly without merit.

35. In early January 2019, the claimant was assessed by a psychological therapy service (ITALK) and their report was to be found in the hearing bundle at pages 533 to 534. The claimant reported that she was experiencing difficulties with her sleep. She stated, "*my main problem is work. It is causing all sorts of worries and affecting my sleep. I feel frustrated to the maximum that the claim is going nowhere. It swings between me not having any energy, and better days trying to motivate myself to do things, and overall is causing me to overeat.*"

36. The rescheduled grievance meeting went ahead at 10pm on the 16th January 2019. It was attended by the claimant, Mr Kirwan, Ms Selby, and Ms Britton. The minutes of the meeting are to be found at pages 344 to 353 in the hearing bundle. Having heard oral evidence from the claimant and Mr Kirwan about that meeting, the Tribunal was satisfied that the meeting was conducted in a fair and reasonable manner by Mr Kirwan. It was clear to the Tribunal that

Mr Kirwan did his best to address the issues raised by the claimant in her grievance.

37. In respect of the grievance that the claimant had not been given the Relief Night Care Coordinator role during a shift in July 2018, Mr Kirwan explained that the claimant had not worked in that role for a long time and that it was felt that that another person should be given that role on that shift. Mr Kirwan told the claimant that the decision to give another carer the role of Coordinator was nothing to do with the claimant's sickness absence but was an operational decision based on the experience of those working on the shift.

38. Another issue raised by the claimant concerned the way in which her pattern of night shifts was recorded on the respondent's newly introduced system, referred to as ESS Lite/IBC. The claimant's complaint was that the new system wrongly recorded her night shifts, which resulted in an inaccurate sickness absence record. It was clear to the Tribunal that this issue was of the utmost importance to the claimant. It appeared to the Tribunal that the claimant was of the view that she had been singled out by this new system for incorrectly recording her days of work and her sickness absence record. It was equally clear to the Tribunal that the claimant was simply wrong about that. As was explained by Mr Kirwan to the claimant during the grievance meeting, and in his oral evidence to the Tribunal, which was accepted, the respondent was fully aware that there was a problem with its ESS Lite/IBC system that affected all night time workers, not just the claimant. Mr Kirwan fully accepted during the grievance meeting that there had been errors in the claimant's case, as there had been with other night workers, and breakdowns in communication with the claimant. He was sympathetic towards the claimant about those problems. He fairly acknowledged that there had been problems and he wanted to hear from the claimant as to how they could move on. It was evident to the Tribunal, however, that the claimant did not accept what Mr Kirwan was saying. She was asked whether she could have a good working relationship with her Manager, Tina Britton, and the claimant replied that the less they see of each other the better. The claimant also expressed the view that the purpose of the meeting had been to put the respondent in a good light in the

context of the ongoing Tribunal claims. It appeared to the Tribunal that that was an unnecessarily cynical view to be taken by the claimant. The Tribunal was satisfied that the purpose of the meeting on the 16th January 2019 was to address the concerns raised by the claimant and find a way of ensuring that the claimant could return to work.

39. On the 22nd January 2019, Tina Britton wrote to the claimant requesting that she attend a "Managing Sickness Absence" meeting on the 1st February 2019. She was informed that she could bring a trade union representative or another employee of the respondent to the meeting. The claimant replied saying that she had a viral infection and would not be able to attend on the 1st February 2019. The meeting was accordingly rescheduled to the 7th February 2019. On the 5th February 2019, the claimant sent an email to the respondent requesting that the meeting be postponed to a later date.

40. On the 28th January 2019, the claimant was seen by Occupational Health, having been referred by the respondent. Their report concluded as follows:

> **Her fitness for work is still affected by low mood and anxiety and current viral infection.**
> **In my opinion, although her mood related condition is not fully stable yet, her symptoms appear reasonably manageable. Therefore, in my opinion, this should not be a barrier for her return to work. In my opinion she is unfit for work at present but can return to work once she recovers from viral infection.**
> **…**
> **I am expecting her to return to work after 10th February 2019.**

41. On the 7th February 2019, Mr Kirwan wrote to the claimant, setting out the outcome of the grievance meeting that had taken place on the 16th January 2019. In the judgment of the Tribunal, the letter was positive and constructive. Mr Kirwan identified the following ways forward:

Whilst I explained that there are some things that have happened which we are unable to change, we explored what could be done to resolve your concerns and the proposed solutions we discussed are summarised below.
As discussed, I believe the best way forward to resolve your workplace issues is:

- **To review your sickness absence records on SAP to ensure that it accurately reflects the days you have been unfit to attend work.** ***Post meeting note – I can confirm that this was done on 17/01/2019. Tina had intended to inform you of your record being correct on 01/02/2019 at the scheduled meeting … Unfortunately, you had been unable to attend due to sickness absence.***
- **To identify relevant training i.e. First Aid training to be arranged within one month of your return to work and attended within three months of your return.**
- **To have regular one to one/supervision meetings with your line manager to ensure that any future concerns you may have can be raised and addressed as swiftly as possible. These meetings will also ensure there is the opportunity to discuss your training needs and opportunities available to support your development. These meetings will be scheduled in advance and the dates will be provided to you on your return to work.**
- **To explore the possibility of accessing mediation with Tina by a neutral third party trained mediator as a tool for resolving communication difficulties and ensuring that a positive way forward is implemented. In order for this to have the most benefit, if in agreement, arrangements will be made prior to your return to work.**
- **To provide you with the details of support options available to you.** ***Post-meeting note – I can confirm that Tina is providing you with comprehensive details of support in relation to Mental Health & Wellbeing*****.**

I feel it is important that I meet with Tina and yourself one month following your return to work in order to review the progress of these actions to ensure that the resolutions are implemented and are working in practice. There will be a further review meeting held two months following that. I will confirm these meeting dates with you on your return to work.
If you are not satisfied with the outcome of the informal process or you feel that the proposed resolutions have not been effective when put into practice, you have the right to raise your workplace issues formally which is the next stage of the procedure …

42. On the 9th February 2019, Tina Britton wrote to the claimant to say that the "Managing Sickness Absence" meeting had gone ahead in the absence of the claimant on the 7th February 2019. In her letter,

Ms Britton refers to the Occupational Health report dated the 28th January 2019, which had stated that the claimant was unfit for work but could return to work once she had recovered from the viral infection. Since that report, however, the respondent had received a GP certificate from the claimant stating that she was unfit to return to work due to anxiety and depression. Ms Britton stated that she wished to support the claimant's return to work when she was fit to do so and that a phased return could be accommodated.

