EMPLOYMENT TRIBUNALS

Claimant: Ms C O'Brien

Respondent: Cheshire and Wirral Partnership NHS Foundation Trust

Heard at: Manchester **On:** 17-24 July 2023

Before: Employment Judge Phil Allen
Ms A Jackson
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Mr A Gibson, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent breached the claimant's contract of employment by dismissing her without notice in circumstances where the Tribunal finds that the claimant had not fundamentally breached her contract of employment with the respondent. The claimant was entitled to twelve weeks notice.

2. The Tribunal would have found that the respondent failed to comply with its duty to make reasonable adjustments by not using the informal procedure and discussing the issue with hours with the claimant prior to commencing a formal investigation, which would have addressed a substantial disadvantage which the claimant suffered related to her disability arising from the practice of using a formal procedure without first discussing the issue with her. However, as the breach of the duty occurred in January 2019 (and at the latest by 31 March 2019), the Employment Tribunal did not have jurisdiction to consider the claim as it was not brought within the time required and it was not brought within such further period as the Tribunal found to be just and equitable.

3. The respondent did not breach the duty to make reasonable adjustments in the other ways alleged. The claims for breach of the duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 are dismissed.

4. The respondent did not treat the claimant unfavourably because of something arising in consequence of her disability. The claim for discrimination arising from disability under section 15 of the Equality Act 2010 is dismissed.

5. The respondent did not subject the claimant to a detriment because she had done a protected act. The claim for victimisation under section 27 of the Equality Act 2010 is dismissed.

6. The claimant was not subjected to a detriment on the ground that she had made a statutory flexible working request. The claim for detriment under sections 47E and 48 of the Employment Rights Act 1996 is dismissed.

7. The claimant was not dismissed on the ground that she had made a statutory flexible working request.

8. The claimant was not unfairly dismissed as the dismissal was by reason of conduct and the dismissal was fair in all the circumstances of the case applying section 98(4) of the Employment Rights Act 1996. The claim for unfair dismissal is dismissed.

9. The respondent did not unreasonably fail to comply with the ACAS code of practice on disciplinary and grievance procedures and, in any event, it would not be just and equitable to increase any award payable.

10. The damages for the breach of contract of found were agreed as being **£10,269.96** (being twelve weeks, multiplied by the gross weeks pay claimed by the claimant in her schedule of loss being £855.83). The respondent is ordered to pay to the claimant that sum as the remedy for breach of contract (less any deductions for income tax and national insurance contributions which it is required to make).

REASONS

Introduction

1. The claimant was employed by the respondent as a ward manager, with continuity of employment from 20 July 2009. The claimant was dismissed on 30 March 2021 with immediate effect. The claimant alleged disability discrimination (breach of the duty to make reasonable adjustments and discrimination arising from disability), victimisation, detriment on the ground that she made a flexible working request (contrary to section 47E and 48 of the Employment Rights Act 1996), unfair dismissal (both ordinary unfair dismissal and automatically unfair dismissal under section 104 of the Employment Rights Act 1996 for having asserted a statutory right) and breach of contract (regarding notice). The respondent denied the claims and asserted that the claimant had been fairly dismissed for gross misconduct.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted on 1 November 2021. At the time the claimant was represented by a solicitor. The issues in the claim were identified at that hearing, subject to the need for the claimant to

provide some further particulars of her claim. A list of issues was appended to the case management order (46). The claimant's solicitors provided the further particulars sought in a document (55).

3. At the start of this hearing, it was confirmed that the issues to be determined were those outlined in the two documents when read together, and (subject to the application to amend which is addressed below) the parties confirmed that they were the issues. Whilst nobody had prepared a document which collated the two, the issues were clear when the two documents were read together.

4. The list had included, at issue 7, whether the claimant had a disability at the relevant time? The respondent accepted that the claimant had a disability at the relevant time as a result of anxiety and depression and/or PTSD. As a result that issue did not need to be determined.

5. At the start of the hearing, it was confirmed that the Tribunal would determine the liability issues in the claim first, with the remedy issues to be determined only if the claimant succeeded. It was however proposed to the parties and accepted by them, that the following issues would be dealt with at the same time as the liability issues: whether the respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures and, if so, whether any award should be increased as a result; *Polkey* (that is whether the claimant would have been dismissed in any event, or what was the chance that she would have been); and contributory fault.

6. The list of issues as considered by the Tribunal when determining liability issues, is appended to this Judgment.

Procedure

7. The claimant represented herself at the hearing. Mr Gibson, solicitor, represented the respondent.

8. The hearing was conducted predominantly in person with both parties and almost all witnesses attending at the Manchester Employment Tribunal in person. On the first day the claimant applied for one of her witnesses, Mr Woodward, to be able to give evidence remotely by CVP. The respondent did not object and therefore arrangements were made for the hearing to be conducted as a hybrid hearing (in part by CVP) on the day when he was due to attend (Thursday 20 July 2023). That day was also the day of a train strike and one member of the panel (Ms Jackson) also attended remotely on that day (only), to enable the hearing to go ahead on that day. Neither party objected to her attending in that way on that day.

9. A bundle of documents was prepared in advance of the hearing. The bundle was in two parts. The first part ran to 877 pages. The second part had 71 pages. The second part was described during the hearing as the supplemental bundle and consisted of documents which the claimant wished to be included in the bundle. Where a number is referred to in brackets in this Judgment that is a reference to the page number in the first part of the bundle, save where it is prefaced with an "S" which shows that it is a page in the second part of the bundle (or supplemental bundle).