43. On the 14th February 2019, Ms Britton wrote to the claimant to say that a further "Managing Sickness Absence" meeting had been fixed for the 1st March 2019.

44. On the 19th February 2019, the claimant responded as follows to the outcome of her grievance and the outcome of the sickness absence meeting on the 7th February 2019. In the judgment of the Tribunal, the response was extraordinary.

> **It is just beyond any comprehension, that I am on the receiving end of a deluge of lies, or if you prefer misinterpretation of the facts. Therefore, I decided to respond to a multitude of emails.**

The claimant then set out her complaints regarding the outcome of the grievance meeting and the outcome of the sickness absence meeting. In respect of the grievance meeting, the claimant's position was that her grievance had not been addressed and in respect of the absence meeting, the claimant's position was that it should not have gone ahead in her absence.

45. Though it was understandable to the Tribunal that the claimant would be concerned that the sickness absence meeting had gone ahead in her absence, the Tribunal's view was that the claimant's criticism of the outcome to her grievance was unjustified. In the judgment of the Tribunal, Mr Kirwan had listened to the grievance, explained the respondent's position in respect of the matters raised in the grievance and had identified a fair and reasonable way forward. It was not clear to the Tribunal why the claimant was so

resistant to the efforts being made by Mr Kirwan to resolve the grievance. As to the sickness absence meeting, it was undoubtedly regrettable that it had gone ahead in the absence of the claimant, it was clear to the Tribunal that no decision, adverse to the claimant, had been made at that meeting and Ms Britton had acted promptly in arranging a further meeting so that the claimant could attend.

46. On the 28th February 2019, Mr Kirwan replied in detail to the claimant's criticisms of the grievance outcome. He was thorough in his approach. Each and every aspect of the grievance raised by the claimant had been dealt with, in a positive way and constructive way, by the 28th February 2019. Mr Kirwan ended his letter as follows: "*I am disappointed that you feel that the informal meeting held on 16 January 2019 has not resolved your concerns, especially as it has not been possible to implement the proposed solutions as yet due to your current period of sickness absence continuing.*". The Tribunal was in no doubt that that was a genuine and fair response from Mr Kirwan.

47. On the 1st March 2019, Ms Britton responded to the claimant's criticisms of the decision to hold the sickness absence meeting in her absence on the 7th February 2019. The letter was positive and reassuring in tone and content. It was clear to the Tribunal that Ms Britton was being supportive of the claimant and striving to do her best to ensure that the claimant would be able to return to work successfully when she was fit to do so. Ms Britton also took the opportunity of confirming that she had checked the claimant's records on the IBC system and they were now showing as being recorded correctly from her view of the records.

48. On the 6th March 2019, Mr Britton sent an email to the claimant requesting a date and time from the claimant for the next sickness absence meeting.

49. On the same date, the 6th March 2019, the claimant attended for a further Occupational Health review. The conclusions were as follows:

> **She continues to have mood related symptoms. They appear reasonably manageable though. So they should not be a barrier for her to return to work.**
>
> **On the other her work situation is a real concern to her. In my opinion, she is unlikely to return to work until the legal proceedings are complete.**

50. On the 12th March 2019, the claimant wrote back to Ms Britton, saying that her rota/absence records were still wrong and she requested that Ms Britton deliver to her a printout of the corrected data before any further meeting takes place.

51. Ms Britton replied on the 20th March 2019, stating that she had completed an IBC inquiry regarding the claimant's work pattern and would forward the response to the claimant. According to the IBC system, the work pattern was correct. Ms Britton stated that if the work pattern was not correct from the claimant's view of it, then could she take a screen shot so that it could be looked into.

52. On the 10th April 2019, the claimant wrote to Ms Britton giving her a deadline of the 12th April 2019 to provide the claimant with a printout or scan of corrected date on the IBC/ESS Lite system.

53. On the 15th April 2019, the claimant submitted a further grievance concerning persisting discrimination (on grounds of disability), victimisation and harassment continuing at her place of work. The grievance can be summarised as follows:

    53.1 the claimant complained about the time taken to deal with her grievances in January 2018 and October 2018;

53.2 the frequency of contact by the respondent with the claimant whilst she was on sick leave;

53.3 ruthless demands to attend frequent and exceptionally formal meetings;

53.4 conducting meetings in the absence of the claimant;

53.5 sending false information regarding the state of the IBC/ESS Lite records.

The claimant alleged that she had been the victim of "*persistent torment and ruthless action*" by the respondent.

54. On the 18th April 2019, the claimant underwent a further assessment with Occupational Health. The report concluded:

> **As you are well aware, Joanna has been off work since last August, diagnosed with anxiety and depression. Her illness was triggered originally by worries about the health of close family members and uncertainty over her status following Brexit. More recently, it appears to have been sustained because of her dispute with management, which is ongoing.**
> **Joanna has made various attempts to source appropriate treatment for her illness through the NHS and self-help guides. She has been treated with an antidepressant and has paid for private counselling in Poland. She plans to return to Poland next month for further treatment.**
> **There is little prospect of Joanna being able to return to work until her grievances with management have run their course. The treatment she is having in Poland should help but, in my experience, when disagreements and feelings of bitterness have become as deeply entrenched as they now appear to be, there is no medical solution to the symptoms.**

55. In response to a subject access request made by the claimant on the 1st April 2019, the respondent's Information Governance Team provided copies of the personal data that the claimant had requested to her on the 24th April 2019. The requested data concerned the claimant's grievances in January 2018 and October

2018 and all communications between Ms Britton and the HR department concerning the claimant's grievances.

56. On the 2nd May 2019, Mr Kirwan wrote to the claimant to say that the Managing Sickness Absence policy was being followed in the claimant's case and he confirmed that the claimant's IBC records were correct as far as the respondent was concerned but if the claimant felt they were incorrect, then she should provide a screen shot of the disputed records.

57. In response to a Freedom of Information request that the claimant had made on the 1st April 2019, the respondent's Freedom of Information Coordinator provided requested information to the claimant on the 3rd May 2019 concerning courses and training.

58. On the 17th May 2019 the claimant wrote to Mr Kirwan saying that she was "*deeply upset and worried that you decided to continue with the HCC tradition of the condescending and sneery tone of correspondence*". That response from the claimant was mystifying to the Tribunal. There had been nothing condescending and sneery in the tone of the correspondence from Mr Kirwan to the claimant. In the judgment of the Tribunal, it demonstrated a deep-rooted hostility and mistrust on the part of the claimant towards the respondent. The claimant repeated her request that she be provided with printouts of the corrected data from the IBC system.