10. In advance of the hearing the claimant had written to the Tribunal asking that a revised disability impact statement be considered which detailed the impact upon her of rheumatoid arthritis (in addition to the impact upon her of the other disabilities relied upon and accepted as being disabilities). That revised statement was included in the bundle (S1). At the start of the hearing, it was confirmed with the claimant why it was that she wished to rely upon this additional impairment. It was confirmed that she wished to do so in order to allege that the respondent had breach its duty to make reasonable adjustments by applying the PCP to her of requiring her to travel to the Trust to attend investigation meetings in-person on 5 March 2020 and 30 June 2020. It was identified that the claimant's original particulars of claim, which she personally had drafted, had included reference to rheumatoid arthritis, but none of the documents in which the claimant's case had been recorded or clarified contained the allegation that being required to travel to investigatory meetings was a breach of the duty to make reasonable adjustments. The Tribunal accordingly confirmed that the claimant required leave to amend her claim, in order to be able to pursue that particular complaint. It was agreed that the application would be considered on the afternoon of the first day of hearing after the Tribunal had read the papers.

11. In the afternoon of the first day, the claimant made her application to amend her claim and the respondent opposed the application. Each party made submissions. The Tribunal decided that the decision would be considered in the remainder of the afternoon (alongside the reading being completed, as the Tribunal had not completed its reading in the morning) and the parties would be informed at the start of the second day (Tuesday 18 July). At the very start of the second day the Tribunal informed the parties that the application to amend was refused and reasons were provided verbally explaining that decision.

12. The reasons as explained at the time were as follows:

a. The amendment sought was to add a further claim for breach of the duty to make reasonable adjustments, relying upon rheumatoid arthritis as the disability. The PCP contended was requiring the claimant to travel to attend investigatory meetings (on 5 March and 30 June 2020). The substantial disadvantage suffered was the need to travel. The adjustment sought, was that the meetings should have been held virtually;

b. As the claimant contended, rheumatoid arthritis was referred to in the original particulars of claim drafted by her (16). However, the allegation that it would have been a reasonable adjustment to conduct the investigatory meeting face to face, was not. Neither the impairment nor the adjustment were detailed in the amended particulars of claim prepared by the claimant's solicitors (27). Neither were identified at the case management preliminary hearing by Employment Judge Sharkett at which the claimant was professionally represented (33). Most importantly, neither were part of the further particulars which were provided to clarify the disability discrimination claims being brought, provided by her solicitors as they had been ordered to do (55). The Tribunal decided that leave to amend was required.

c. In considering the application to amend, the Tribunal considered the factors set out in the well know *Selkent Bus Company* case and those set out in the Presidential Guidance on general case management (the relevant parts of which had been read to the parties prior to the submissions on the application). The Tribunal considered the balance of prejudice in allowing the amendment when compared to refusing the application. The key factors considered are set out at (d) to (h) below.

d. The amendment sought was a substantial amendment relying upon an additional alleged disability and raising a new complaint.

e. The application had been made well outside the primary time limit for such an application to have been made. The application had been made (at the earliest) in December 2022. The last alleged breach of the duty relied upon occurred on 30 June 2020. A claim should have been entered (or ACAS early conciliation commenced) by the end of September 2020. The application to amend was made over two years outside the primary time limit.

f. The application had been made very late in the proceedings. The claimant had been represented by solicitors at the preliminary hearing (case management) on 1 November 2021 when it had not been identified. It had not been included in the further particulars provided. There was no particular reason why it had been made so late, save that the claimant had said that she had only identified that it was not included in the claims identified when she made the application.

g. The prejudice of refusing the application for the claimant was significant as she would be unable to pursue a potentially meritorious claim. However the claimant was already pursuing a great many claims which would need to be determined including all of the claims identified at the preliminary hearing and in the further particulars prepared by her solicitors on her behalf. That lessened the potential prejudice and was a significant factor. The claim for which amendment was sought was not the most significant of the claims being asserted and was not at the heat of her complaints, as evidenced by the fact it was not an adjustment which had been raised or recorded before.

h. For the respondent there would be prejudice in allowing the amendment. It had prepared for a six day final hearing on the basis of the case as pleaded. There was prejudice in it being faced with having to address a new claim at the hearing without the opportunity to have prepared (which may involve additional witnesses).

i. On balance the Tribunal’s decision was that the application to amend was refused, taking account of and balancing all the factors identified. That did not mean that the claimant could not rely on the rheumatoid arthritis when arguing for remedy (on the basis that she contended that the respondent’s discrimination had caused that condition).

13. The Tribunal received witness statements from the following witnesses called by the respondent: Ms Joy Fenna, the head of clinical services; Mr Jeffrey Johnston, the head of operations; and Mrs Elizabeth Harrison, a non-executive director of the respondent. Witness statements were provided for the following witnesses for the claimant: the claimant herself; Mr Alan Woodward, previously ward manager for the respondent; and Mrs Aeron Gates, previously specialist occupational therapist for the respondent. The Tribunal read all of the witness statements during the first day of hearing, together with the documents included in the bundle which were referred to in their statements. The claimant clarified that the page references in her statement were incorrect as the bundle provided to the Tribunal differed from the bundle which she had been provided, and she provided an email to the Tribunal which confirmed the page numbers for pages which should be read alongside her statement.

14. The case management order had included a draft proposed timetable for the hearing. In that timetable it had been recorded that the respondent's witnesses would give evidence first. That was discussed briefly with the parties on the first day and it was agreed that the order proposed would be followed (one reason being that it fitted with the date upon which the claimant's witnesses were available). The respondent also agreed that Ms Fenna would not be present at the Tribunal when Ms Gates gave evidence, which was something it was understood she had requested.

15. Each of the respondent's witnesses gave evidence, were cross-examined by the claimant, and were asked questions by the Tribunal. The claimant then gave evidence and was cross-examined, before being asked questions by the panel. On Thursday 20 July 20203 the claimant's two other witnesses attended and gave evidence, being cross-examined (briefly) by the respondent's representative and being asked questions by the panel. Mr Woodward attended remotely and Mrs Gates attended in person.

16. During the hearing the Tribunal made certain reasonable adjustments as required and identified for the claimant. The lighting was adjusted. Additional breaks were taken when required or requested.