59. On the 19th June 2019, Mr Britton sent a screen shot from the IBC system to the claimant in the hope that it would assist in resolving the ongoing dispute about the IBC system.

60. On the 21st June 2019, Ms Britton prepared a report relating to the claimant's absence from work. In the judgment of the Tribunal, the report was balanced and fair in its summary of the claimant's sickness absence.

61. On the 24th June 2019, a letter was sent by the respondent to the claimant informing her that a final review meeting under the Managing Sickness Absence policy had been fixed for the 5th July 2019. In response, the claimant prepared a position statement dated the 1st July 2019 which ran to 7 pages. She ended her position statement by saying, "*there is no real goodwill from management to reach any agreement and solve past problems. Whole effort concentrates on covering past mistakes and obstructing access to evidence – against legislation. That is an exercise in damage limitation.*" The Tribunal did not share the claimant's assessment of the respondent's efforts to resolve the issues that she had raised. The Tribunal was satisfied that the respondent had done all that could reasonably have been done to deal with the grievances raised by the claimant and to manage her sickness absence in a fair and responsible way.

62. On the 28th June 2019, the claimant's GP signed a Med 3 certificate, which stated that the claimant "*may be fit for work taking account of the following advice. Joanna is now ready, from the start of July, to plan a phased return to work with her employer.*"

63. The final sickness absence review meeting took place on the 5th July 2019. The meeting was chaired by Mr Cameron. The meeting started at 10am and ended at 4:05pm. The Tribunal was provided with two minutes of the meeting. The first set of minutes came from the respondent. The second set of minutes came from the claimant's covert audio recording of the meeting. The fact that the claimant felt it necessary to record the meeting secretly was, in the judgment of the Tribunal, a manifestation of her mistrust of the respondent. The meeting was thorough. It is clear that there were times when the claimant became angry, disruptive and uncooperative. One of the issues that she wanted to raise

repeatedly was her assertion that Ms Cannon had committed perjury in the first set of Tribunal proceedings. At one stage, Mr Cameron had to say to the claimant, when she had once again made reference to the perjury allegation, that he would have to adjourn the meeting unless the claimant answered the questions that he had for her. It is clear to the Tribunal that Mr Cameron did his best to review the claimant's sickness absence record and deal with the claimant's obstructive and oppositional behaviour.

64. Near the start of the meeting, agreement was reached between the claimant and Ms Britton as to the claimant's working pattern. The issue as to the alleged discrepancies arising from the IBC records was resolved at that point. Later on during the meeting, the claimant was asked by Mr Cameron to give examples of disability discrimination that she had suffered and she replied that the discrimination was related to management not agreeing to overtime, overlooking her when offering training and treating her differently from others. She made no mention of race discrimination during the meeting. Mr Cameron explained to the claimant that it appeared to him to be the case that management believed it had resolved her grievance issues but she believed that they had not. He asked how that significant difference in opinion was likely to impact her return to work and she replied that she would need mediation regarding the discrimination. Mr Cameron stated that he believed it was important for the claimant to return to work and try to resolve any ongoing issues when she was back at work. He asked the claimant if she would be able to sustain a return to work given her current view that management had not resolved her grievance issues and she replied that she had good intentions but did not have a crystal ball.

65. Following the final review meeting, which was subsequently resumed on the 19th July 2019, Mr Cameron prepared a reflective statement on the 6th July 2019. He reviewed the claimant's three grievances from January 2018, October 2018 and April 2019. He concluded that the grievances were a causal factor to the claimant's long-term sickness absence. His concern was that without satisfactory resolution of the issues, the removal of the factor causing the sickness absence could not be achieved.

66. On the 11th July 2019, the claimant underwent a further assessment with Occupational Health. The report concluded:

> **Whilst Joanna is fit for work, it is not altogether clear to me whether she plans to do so, as her position appears to be somewhat in limbo at present. She told me that she has had a 'final review meeting' on 5th July but is still awaiting the outcome. Her ET case is also ongoing.**
> **If she does return to work, then a phased return would be appropriate. I recommend that she starts with half her normal number of shifts for the first two weeks. She can then add one shift a week, until back to her normal working pattern.**

67. The final review meeting was resumed on the 19th July 2019. Mr Cameron began by saying that as far as he could see, management had done everything possible to resolve the claimant's grievances and he could not see anything further that could be done to resolve the issues. He asked the claimant whether it was realistic that she would return to work at the end of July 2019. The claimant was initially reluctant to answer that question but she finally answered that she would return to work on the 1st August 2019 when the current GP certificate ran out. She was then asked whether the pattern of absence would be repeated and the claimant's reply took the form of a question: "*do you hold me responsible for management failings?*". She disputed that there was a pattern of sickness absence and said that if she were to be tormented and harassed at work, she could not guarantee that there would not be a further sickness absence. She was finally asked whether she wanted to work for the respondent. Her reply was as follows:

> **Now you getting to the point. I explained very clearly in my letter. I planned to work for HCC as with my volunteering at Citizens Advice Bureau. I had to give up volunteering. I saw people with unpaid wages, not given notice, again and again. When I decided to apply for job at HCC, the idea was that HCC, local government etc. have HR teams, have a legal department, with a small employer there is a lack of knowledge, malicious people, people who want to abuse others and make extra money. But that's a small minority, most of cases it's simply lack of knowledge. My son was at college and a recommendation came from another advisor at Citizens Advice Bureau so there was extra pressure because you don't want to let someone down who gave you a good reference. My way of thinking was that everything/all the rules will be followed to the T at HCC and**

I won't have problems with unpaid wages etc. that was my only purpose applying for HCC. After 3 years in 2015, the saga started and now it's even worse. Over the last year I have had experiences that I didn't expect it could go so deep.
If HCC won't follow rules, then I don't.
It's like I would ask you, if HCC were doing the same thing so not following rules, not paying wages, harassing, would you still want to work for HCC? If the rules will be followed, then obviously yes.