17. After the evidence was heard, each of the parties was given the opportunity to make submissions. The claimant provided a document which contained her submissions and relied upon that document. She was also asked a couple of additional questions. The respondent's representative made his submissions orally. Following his submissions, the claimant responded to the submissions which he had made.

18. The Tribunal took the remainder of the fourth day, all of the fifth day and some of the sixth day to consider and reach a decision. The parties had been due to return at 10 am on the sixth day for the liability decision, but that time was changed to allow further time for deliberations to conclude and Judgment was delivered verbally at 2pm on the sixth day. After Judgment was delivered the claimant requested written reasons and therefore these written reasons have been prepared and provided.

19. Following the decision being given, the remedy for breach of contract was identified and agreed with the parties. That remedy and the reasons for it are also included within this Judgment.

Facts

20. The claimant was employed by the respondent as a ward manager. At the time of the relevant events she was responsible for the Indigo Ward at Ancora House, a twelve bedded inpatient mental health ward caring for young people with mental illness. It was one of two adjoining wards at Ancora House. In her role the claimant managed a number of employees. There was no dispute that, at least for the majority of her duties, the claimant needed to be present on the ward so that she could support the staff and patients and address issues which arose. The claimant's office was located behind the nurse's station on the ward.

21. There was no dispute that at the relevant time the claimant had anxiety and depression and PTSD.

22. The claimant's contract of employment set out notice periods which applied based upon age and length of service (90). The maximum potential contractual notice period was twelve weeks. The contract required the claimant to work 37.5 hours per week exclusive of meal breaks.

23. The respondent operates various policies. The one policy which the Tribunal particularly considered was the disciplinary policy (288). That included an informal stage (294), which said that initial management concerns about misconduct would normally be raised in an informal discussion between manager and employee prior to any formal action being considered (albeit the policy did say that the exception to that applying was in circumstances of possible gross misconduct). Examples of misconduct and gross misconduct are included (304) (poor timekeeping in the former; and theft fraud or deliberate falsification of records in the latter). The guidance for appeal panels set out the purpose of the appeal panel (310) and the limited questions they are asked to determine (as Mrs Harrison emphasised when asked about the appeal panel's approach in this case).

24. Earlier in her employment the claimant undertook her 37.5 contracted hours per week spread over four days. The claimant lived some distance from the ward and to reduce total travelling time in the week had a strong preference for working fewer days and also starting work earlier in the morning (at 7 am), as if she had to travel during the peak period the travel took considerably longer. After 2013 the claimant worked five days per week.

25. The claimant in her evidence referred back to an investigation which was undertaken in 2013. The Tribunal did not need to determine anything about that investigation or its outcome. However, the claimant placed emphasis upon an occupational health report provided to the respondent during that investigation (810). That report provided detail about the claimant's mental health issues. The Tribunal was also provided with a letter sent from the claimant's consultant psychiatrist to the respondent's occupational health physician on 6 July 2011, which included considerable detail about the claimant's medical history and the reasons for it (S11). The Tribunal was also provided with the transcript of an investigatory interview with the claimant on 5 September 2013 (S16) in which the claimant provided some information about the causes of, and triggers for, her disabilities with reference to an abusive relationship and the use of CCTV (S24). It was not in dispute that the records of that previous investigation were no longer held by the respondent at the

time of the matters under consideration in 2019. It was the claimant's evidence that the member of the HR team involved in that investigation (who was recorded in the notes) also supported the disciplinary investigation undertaken in 2019, and she therefore contended that she would have been aware of what had been said at the time. The Tribunal did not hear from the HR advisor, but accepted that an HR advisor would be unlikely to recall that detail from an interview many years before.

26. The claimant suffered a serious assault in 2017. She was absent from work from 4 November 2017 until 5 February 2018 as a result of the assault and the ongoing trauma suffered.

27. At that time the claimant was line managed by Julie Williams. It was clear that the claimant and Ms Williams had a good working relationship and the claimant felt supported by her. On her return to work, a phased return was agreed. What was agreed was recorded in a letter from Ms Williams (251). Reasons for the phased return were set out in that letter. In fact, the claimant continued to work the compressed hours agreed for the phased return for some time afterwards, working three long days and one shorter day each week. It was the claimant's evidence that she agreed with Ms Williams that she could work her full time hours over four days, partly because of her ongoing PTSD for which she was receiving therapy and also because of the length of her daily commute.

28. Ms Fenna became the claimant's line manager in May 2018. She was the head of clinical services. It was clear that the claimant's working relationship with Ms Fenna was not the same as the relationship which she had previously had with Ms Williams. The claimant gave evidence about comments made by Ms Fenna to her much earlier in 2015 about the claimant attending a funeral. Ms Fenna could not recall what was alleged. The claimant also gave evidence about an occasion when she said Ms Fenna had physically man-handled her and moved her like a child (as she described it), which Ms Fenna also could not recall.

29. In May or June 2018 the claimant disclosed to Ms Fenna some details about the trauma she had suffered. It was in dispute exactly what she disclosed and when. It was clear that the claimant did not feel that Ms Fenna's response to what was said had been supportive. The claimant described her as being invalidating and dismissive.

30. Ms Fenna spoke to the claimant about her hours of work. The claimant's evidence was that in June 2018 Ms Fenna indicated to her that she wanted her to work five days a week. Ms Fenna's evidence was that she informed the claimant in September 2018 that at some point Ms Fenna would like her to re-commence working five days per week. In any event, on 3 September 2018 Ms Fenna emailed the claimant asking about her shift start as the rosters said 7 am when Ms Fenna thought the claimant started at 7.30 am (253). The claimant responded to say that she started work at 7 am and worked until 17.30.