68. At that point, the final review meeting was adjourned for a short while. Mr Cameron then returned and gave his decision as follows:

I have carefully considered all the evidence presented to me, both in the bundle of documents and verbal evidence given at the meeting by both parties. You raised concerns that were outside of this procedure that I wanted to explore further. Consequently, I considered additional information provided during my period of deliberation. I was satisfied that that all of the issues were addressed and the questions raised answered and that you were given the opportunity to raise these formally within an agreed timescale if necessary. Therefore, I am content that now the focus should be on the sustainability of the absence.
I asked you three questions: how realistic was your return, what assurances you could give me of your attendance and do you want to work for HCC. I asked these questions because the case brought forward to me was not centred on the most recent period of absence but included historical, significant levels. In your response I am reassured that there would be a return, however I was not reassured that your attendance would be sustained or that the levels of absence would not be repeated. The reason for my lack of assurance was primarily your view on HCC "not playing by the rules" for which I could find no evidence to support in my deliberation. Equally, management practice to deal with any future concerns would unlikely be viewed by you as positive, reflected in your continual escalation of repeated concerns.
The decision I have taken is to support management's argument that the levels of absence, both current and historic cannot be sustained. Therefore, my decision is to terminate your contract with HCC on the basis of medical capability and sustainability. The termination of your contract is with immediate effect with your contractual notice period paid in lieu. This decision will be confirmed in writing within the next 4 calendar days to you. You have the right to appeal against this decision. If you wish to appeal you should put this in writing to myself.
This concludes the meeting of this panel.

69. The letter of dismissal was sent to the claimant on the 23rd July 2019. The reasons for the dismissal were as given by Mr Cameron at the conclusion of the meeting on the 19th July 2019. Mr Cameron also prepared a further reflective statement on the 20th July 2019 setting out his position as to the decision to dismiss the claimant.

70. The claimant subsequently appealed the decision to dismiss her. The appeal was heard by Mrs Ashton on the 12th August 2019. The appeal was dismissed. The minutes of the appeal hearing are to be found at pages 476 to 483 of the hearing bundle. The outcome of the appeal was set out in a reasoned letter to the claimant dated the 14th August 2019. It was apparent to the Tribunal that Mrs Ashton had carefully considered the points raised by the claimant in support of her appeal.

71. On the 4th October 2019, the respondent provided the claimant with a reference in the following terms:

> **Please find below employment information about the above named individual:**
> **Start date of current/last post:** **04.10.2012**
> **Date of commencement with:** **04.10.2012**
> **Hampshire County Council**
> **Leaving date:** **19.07.2019**
> **Reason for leaving:** **Dismiss – Capability**
> **Job title:** **Night Care Assistant**
> **This reference is given without legal responsibility and must not be disclosed to any third party. While the information provided is, to the best of the organisation's knowledge, accurate, the organisation cannot accept any liability for decisions based on it.**

The law

72. When deciding this case, the Tribunal had regard to the following statutory provisions:

- Section 13 of the Employment Rights Act 1996: right not to suffer unauthorised deductions;

- Part IVA of the Employment Rights Act 1996: protected disclosures;
- Section 47B of the Employment Rights Act 1996: protected disclosures;
- Section 94 of the Employment Rights Act 1996: the right not to be unfairly dismissed;
- Section 98 of the Employment Rights Act 1996: fairness;
- Section 103A of the Employment Rights Act 1996: protected disclosure;
- Section 6 of the Equality Act 2010: disability;
- Section 9 of the Equality Act 2010: race;
- Section 13 of the Equality Act 2010: direct discrimination;
- Section 15 of the Equality Act 2010: discrimination arising from disability;
- Section 26 of the Equality Act 2010: harassment;
- Section 27 of the Equality Act 2010: victimisation;
- Section 39 of the Equality Act 2010: employees and applicants;
- Section 40 of the Equality Act 2010: employees and applicants – harassment;
- Section 136 of the Equality Act 2010: burden of proof.

73. As to the authorities, the Tribunal read and considered the following authorities relied upon by the claimant:

- *Healey v. Lancashire County Council and others* (ET v2417254/2018 and 2402589/2021);
- *First Great Western & Linley v. Waiyego* (UKEAT/0056/18/RN);
- *Chief Constable of West Yorkshire Police v. Khan* [2001] 1 WLR 1947;
- *St. Helens Metropolitan Borough Council v. Derbyshire* [2004] IRLR 851;
- *Rowstock Ltd and another v. Jessemey* [2014] EWCA Civ 185;
- *Parkins v. Sodexho Ltd* [2002] IRLR 109;
- *Douglas v. Birmingham City Council* (UKEAT/0518/02);
- *Eiger Securities LLP v. Korshunova* (UKEAT/0149/16);
- *Gilham v. Ministry of Justice* [2019] UKSC 44;
- *Jhuti v. Royal Mail Group Ltd* [2019] UKSC 55.

74. The Tribunal also read and considered the following authorities relied upon by the respondent:

- *Owen v. Amec Foster Wheeler Energy Ltd & another* [2019] ICR 1593;
- *DB Schenker Rail (UK) Ltd v. Doolan* (UKEATS/0053/09);
- *McAdie v. Royal Bank of Scotland plc* [2007] EWCA Civ 806;
- An extract from *Harvey on Industrial Relations and Employment Law* on the purpose or effect of harassment;
- *Bolton St Catherine's Academy v. O'Brien* (UKEAT/0051/15/LA);
- An extract from *Employer Code of Practice*, paras. 4.31 & 4.32.

The parties' respective cases

75. The claimant's closing submissions were set out in her detailed written submissions dated the 24th February 2023.

76. The respondent's closing submissions were set out in Mr Doughty's detailed written submissions dated the 3rd March 2023.

Decision

77. The Tribunal's decision in this case, which is unanimous, is structured around the list of issues agreed by the parties and which is set out above.

First issues in the list of issues

78. On the basis of its findings of fact, the Tribunal was satisfied that the respondent had not acted in an intensely oppressive and intimidatory manner in managing its sickness absence policy in relation to the claimant over the period from the 1st January 2019 to the 31st March 2019. In deciding this issue, the Tribunal carefully

considered the events that had occurred over that period. On the 16th January 2019 there was the grievance meeting with Mr Kirwan. There was nothing oppressive or intimidatory in the way in which that meeting was conducted. On the 1st February 2019, the claimant was requested to attend a sickness absence meeting. That was a reasonable request. The meeting was subsequently put back to the 7th February 2019 at the claimant's request. On the 28th January 2019, the claimant was seen by Occupational Health upon a referral by the respondent. It was reasonable for such a referral to have been made. On the 7th February 2019, the outcome of the grievance was produced by Mr Kirwan. There was nothing oppressive or intimidatory in the way in which the outcome of the grievance was dealt with. On the same date, Ms Britton proceeded to deal with the sickness absence meeting in the absence of the claimant. That was a surprising decision, but it cannot be said that it amounted to oppressive or intimidatory conduct by Ms Britton. A further sickness absence meeting was scheduled for the 1st March 2019, which was reasonable in the circumstances. On the 28th February 2019, Mr Kirwan responded to the claimant's criticisms of the outcome of her grievance. He dealt with that response in a considerate, measured and reasonable manner. On the 1st March 2019, Ms Britton responded to the claimant's criticism of the decision to proceed with the sickness absence meeting on the 7th February 2019 in the claimant's absence. There was nothing oppressive or intimidatory about that. On the 6th March 2019, Ms Britton requested that the claimant attend a further sickness absence review, which was a reasonable request. On the same date, the claimant attended a face-to-face assessment with Occupational Health, which was her preference as opposed to a telephone assessment. On the 20th March 2019, Ms Britton made inquiries of the IBC system, at the claimant's request, to assess the position regarding the accuracy of the recording of the claimant's work pattern. That could not be said to be oppressive or intimidatory action on the part of Ms Britton. In short, the Tribunal could not identify any action on the part of the respondent during the period from the 1st January 2019 to the 31st March 2019 that amounted to oppressive and intimidatory behaviour. In the judgment of the Tribunal, the respondent, through Ms Britton, was implementing its Managing Sickness Absence policy in a fair and responsible manner.

79. As to the complaint that the meeting scheduled at 10pm on the 16th January 2019 amounted to harassment, the Tribunal was satisfied that that suggestion was misconceived. The timing of that meeting arose from the claimant's request that it be scheduled on a day when she would be working according to her rota. Mr Kirwan diligently followed that request. When the claimant indicated that she thought a mistake had been made as to the timing, Mr Kirwan requested that the claimant provide him with an alternative time. The claimant declined that invitation. In the judgment of the Tribunal, responsibility for the timing of the meeting on the 16th January 2019 fell on the claimant's shoulders.

80. The contention that the respondent failed to amend the claimant's work pattern is similarly misconceived in the judgment of the Tribunal. The respondent openly acknowledged that there were faults with its ESS Lite/IBC system that resulted in errors in relation to the work patterns of night shift employees. It was not a problem that affected the claimant alone. The claimant, however, stubbornly refused to accept the respondent's explanations as to the shortcomings of the ESS Lite/IBC system. The respondent, in the judgment of the Tribunal, acted reasonably in investigating the claimant's concerns and did all that could be done to correct the errors on the system. Agreement was reached with the claimant on the 5th July 2019 as to the corrections to be made to her pattern of work and assurances were given to the claimant, which were unreasonably rejected by her, that the system, for the future, would correctly record her pattern of work. The only unresolved issue concerned the historical pattern of the claimant's work. The claimant wanted that to be corrected and she wanted proof that it had been corrected. The respondent's position, which the Tribunal accepted, was that it simply could not carry out historical corrections of the system as demanded by the claimant. Why the historical position continued to be of concern to the claimant was unclear to the Tribunal. The respondent had corrected the system so that the errors of the past would not be repeated. Why the claimant continued to be unhappy with that state of affairs did not appear to be a rational concern. The Tribunal was left with the impression that the claimant's unfounded hostility and distrust of the respondent was colouring her judgment when it came to her view of the respondent's actions and commitments for the future.

81. The contention that the respondent acted unreasonably or discriminated against the claimant by not permitting her to return to work on the 1st July 2019 was simply not born out by the facts. On the 28th June 2019, the claimant's GP had certified that the claimant may be fit for work after discussions with the respondent in early July to plan a phased return to work. That was not a clear indication from the GP that the claimant was fit to return to work on the 1st July 2019. There was also no indication from the claimant herself that she was ready and willing to return to work on the 1st July 2019. Her last sickness absence meeting had been on the 30th November 2018. She had been invited to agree a date for a further sickness absence review meeting after the 6th March 2019 but the claimant's position appears to have been that she would not attend such a meeting until her demands regarding the correction of the IBC system had been met. There had been an Occupational Health assessment on the 18th April 2019, which concluded that the claimant was unfit to return to work and there was little prospect of her being able to return to work until her grievances had run their course. As of the 1st July 2019, there was simply no clear evidence to indicate that the claimant was fit to return to work on that day. Furthermore, at that time the claimant was awaiting the outcome of a further Occupational Health assessment that was due to take place on the 11th July 2019. Against that background, the contention that the respondent acted unreasonably in not permitting the claimant to return to work on the 1st July 2019 was doomed to fail. The respondent showed, in the judgment of the Tribunal, that the fact that the claimant failed to return to work on the 1st July 2019 was wholly unrelated to the claimant's disability or race.

82. The Tribunal also rejected the contention that the respondent disregarded the GP's certificate dated the 28th June 2019 and the results of the Occupational Health assessment on the 11th July 2019. The Tribunal was satisfied on the facts of the case that the respondent had carefully considered all of the medical evidence that was put before it when managing the claimant's long-term sickness absence. That evidence made a material contribution to the respondent's reasonable conclusion that there was a significant risk of repeated sickness absence if the claimant were to return to work.

83. The contention regarding unfair dismissal will be considered below under that heading.

84. The contention that the respondent did not provide the claimant with a fair reference was rejected by the Tribunal. The reference, though brief, was factually accurate and not contentious. The claimant may have wished for a more glowing reference but in the judgment of the Tribunal, she had no valid grounds for complaint in relation to the factually accurate reference provided by the respondent.

Unfair dismissal

85. It was not in dispute in this case that the claimant had been dismissed by the respondent. The burden rested upon the respondent to show that the reason for the dismissal was a prima facie fair reason within the meaning of section 98(2) of the Employment Rights Act 1996. The respondent contends that the reason for dismissal was a reason related to capability as defined in section 98(3)(a) of the Employment Rights Act 1996. That is a potentially fair reason for a dismissal. On the basis of its findings of fact, the Tribunal was satisfied that the reason for Mr Cameron's decision to dismiss the claimant was his assessment that the risk of further significant absences from work in the future was high. The reason for that assessment was the ongoing dispute between the claimant and the respondent as to whether her grievances, and in particular, the grievance concerning the recording of her work pattern, had been resolved. The respondent's position, which the Tribunal accepted, was that the respondent had done all that could reasonably be done to address the grievances raised by the claimant. The only thing it could not do was carry out corrections to the historical record of the pattern of work. The claimant did not accept that. She continued to believe, unreasonably in the view of the Tribunal, that her grievances had not been addressed and that the respondent's efforts to address the grievances were a mere sham put on for the benefit of the Tribunal. Given that the claimant refused to accept that the respondent had done all that could reasonably be done to address her grievances and given that the claimant's ongoing absence from work appeared to be related to

the claimant's ongoing concerns about her grievances, the Tribunal concluded that Mr Cameron's conclusion that there was a high risk of further absences from work if the claimant were to return to work with her continuing feelings of hostility and distrust of the respondent was reasonable. Having regard to the authority relied upon by Mr Doughty in paragraph 55 of his closing submissions, the Tribunal was satisfied that the respondent had discharged the burden of proving that the decision to dismiss was for a reason related to the capability of the claimant to perform work of the kind for which she was employed by the respondent to do.