31. Following receipt of Ms Fenna's email about working hours and on the same day, the claimant made a flexible working request (254). The letter set out the recent history of the claimant's hours of work, stating that she had a non-statutory arrangement in place agreed with Ms Williams which had been in place since 5 February 2018. The arrangement was stated as having supported the claimant with

ongoing work regarding trauma following the assault. The claimant said it also afforded her increased time with her family thus supporting a healthier work life balance (and the letter referred to the claimant's partner's health issues). The claimant also explained that due to the distance that she lived from work, it also reduced the stress associated with extensive time on the road. She explained that she believed there had been no issues raised that the reduction in her days had detrimentally impacted upon core business. She stated that her current working pattern was working four days between Monday and Friday, with three ten hour days and one seven and a half hour day. She said on her long days she worked 7-17.30 and on the shorter day she worked 7-15.00.

32. The claimant raised with Ms Fenna the use of certain terminology used by her which she considered inappropriate, such as use of the word "*crackers*". That was recorded in a supervision note dated 5 September 2018 (258). In doing so, the claimant accorded with what was said in the relevant procedure by raising matters initially informally with her line manager. At the same meeting the flexible working request was acknowledged. In a later supervision meeting on 22 October 2018 (108) the claimant raised with Ms Fenna her ways of speaking to her and the note recorded her raising her demeaning and derogatory tone.

33. On 19 October 2018 an issue on the ward during a safety walk around was identified by Ms Fenna as being a risk issue, because a television wire was exposed which was considered to represent a risk. The claimant did not agree that it was a risk. When it was raised with the claimant by Ms Fenna she swore at Ms Fenna. In her own email the claimant described herself as having lost her temper. Ms Fenna asked the claimant to come to her office to discuss it later and the claimant refused to do so.

34. The claimant emailed Ms McCormack (the head of operations) on 19 October (204) in an email headed "*Issue*". She recounted what had occurred and said her concerns were about being micro-managed by Ms Fenna and spoken to in the company of others. She referred to Ms Fenna as having clumsiness with her interactions and tone and manner. She stated that she did not come to work to be subjected to abuse by her colleague or feeling physically threatened. She referenced that Ms Fenna was aware that the claimant had been attacked and that she would have expected her to display more sensitivity or skill in her approach. She ended the email by saying that she wished to raise the matter formally. The email did not allege discrimination or harassment, nor did it allege that what had occurred was because of a protected characteristic (albeit it did reference that greater sensitivity would have been expected because of her trauma and recent assault).

35. The claimant was invited to a meeting to discuss her flexible working request (260). The meeting took place on 15 November 2018. It was attended by Ms Fenna, the claimant, the claimant's RCN representative, and a person from HR. The Tribunal was provided with an outcome letter of 28 November 2018 (261) in which Ms Fenna stated that she was unable to agree to the claimant's formal request. The reasons were given, including the summary that Ms Fenna did not believe that the claimant working her hours over four days was sustainable in the long term due to the impact it had and would have on the service. The letter concluded by stating that the claimant's normal working hours of 7.30-3.30 Monday to Friday would recommence on Monday 31 December 2018. In her evidence to the Tribunal Ms

Fenna stated that there had been instances with the handover of information which could have adversely affected patient care (albeit no documentation to support the evidence or specific examples, were provided).

36. The claimant appealed against the outcome of the flexible working request in an email of 7 December 2018 (264). In her appeal the claimant stated that she needed the additional time she had away from work to maintain equilibrium and keep herself mentally healthy. She also referenced PTSD, domestic abuse and therapy. She stated that her motivation was increased and due to less time spent commuting she was more energised and effective in her role.

37. The flexible working appeal was heard by Ms McCormack (the head of operations) on 7 January 2019. The claimant attended and was supported by her RCN representative. An outcome was provided in a letter of 17 January 2018 (265). Ms McCormack rejected the claimant's appeal. She cited detrimental impact on quality, detrimental impact on performance/service delivery, and lack of work during the periods the claimant proposed to work, as being the reasons for her decision. In the decision letter, Ms McCormack's account of what had been said in the meeting by the claimant was that she had confirmed that her therapy had been completed and there was no reasonable adjustments required or advised by the occupational health unit, however the claimant felt that by having a day off in the week it helped her wellbeing, together with being with her partner, family and being able to attend the gym, all supported this.

38. Ms Fenna subsequently agreed with the claimant that she could work 7.30 am to 3.30 pm five days a week, to support her, since the claimant had identified that she would struggle with a later start.

39. It was Ms Fenna's evidence that, in around January 2019, she was told that other members of staff were not happy with having to sort out staffing issues on the ward that the claimant managed. She said that she was told that this arose because the claimant was not around at the start of her shift. She referred to two occasions when she was made aware that the claimant was not on the ward at the time when she should have been working. The Tribunal was not provided with any document which recorded the issue being raised at the time. The disciplinary investigation report did not address or document (at least clearly and save for an interview with Ms Fenna) the issues which had led to the investigation and who raised them about what. In answering questions at the Tribunal, Ms Fenna explained that one of the people who raised issues was Mr Woodward (the ward manager on the other ward), who had raised issues with the matron. When he was asked about this when giving evidence, Mr Woodward could not recall any such issues being raised with (or by) him.

40. Ms Fenna did not speak to the claimant at the time about the issues which had been raised.

41. It was Ms Fenna's evidence that she had sought advice from a member of HR who had said she should undertake a fact-finding exercise. It was also her evidence that once she had done so and it was identified as a potential fraud issue, she was advised that she should not speak to the claimant about what was being investigated. It was Ms Fenna's evidence that the matter was considered as being a

potential fraud investigation from January to March 2019. The Tribunal was not provided with any documents which detailed any exchanges about the fraud investigation or the need for the claimant not to be told about it.

42. Ms Fenna obtained access to CCTV records and obtained the log of the claimant's access and the electronic shift rosters (which recorded the hours worked). The respondent operated a fob system which recorded each occasion when the fob was used to access parts of the site, including the ward (albeit it would not have recorded access if someone followed another member of staff onto the ward). The claimant was provided by email with the dates when CCTV access was provided (214). That recorded that the initial request for access was made on 2 January 2019 (Ms Fenna could not recall whether that would have been herself personally or an HR team member, but accepted that would have been the start of the fact-finding). Ms Fenna also accessed the CCTV on 9, 16 and 17 January, 27 February and 4 and 5 March 2019. It was Ms Fenna's evidence that had either of the systems evidenced that the claimant had been working the hours she had indicated on the electronic roster than an investigation under the Trust's disciplinary policy would not have been required. However, the records did not show that the claimant was present on the ward and working at the times for which she was rostered to work and recorded as having been working.