86. Having found that the reason for the claimant's dismissal was related to capability, the Tribunal next considered whether the dismissal was fair or unfair having regard to the provisions of section 98(4) of the Employment Rights Act 1996. The burden of proof on that question is neutral. In deciding that question, the Tribunal had regard to its findings of fact that the claimant had lost complete trust in the respondent being able or willing to resolve her grievance and in the respondent generally. Notwithstanding the efforts made by the respondent to address the grievances raised by the claimant in October 2018 and April 2019, which the Tribunal found to be reasonable, the claimant was not willing to accept that those efforts were genuine. The Tribunal also reminded itself that the respondent had received reports from Occupational Health that made a clear link between the claimant's long-term absence from work and the failure to have her grievance and Tribunal claims resolved. Against that factual background, and having regard to equity and the substantial merits of the case, the Tribunal was satisfied that the claimant's dismissal was fair, both substantively and procedurally. The respondent had undertaken a fair procedure in dealing with the claimant's grievances and her long-term sickness absence but there remained an undoubtedly high risk of further significant absences from work if the claimant were to return to work bearing the unwarranted grudge that she had towards the respondent. There was simply no indication that the claimant had given the respondent that she was willing to relent in her deep rooted view that the respondent's efforts to deal with her grievances and manage her sickness absence were fundamentally dishonest and designed, as she put it, to torment her. As to whether her dismissal fell within the band of reasonable responses, the Tribunal was satisfied that it did. The only alternative would have

been to plan a phased return to work and await the anticipated further absences from work due to the claimant's unresolved hostility and distrust of the respondent. The Tribunal was satisfied that the respondent was genuine in its stated aim of supporting the claimant's return to work, by implementing any reasonable adjustments that would permit a successful return to work, but the claimant unreasonably refused to accept that that was the case. In the circumstances, there were no realistic alternatives to dismissal. As to procedural issues, the Tribunal was satisfied that the respondent had fairly followed its sickness absence policy, including the final review process in which the sickness absence record was agreed and in which Mr Cameron did not dispute that the claimant was disabled, and had adopted a fair procedure in dealing with the claimant's grievances. There had also been an opportunity to appeal the dismissal and the appeal was carried out by Mrs Ashton in a fair and reasonable manner.

87. For the reasons set out above, the claim of unfair dismissal is dismissed.

Wrongful dismissal: notice pay

88. The Tribunal notes that the respondent, in its closing submissions, has conceded the claim for notice pay. In those circumstances, the claim for notice pay succeeds and there shall be judgment for the claimant in the sum of £153.62.

Disability

89. The respondent has conceded that the claimant was a disabled person from the 1st August 2018 onwards. In respect of the period prior to the 1st April 2018, for the reasons set out above, the Tribunal was not satisfied that the claimant was a disabled person prior to the 1st August 2018. In the context of the remaining claims brought by the claimant based on disability discrimination, that finding does not appear to have any significance. The remaining

claims of disability discrimination are not founded upon the claimant having a disability prior to the 1st August 2018.

Direct disability and/or race discrimination (s. 13 Equality Act 2010)

90. Section 13(1) of the Equality Act 2010 provides that 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. The protected characteristics relied upon by the claimant in her claims are disability and race. Section 13(1) of the 2010 Act requires a comparison to be drawn between the claimant and either an actual or hypothetical comparator. In the list of issues, the claimant relied upon a list of named comparators (namely, Sarah Boyce, Kelly Bush, Sylwia Narloch and Tara Glass-Lane. The only evidence about those comparators was to be found in paragraph 76 of the claimant's witness statement. The evidence was minimal and it was therefore difficult for the Tribunal to assess whether the named individuals were appropriate comparators and whether the claimant had been treated less favourably than them. Whether the claimant was relying upon named comparators or a hypothetical comparator, it was for her to show that a named or hypothetical comparator with similar levels of sickness absence to her own and with a similar significant risk of recurring sickness absence, who did not have the protected characteristics relied upon by the claimant, would not have been dismissed. In the judgment of the Tribunal, the claimant was not able to show that on the facts of the case. The Tribunal considered the reason why the treatment complained of occurred as it is required to do. The Tribunal reminded itself that the onus lay on the respondent to give an explanation for the alleged discriminatory treatment.

91. It is not in issue that the respondent dismissed the claimant on the 19th July 2019 and did not allow the claimant to return to work on the 1st July 2019. The Tribunal was satisfied that the respondent had shown that the decision to dismiss the claimant and the fact that the claimant did not return to work on the 1st July 2019 were not tainted by the protected characteristics of disability or race. The respondent satisfied the Tribunal that the reason for the dismissal was related to the claimant's capability and, in particular, the

assessment that if she returned to work there was a high likelihood of repeated sickness absence due to the claimant's ongoing lack of trust of the respondent. In respect of the fact that the claimant did not return to work on the 1st July 2019, that was, in the judgment of the Tribunal, plainly related to there being no clear evidence available to the respondent at that time that the claimant was fit to return to work on that date. As of the 1st July 2019, there remained reasonable ongoing concerns on the part of the respondent as to the claimant's fitness to return to work.

92. For the reasons set out above, the claim of direct discrimination is dismissed.

Discrimination arising from disability (s. 15 Equality Act 2010)

93. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal has to ask itself whether the respondent treated the claimant unfavourable because of an identified 'something' (the first question) and did that 'something' arise in consequence of the claimant's disability. The first issue inevitably involves an examination of the state of mind of the respondent, to establish whether the unfavourable treatment occurred by reason of the respondent's attitude to the relevant 'something'. The second issue is an objective matter and is concerned with whether there is a causal link between the claimant's disability (anxiety and depression) and the relevant 'something'. The Tribunal was satisfied that Mr Cameron dismissed the claimant because of his assessment that there was a significant risk of repeated absences from work if the claimant were to return to work. That appeared to the Tribunal to be the relevant 'something'. Was there a causal link between the claimant's disability and that 'something'? The Tribunal's answer to that question was no. There was no causal link between the claimant's disability and the relevant 'something'. The relevant 'something' was causally related to the irretrievable breakdown in trust, as the Tribunal found it to be, of the claimant in the respondent, which had

nothing to do with the claimant's disability. For those reasons, the claim under section 15 of the Equality Act 2010 is dismissed.