43. In March 2019 the claimant Ms Fenna exchanged emails about start times and working hours (169).

44. In late March 2019 the claimant suffered a serious health issue which resulted in her requiring an operation and, as a result of which, she told the Tribunal she had nearly died. The claimant was absent from work on ill health grounds from 31 March 2019 until September 2019. It was clear that the ill health event had a serious impact upon the claimant. The claimant's evidence was that, even after her return to work, it also had an impact upon her memory and ability to recall events.

45. During the period of absence Ms Fenna decided not to commence a formal disciplinary investigation whilst the claimant was absent, because she was off on long-term absence.

46. In an occupational health referral form of 17 July 2019 (S37) Ms Fenna stated "*no*" in answer to a question asked about whether there was a grievance, disciplinary or investigatory process underway and was specific advice needed about fitness to attend a meeting. When asked about this, Ms Fenna explained that the formal disciplinary investigation had not commenced.

47. It was agreed with the claimant that she should return to work initially to a separate location closer to her home. That was initially intended to be for a short term. The claimant returned on 16 September 2019. She initially undertook a two week phased return to work and the claimant then took some annual leave shortly after her return. In fact, following the disciplinary investigation being undertaken, the decision was made that the claimant should continue to work at the alternative location during the investigation. After her return from ill health, the claimant never actually returned to undertaking her role on the ward. She also agreed with the local management at the other location that she should work her hours in four days per

week (her position there was not that of ward manager, so different considerations applied).

48. At a meeting on 7 October 2019 Ms Fenna informed the claimant that a formal investigation would be undertaken into allegations that the claimant had failed to work her weekly contracted hours and had claimed overtime for hours not worked. A letter confirming the position was sent on 11 October (312).

49. The commissioning manager for the investigation was Ms Fenna. That was recorded in a terms of reference document dated 14 October 2019 (249), in which it was also said that the investigation would start on 14 October and the aim was to have it completed by 13 January 2020. As Ms Fenna was required to be interviewed as part of the investigation, the commissioning manager was changed (after the investigation had been commissioned) to Ms Sturgess. She was identified on 16 December 2019 and wrote to the claimant to confirm the change on 31 January 2020. An updated terms of reference was prepared on 21 February 2020 (247) which said the aim was to have the investigation completed by 31 May 2020. That aim was clearly missed by some considerable extent.

50. On 21 January 2020 the claimant emailed Ms Watts asking if she was available for a catch up (210). Ms Watts did not respond. It was the claimant's intention to raise matters with her.

51. During the early part of the Covid pandemic the investigation was put on hold. It resumed on 19 June 2020 (320). It was common ground that the pandemic accounted for three months of the delay in the disciplinary investigation being completed.

52. On 14 May 2020 the claimant emailed Ms Fenna and others with an email headed "*grievance*" (192). The claimant had obtained copies of her occupational health records. Within those records an email had been identified from a member of the HR team from 14 May 2019 in which it was stated that "*we*" were thinking that the claimant had potentially been deceptive in her presentation of her health issues. There was no genuine contention that the claimant had been anything other than seriously unwell during the relevant period.

53. On 7 July 2020 Mr Sheldon, the head of HR, wrote to the claimant responding to the grievance raised on 14 May 2020 (193). He confirmed that he had made the member of the HR team aware of the inappropriate nature of some of the comments made. He confirmed that the emails would be removed from the claimant's occupational health record. He apologised for any distress caused.

54. On 9 July 2020 the claimant wrote to the respondent with an information rights concern regarding the use and retention of the CCTV on the ward (194). On 10 August 2020 Mr Sheldon wrote to the claimant responding to the concern raised (201). He concluded, in summary, that he did not uphold the claimant's concerns. The Tribunal was shown some related documents, such as the information provided about the use of CCTV on the ward. It was not a matter for this Tribunal to decide whether or not the CCTV should have been accessed and considered as part of the investigation, as that is a matter for the Information Commissioner. Nonetheless, to the extent relevant and based upon the documents provided to it, the Tribunal's view

was that the CCTV should not have been used as part of an investigation into the working hours of a member of staff as the employees had not been informed that the CCTV would be used for that purpose (it not being in dispute that the claimant and other employees were aware that the ward was covered by CCTV which could and would be used for issues arising from and relating to certain patient issues).

55. On 18 August 2020 the claimant emailed Ms Watts with a concern regarding dignity at work. The concerns were set out in a letter attached to the email (211). The dignity at work complaint raised: the reference in the occupational health referral which suggested the claimant was potentially being deceptive; the fact that Ms Fenna had called the claimant "*crackers*"; the occasion when the claimant said that Ms Fenna had physically handled the claimant; an allegation that Ms Fenna had referred to the claimant as looking like a scarecrow; the comment about funerals in 2015 which it was alleged Ms Fenna had made; and the fact that the claimant's personal and work phones had been taken (before being returned) at a coaching event. The letter referred to the impact which the claimant believed the events had had on her mental health and stated that she felt targeted and subjected to undue harassment. It was Ms Fenna's evidence that, as she understood it, the grievance was later put on hold at the claimant's request.

56. The investigation report recounted that the use of CCTV footage in the investigation caused significant delays (220). Between 13 July and 13 August, whilst the complaint about its use was outstanding, the footage was unable to be viewed by the investigator.

57. Ms Davies, who undertook the investigation, was the Lead Nurse for Infection Prevention and Control and her report stated that she was heavily involved in the covid-19 response and service demands had impacted upon the completion of the investigation.

58. As part of the investigation, the claimant was interviewed on four occasions, the first two at face to face meetings and the second two remotely. The interviews were on 5 March, 30 June, 8 July and 11 September 2020. At the second interview, on 30 June 2020, the claimant was shown the CCTV footage. The claimant's evidence was that this was triggering for her as a result of the background to/causes of her mental health issues. At that meeting the claimant was only accompanied by her trade union representative remotely, and she evidenced how difficult she found the meeting and the journey home from it.

59. The Tribunal was provided with the notes of each of the interviews with the claimant, which were included in the investigation report as appendices (324). It is not necessary to recount all that was said, albeit that it was considered by the Tribunal. In general terms the claimant did not provide explanations for the specific facts that she was not on the ward on the occasions identified. She provided some general reasons such as when she took her breaks (332) and making and taking calls from home (336). The claimant did not contend that her impairments meant she was unable to work a full shift. She did refer to working four days per week so that she could have a wellness day (339).

60. As part of the investigation, Ms Fenna was also interviewed and asked to provide two statements. Mr Woodward provided a statement on 14 October 2020

which said that he had no concerns regarding the claimant's working pattern and was supportive of the claimant. Four other people also provided statements. The investigator collated the CCTV images she felt to be relevant and provided a detailed log of the claimant's fob access. The report was lengthy, detailed, and included numerous and lengthy appendices (all of which were provided to the Tribunal). The investigator did not expressly interview or obtain a statement from the people who Ms Fenna said had approached her about the claimant's non-availability during working hours, to confirm that they had raised the issues and why they had done so. The report focussed on the technical evidence about the claimant's working time during the relevant period. It did not address at any length the trigger for the investigation. The investigation report was dated 13 November 2020 (218).

61. The investigation focussed entirely upon a three month period of September to December 2019. It was Ms Fenna's evidence that she did identified this period because the issue had been raised about December 2019. She looked at a broader three month period because she considered that to be fairer to the claimant. She also did not believe it would have been fair to look at a period after the time when the issue had been raised. The claimant, in the Tribunal hearing, was critical of the period used and she contended both that: her conditions for reasons related to the triggering factors were more acute in September each year; and she believed a longer period would have been fairer. The Tribunal accepted Ms Fenna's evidence about why it was that a three month period was used.

62. The report contained a detailed breakdown of the hours upon which the claimant was recorded as having been on the ward, relying upon the key fob data and CCTV images. That was contrasted with the roster and the hours which the claimant was recorded to have worked. Graphs and table were appended to record that data. A detailed table showing the hours rostered and the hours actually worked, based upon access to the ward, was included (229). Amongst the conclusions drawn by the investigator from the data were that: the fob implied that the claimant was not on the ward up to thirty six times at 7 am when she was due to start her shift (including an allowance of fifteen minutes); the claimant frequently altered her finishing times and had not worked the varied shift pattern she set out in interview; and that over the period the claimant worked fewer hours than it was indicated on the roster that she should have done.

63. The report separately addressed overtime claimed by the claimant on two occasions. The claimant had claimed for six hours of overtime worked on each of 29 and 30 December 2018. On the 30 December the claimant had been on the ward for almost the entire period, being there for five hours and forty nine minutes. On 29 December she had been on the ward (according to the fob records) for three hours fifty seven minutes. That was also proposed to be the subject of a separate allegation.

64. Other than being interviewed and asked to provide statements to the investigator, after she ceased to be commissioning manager, Ms Fenna had no further involvement in the investigation. It was not suggested by the claimant that she materially influenced the disciplinary decision made at the disciplinary hearing. The materials she had initially obtained were passed to Ms Davies and therefore formed part of the investigation.

65. In late 2020 the claimant raised a complaint which was recorded in a document (643). As a result of the commissioning manager change, the claimant asked for a second manager without prior involvement to review the investigation. There was no dispute that the Trust did so, and the second manager's view was that the matter should be addressed informally. The respondent then decided to also seek the view of a third manager. The deputy director of nursing (the third manager) took the view that the matters should be dealt with formally. The process was then proceeded with formally. Unsurprisingly, the claimant complained about this approach, which she contended was inherently unfair.

66. Mr Sheldon provided a response to the complaint on 21 January 2021 (644). His decision was that after the second manager's view, there was a difference of opinion, so the third manager's view was sought. As they supported the commissioning manager, their view as followed. When the respondent's witnesses at the Tribunal were asked about this approach, they referred to it as being outside the procedure. It was.

67. The Tribunal was also provided with the outcome to a grievance submission written by Ms Woods, deputy director of people and OD services, on 11 February 2021 (654).

68. Prior to the disciplinary hearing the claimant sent Mr Johnston her own timeline document and some other documents (658). Mr Johnston acknowledged that he read the documents prior to the disciplinary hearing

69. The disciplinary hearing was held on 15 March 2021. It was adjourned, and continued on 30 March 2021. The Tribunal was provided with notes (713). The claimant was accompanied by her RCN representative. She was given the opportunity to put her case. In addressing the allegations, the claimant highlighted that she had maintained throughout the investigation that it was impossible for her to answer specific questions about what occurred on a specific date two and a half years later, as to the reason why the time may have been what it was (727). In the disciplinary hearing the claimant did not explain her response to any of the allegations as being because she had been unable to work the hours required due to her disabilities.

70. In the time between the two dates of the disciplinary hearing, a breakdown of hours worked was prepared at Mr Johnston's request (771). That totalled the hours under for the claimant when what she had worked (or been on the ward), as compared to her rostered hours, as being twenty hours and eight minutes. It did include some relatively small discrepancies such as the claimant being three minutes under for the week beginning 1 October 2018, which Mr Johnston acknowledged when questioned were not really matters which should have been considered as misconduct. He emphasised the pattern of hours worked over the period.