Harassment related to disability (s.26 Equality Act 2010)

94. It is to be noted that the claimant, in the agreed list of issues, does not rely on the protected characteristic of race in respect of her claim of harassment under section 26 of the Equality Act 2010.

95. Section 26 of the Equality Act 2010 provides that a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

96. The Tribunal found as a fact that Mr Cameron did not act in a hostile and intimidating way towards the claimant at the final review meetings on the 5th July and the 19th July 2019. The Tribunal's finding was that it was the claimant who became angry and disruptive, particularly during the course of the meeting on the 5th July 2019.

97. The Tribunal found as a fact that responsibility for the timing of the grievance meeting on the 16th January lay with the claimant. Mr Kirwan had attempted to comply with the claimant's request that the meeting be scheduled at a time when she would be working according to her rota (notwithstanding the fact that the claimant was on sick leave at the time) and when the claimant was given an opportunity to change the time, she did not take up that opportunity. The Tribunal was satisfied that the grievance meeting on the 16th January was not conducted by Mr Kirwan in such a manner that amounted to harassment of the claimant within the meaning of section 26 of the 2010 Act. The Tribunal noted that the respondent acceded to the claimant's request that Ms Cannon not attend

meetings even though the claimant's hostile attitude towards Ms Cannon appeared to be unjustified. The Tribunal was satisfied that the frequency of meetings relating to the grievance raised in October 2018 and the claimant's sickness absence was not such as to amount to harassment under section 26 of the 2010 Act. The Tribunal was satisfied that Ms Britton's decision to press on with the sickness absence meeting on the 7th February 2019 in the absence of the claimant did not amount to harassment under section 26 of the 2010 Act. The Tribunal was satisfied that Ms Britton did not proceed with the meeting on the 10th December 2018 in the claimant's absence. The Tribunal was satisfied that the delay in the outcome of the grievance raised in October 2018 did not amount to harassment under section 26 of the 2010 Act. The Tribunal was satisfied that the frequency of contact between the respondent and the claimant whilst she was on sick leave did not amount to harassment under section 26 of the Act. The Tribunal was satisfied that the respondent, when contacting, and attempting to contact, the claimant during her sickness absence was acting reasonably in furtherance of its Managing Sickness Absence policy. The Tribunal was satisfied that when meetings were rescheduled, the fact that they were rescheduled did not amount to harassment of the claimant under section 26 of the 2010 Act. The Tribunal was satisfied that the referral of the claimant to Occupational Health did not amount to harassment under section 26 of the 2010 Act. It seemed to the Tribunal to be perverse for the claimant to suggest in the agreed list of issues that the referrals to Occupational Health amounted to harassment, given that she had requested, in November 2018, face-to-face meetings with Occupational Health. The Tribunal was satisfied that the respondent did not disregard the Occupational Health report dated the 28th January 2019. The evidence showed that Ms Britton had regard to the report. The Tribunal was also satisfied that Ms Britton did not disregard the GP certificate issued in January 2019. The evidence showed the contrary. Finally, and this perhaps lay at the heart of the breakdown in trust by the claimant towards the respondent, the Tribunal rejected the claimant's notion that the respondent had made false declarations regarding the claimant's pattern of work. The Tribunal found that the respondent was fully aware of the problems that the ESS Lite/IBC system presented in relation to the pattern of work of night shift employees but, in the judgment of the Tribunal, the respondent bent over backwards trying to correct the claimant's pattern of work and reassure her that the problems of the past would not be repeated in the future.

It was regrettable that the claimant refused to recognise that the respondent understood her concerns about the recording of the pattern of work and wanted to reassure her that the problem had been addressed. In respect of the allegation that there was a meeting that took place in the absence of the claimant on the 11th March 2019, which amounted to harassment, the Tribunal was not satisfied that such a meeting occurred. It was certainly the case that Ms Britton had suggested a meeting on the 11th March 2019 but it appeared to the Tribunal that the claimant simply ignored that request for a meeting on that day.

98. For the reasons set out above, the claim of harassment related to the claimant's disability is dismissed.

Victimisation (s. 27 of the Equality Act 2010)

99. Section 27 of the Equality Act 2010 provides that a person A victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. Section 27(2) provides that each of the following is a protected act:

- bringing proceedings under the Equality Act 2010;
- giving evidence or information in connection with proceedings under the Equality Act 2010;
- doing any other thing for the purposes of or in connection with the Equality Act 2010;
- making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.

100. The respondent accepts that the grievances raised in October 2018 and April 2019 are protected acts because they raise matters of discrimination on the grounds of disability. The grievance raised on the 30th January 2018 was not a protected act because it raised no matters of discrimination on the grounds of disability or race. The respondent also accepts that the proceedings under Claim No. 1401464.2018 are capable of amounting to a protected act.

101. The agreed list of issues identifies detriments that the claimant maintains were the result of the protected acts identified above. The first detriment identified by the claimant is her dismissal on the 19th July 2019. For reasons that have already been set out in this judgment, the Tribunal is satisfied that the respondent has demonstrated that the reason for the dismissal was related to the claimant's capability and, in particular, the assessment that if she returned to work there was a high likelihood of repeated sickness absence due to the claimant's ongoing lack of trust of the respondent. In the judgment of the Tribunal the dismissal did not occur because of the identified protected acts. The Tribunal was satisfied that the claimant's requests for the work patterns on the ESS Lite/IBC system to be corrected played no part in the respondent's decision to dismiss the claimant. The respondent openly acknowledged that there was a problem with the ESS Lite/IBC system and the Tribunal was satisfied that the respondent did what it reasonably could to correct the claimant's work pattern. The Tribunal was also satisfied that there had been no victimisation of the claimant under section 27 of the 2010 Act in the way that the respondent had dealt with its disclosure obligations in these proceedings. The Tribunal was satisfied that Mr Cameron, during the final review meetings, did not demand that the claimant give assurances about her future attendance at work in a way that amounted to victimisation. Mr Cameron legitimately explored the issue as to the likelihood of repeated absences from work in the future given the claimant's undisguised lack of trust of the respondent. The Tribunal was satisfied that the respondent had dealt with the grievances raised by the claimant in October 2018 and April 2019 so far as the respondent was able and the only issue that could not be addressed, for reasons outside the control of the respondent, was the correction of historical records on the ESS Lite/IBC system, which was something that the claimant demanded. The suggestion made by the claimant in the list of issues that the respondent was seeking an assurance from the claimant that she would attend work in the future if unwell, which amounted to victimisation, was simply not born out by the facts. Lastly, the Tribunal was satisfied that the reference provided to the claimant by the respondent was not an act of victimisation under section 27 of the 2010 Act. The reference was factually accurate and could not realistically be said to amount to a detriment.