71. At the end of the hearing on 30 March 2021 the claimant was informed that the decision was that she would be dismissed with immediate effect. Two of the allegations were upheld: that the claimant had not worked her contracted hours; and that she had claimed overtime for hours not worked. Two allegations were not upheld: that the claimant had not followed Trust policy in terms of the flexible working policy and the effective rostering policy. The decision was confirmed in a letter which

set out the reasons for that decision dated 7 April 2021 (741). In reaching the decision, Mr Johnston stated that the CCTV evidence provided by management was not used to inform the decision. The letter set out the claimant's right of appeal.

72. The claimant appealed in a letter of 23 April 2021 (745). She appealed based on the severity of the sanction, process issues, and new evidence. A further document with a statement of case for the appeal was also provided (753). As part of that document and the appendices, the claimant provided an account and timeline relating to what she had identified on one of the days in question (13 December 2018), where she had travelled to another hospital in Bury to see a patient who had recently transferred and to deliver her belongings to her. Mr Johnston also prepared a management statement of case for the appeal explaining the reasons why he had made the decision and addressing the grounds of appeal (762). He recorded that the claimant had not provided any evidence of work outside her working hours which could have been taken into consideration, and he said that the management team had been clear that the expectation was that the role was very much site based.

73. The appeal was heard on 24 June 2021 by the appeals sub committee of the Trust Board. The committee consisted of the medical director, the acting heard of human resources, and Mrs Harrison a non-executive director (from whom the Tribunal heard evidence). The claimant was accompanied by an RCN union officer. Notes were not provided of the appeal hearing. The decision was contained in a letter of 24 June (792). The appeal was dismissed, and the letter recorded that the panel agreed that the decision to dismiss was reasonable. The letter emphasised the impact to patient safety and the seriousness of the misconduct, when explaining the sanction.

74. The Tribunal heard evidence from two witnesses called by the claimant. The Tribunal found both of them to be genuine, credible and believable witnesses, and it accepted their evidence as being true. Both witnesses evidenced a working environment in which there was greater flexibility in working hours and the requirement to work the hours on the ward, than had been considered by the respondent's witnesses. Mrs Gates was never aware of any issue with the claimant's punctuality, and she gave evidence that she knew that the claimant would often stay late or take work home with her. It was Mrs Gates' evidence that she personally often took work home and worked from home on things such as reports. Mr Woodward's evidence was that he had no concerns in relation to the claimant's time keeping (the claimant would usually start work before him) and he also said that the claimant would inform him that she would complete work at home if she was unable to complete it within her daily duties. When asked about his working arrangements, he explained that Ms Fenna had agreed that on occasion, when he needed to do so, he could leave work early for childcare reasons and collect his child from school, before concluding his shift at home. He did not appear to be required to record the working hours undertaken on that basis and he believed that the time spent collecting his child was, in effect, the break to which he was entitled.

The Law

75. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The claimant bears the burden of proving that the dismissal was due to her asserting a statutory right under section 104 of the Employment Rights

Act 1996 (here the statutory right being the right to make a flexible working request) for her claim for automatic unfair dismissal. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct, for the ordinary unfair dismissal claim. If either the claimant proves that the dismissal was because she made a flexible working request or the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed her for that reason, the dismissal will be unfair.

76. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for misconduct (but not due to the flexible working request), the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral. The Tribunal did consider exactly what was said in section 98(4) when considering this claim.

77. The list of issues reflected the issues which the Tribunal must consider when considering reasonableness as a result of the well-known cases of *British Home Stores v Burchell* and *Iceland Frozen Foods Ltd v Jones*. The questions to be asked are:

a. Did the employer have a genuine belief that the employee was guilty of misconduct?

b. Did the employer have reasonable grounds for that belief?

c. Did the employer carry out a reasonable investigation in all the circumstances?

d. Was the decision to dismiss one which was within the range of reasonable responses that a reasonable employer could reach.

78. The Tribunal must not substitute its own view for that of the respondent. It must not slip into what is sometimes called the substitution mindset. It is not for the Tribunal to decide whether the claimant committed the misconduct alleged or whether the respondent has proved that she did so. It also must not decide whether it would have dismissed the claimant had it conducted the disciplinary hearing and considered the evidence which was in front of the decision-maker. The appropriate standard of proof for those at the employer who reached the decision, was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt. In considering the investigation undertaken, the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the Tribunal is considering fairness, it is important that it looks at the process followed, as a whole, including the appeal.

79. As it was required to do, the Tribunal also considered the ACAS code of practice on disciplinary and grievance procedures. Amongst other things, that says that whenever a disciplinary process is being followed it is important to deal with issues fairly. It then lists what are described as a number of elements to this, including that employers should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions, or confirmations of those decisions. The highlighted emphasis on promptly is included in the code of practice.

80. The claimant also claimed breach of contract, with regard to notice. A breach of contract claim can be brought in the Employment Tribunal as a result of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. There is a difference between the test in an unfair dismissal claim and the test for wrongful dismissal (as such a breach of contract claim is often known). Whereas the focus in unfair dismissal is on the respondent's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question of wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred. In a claim for wrongful dismissal, the legal question is whether the respondent dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the respondent was entitled to dismiss summarily. A respondent would only be in that position if the employee was herself in breach of contract and that breach was repudiatory.

81. For the claimant's claims for discrimination and victimisation the Tribunal took into account the provisions on the burden of proof. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

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

82. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

83. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

84. A Tribunal is not always required to follow the steps as a formula, as sometimes these two issues are intertwined. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded. The protected characteristic or protected act does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

85. The claimant alleged discrimination arising from disability. Section 15 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against a disabled person (B) if —*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

86. For unfavourable treatment there is no need for a comparison. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it. Many cases have set out the correct approach to such a claim, including the Judgment in the case of *Pnaiser v NHS England* setting out the correct approach to be followed (which it is not necessary to reproduce in this Judgment).

87. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

88. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP but it is not necessarily the case that it is. A PCP should be something which connotes a continuing state of affairs, that is it is a practice which will or could be done again if a future hypothetical similar case arose even if it has only been applied in one case. A PCP should have something of the element of repetition about it (*Ishola v Transport for London* is the leading authority on this issue).