102. For the reasons set out above, the claim of victimisation under section 27 of the Equality Act 2010 is dismissed.

Unauthorised deductions from pay

103. The Tribunal was not satisfied that the claimant had demonstrated that there had been any unauthorised deductions from her pay in the period leading up to her dismissal on the 19th June 2019. It appeared to the Tribunal that the claimant, during her period of sick leave that commenced on the 1st April 2018, was paid the correct amount of sick pay up until she was dismissed on the 19th July 2019. The claim for unauthorised deductions from pay is accordingly dismissed.

Detriment following the making of a protected disclosure

104. Section 47B of the Employment Rights Act 1996 provides as follows:

> **47B Protected disclosures**
> **(1) A worker has the right not to be subject 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.**
> **…**
> **(2) … this section does not apply where-**
> **(a) the worker is an employee, and**
> **(b) the detriment in question amounts to dismissal (within the meaning of Part X).**

105. Section 103A of the Employment Rights Act 1996 provides as follows:

> **103A 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.**

106. The following provisions of the Employment Rights Act 1996 set out the definition of a protected disclosure:

> **43A 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, 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 paragraph has been, or is likely to be deliberately concealed.**
>
> **43C Disclosure to employer or other responsible person**
> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure-**
> **(a) to his employer …**

107. The causation test is different in respect of detriment and dismissal. In respect of a detriment, the test of causation is one of "material influence". In respect of dismissal, the test of causation is whether the reason or principal reason for the dismissal was that a protected disclosure had been made.

108. It is the claimant's case that she made the following disclosures to the respondent that amounted to qualifying disclosures:

- disclosures as to errors on the ESS Lite/IBC system relating to her patterns of work on the 5th July 2017 (during a sickness

absence review meeting), the 30th January 2018 (in a grievance letter), the 15th October 2018 (in a second grievance letter), the 16th January 2019 (during the grievance meeting), the 15th April 2019 (in a third grievance letter) and the 5th July 2019 (during the final review meeting);

- notifying a Deputy Manager in April 2017 that the claimant had sustained a burn to her hand.

109. Further, it is the claimant's case that she suffered the following detriments as a result of qualifying protected disclosures:

- incorrect recording of her sickness absences on the ESS Lite/IBC system that adversely affected the respondent's approach to managing her sickness absence;
- the respondent added to the claimant's sickness record during her first long-term sickness absence;
- the respondent deliberately concealed documents from the claimant relating to workplace issues that she had raised;
- the ESS Lite/IBC system continued to show an incorrect sickness absence for the claimant at the time of her dismissal;
- the incorrect sickness absence record resulted in unlawful deductions from the claimant's wages after her dismissal.

110. The claimant also contends that the reason or principal reason for her dismissal was her protected disclosures. In relation to that contention, the Tribunal reminded itself that the burden of proving that the protected disclosure(s) was not the reason or principal reason for the dismissal lay on the respondent.

111. The first question for the Tribunal to consider is whether the contended protected disclosures amounted to qualifying protected disclosures. The reporting of the injury in April 2017 was, on the face of it, a qualifying disclosure as were, in the judgment of the Tribunal, the claimant's repeated disclosures about the problems and inadequacies of the ESS Lite/IBC system.

112. The next question was whether those qualifying protected disclosures had had a material influence on the respondent that resulted in the claimant suffering the detriments that she complains of. The Tribunal approached this question on the basis that it was for the respondent to show that the detriments complained of were not the result of the qualifying protected disclosures. The Tribunal was satisfied that the incorrect recording of the claimant's pattern of work on the ESS Lite/IBC system had not had a material influence upon the respondent's approach to the implementation of the Managing Sickness Absence policy in the claimant's case. The respondent was aware of the shortcomings of the ESS Lite/IBC system and the Tribunal was satisfied that those shortcomings had not resulted in the respondent forming a mistaken view or impression of the claimant's sickness absence record. The Tribunal was satisfied that the Managing Sickness Absence policy had been fairly applied to the claimant and the incorrect data on the ESS Lite/IBC system had not resulted in the claimant suffering a detriment. In addition, the Tribunal was satisfied that the respondent had not taken any deliberate action that resulted in any errors being made over the calculation of the claimant's sickness absences. The Tribunal was equally satisfied that the respondent had not concealed any documents from the claimant. It appeared to the Tribunal that there had been proper disclosure between the parties in the course of these proceedings and it was noted that the claimant had made a subject access request and a freedom of information request of the respondent that had both been complied with. The Tribunal was satisfied that the claimant's assertion that her pattern of work continued to be wrongly recorded as of the 5th July 2019 was plainly wrong on the facts. The claimant and Ms Britton had agreed the correct pattern of work at the final review meeting on the 5th July 2019 so there was no incorrect recording of data as at that date. The Tribunal was also satisfied that the problems with the ESS Lite/IBC system had not resulted in any unlawful deduction from the claimant's wages after her dismissal.

113. As to the claimant's case that the reason or principal reason for her dismissal had been the qualifying protected disclosures, the Tribunal was satisfied that the respondent had demonstrated that that was not the case. As has been stated in this judgment, the respondent has shown to the satisfaction of the Tribunal that the only reason for the dismissal was one that was related to the

claimant's capability and, in particular, the assessment that if she returned to work there was a high likelihood of repeated sickness absence due to the claimant's ongoing lack of trust of the respondent. The Tribunal was satisfied that the qualifying protected disclosures, or the possibility that qualifying protected disclosures may continue to be made if the claimant returned to work, played no part in the respondent's decision to dismiss the claimant.

114. For the reasons set out above, the claim of detriment following the making of protected disclosures is dismissed.

____
Employment Judge David Harris
Dated: 14th May 2023

Judgment sent to parties on 08 June 2023

For the Tribunals Office