89. In reaching its decision the Tribunal considered the EHRC code of practice on employment and, in particular, what was said in it about knowledge and the duty to

make reasonable adjustments, and the factors to be considered when determining whether an adjustment is one which should reasonably be made.

90. The claimant also brought a claim for victimisation. Section 27 of the Equality Act 2010 says:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act"*

91. The first question is whether the claimant did a protected act. The claimant must identify and rely upon something specific which she says amounted to a protected act. The meaning of that relevant document can be considered in all the circumstances and in context, but it must comply with what is required by section 27(2). If the claimant has done the protected act, for victimisation the next question for the Tribunal is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had a material or significant influence on subsequent detrimental treatment. That exercise has to be approached in accordance with the burden of proof, as I have explained. The word detriment in section 27 is to be interpreted widely. The key test is for the Tribunal to ask itself: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment?

92. When applying a time limit in a discrimination claim, the key issues are not controversial. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation). Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

93. If a claim is entered out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as was explained in the case of *British Coal Corporation v Keeble*. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends

upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent. It was held in *Robertson v Bexley Community Centre t/a Leisure Link* that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. The onus to establish that the time limit should be extended lies with the claimant.

94. In their submissions the parties referred to only one case. The claimant placed reliance upon *Doolin v Data Commission Officer* an Irish Court of Appeal decision 2022 IECA 117. That case had facts which reflected some of those in this case and related to the application of GDPR in Irish law, but the decision itself did not assist the Tribunal in this case reaching a decision on the issues identified and applying the law of England and Wales.

Conclusions – applying the Law to the Facts

95. The list of issues recorded that time limits and jurisdiction were the first issue to be determined. The Tribunal did not consider time limits first. The broad position was that the claim had been entered in the time required in relation to the claimant's dismissal and the claims arising from it. For some of the other allegations, if found, the time and jurisdiction issues would need to be considered if they were not found to have been a continuing act with matters found which were in time. The Tribunal accordingly left the time issues to be determined once the other findings had been made.

Automatic unfair dismissal

96. The second issue in the list of issues detailed the issues which needed to be determined in the unfair dismissal claim. Issue 2.1 asked whether the principal reason for the dismissal of the claimant was that the claimant made a flexible working request. As recorded at issue 2.1, if the Tribunal found that was the principal reason for dismissal, that would mean that the dismissal would have been unfair.

97. The claimant did make a statutory flexible working request on 3 September 2018. That was initially considered by Ms Fenna and rejected by her in a decision letter of 28 November 2018 following a meeting on 15 November 2018. The claimant appealed, which was heard by Ms McCormack on 7 January 2019 and her outcome letter, rejecting the appeal, was dated 13 January.

98. The decision to dismiss was made by Mr Johnston, together with Ms Billington, an HR Manager (albeit I will refer to it as being Mr Johnston's decision as that was the way in which it was presented to the Tribunal). His decision was made at the reconvened disciplinary hearing on 30 March 2021, following a first day of hearing on 15 March. The letter of 7 April 2021 recorded his reasons for reaching that decision. He dismissed the claimant because he found that the claimant had,

during the period under investigation, failed to work her weekly contracted hours and that, on one occasion, she had claimed for overtime for hours not worked. He attended the Tribunal hearing and confirmed and explained the reasons why he dismissed the claimant. The Tribunal accepted his evidence about the reasons why he made the decision to dismiss the claimant. The Tribunal did not find that the reason why he dismissed the claimant was the flexible working request which the claimant had made in 2018. That decision was not part of the reason for dismissal, and it was not the principal reason. As a result, the claim for automatic unfair dismissal did not succeed.

Unfair dismissal

99. Issue 2.3 and, in particular, issues 2.3.1-2.3.5, set out the issues which needed to be considered and determined as part of the claimant's ordinary unfair dismissal claim. Those issues reflected the questions which the Tribunal was required to ask following the cases of *Burchell* and *Iceland Frozen Foods*. However, the Tribunal also ensured that what it considered was what the statute required the Tribunal to decide, as set out in section 98 of the Employment Rights Act, in particular section 98(4).

100. The first question set out in the list of issues was whether the respondent genuinely believed that the claimant had committed misconduct? The Tribunal found that Mr Johnston did genuinely believe that the claimant had committed the misconduct which was alleged based upon the facts, report and evidence in front of him. The Tribunal found him to be a genuine and credible witness and it accepted the reasons he gave for having dismissed the claimant as evidenced before the Tribunal and in his disciplinary decision letter on 7 April 2021. The Tribunal also found Mrs Harrison to be a genuine and truthful witness and it accepted her evidence about the reasons why the claimant's appeal against dismissal was not upheld by the panel of which she was a part, as recorded in the appeal decision letter of 24 June 2021.

101. The next question was whether there were reasonable grounds for that belief? The Tribunal noted the lengthy and detailed investigation report and the information set out in it, particularly as based upon the claimant's fob records. The Tribunal also considered the notes of the investigatory meetings with the claimant and the notes of the disciplinary hearing. Based upon what was recorded, the Tribunal found that there were reasonable grounds for Mr Johnston's belief, as he evidenced and as he recorded in his decision letter. With regard to the hours not worked, he placed emphasis upon there being a consistent pattern of hours not having been worked during the relevant period, and that was supported by the investigation report and fob records. He also found the claimant to have claimed for two hours of overtime which she had not worked, which was supported by the information obtained. The Tribunal found that there were reasonable grounds for Mr Johnston's belief (and also, to the extent it was relevant, reasonable grounds for the finding reached by the appeal panel).

102. Issue 2.3.3 asked whether, at the time that the belief was formed, the respondent had carried out a reasonable investigation. The respondent's representative emphasised the lengthy and detailed investigation by Ms Davies as recorded in the detailed investigation report, with a number of lengthy and detailed

appendices. His observation was that, if anything, the investigation and report could be viewed as having been too detailed. The claimant attended four meetings as part of the investigation, and she was accompanied by a trade union official at all of them (albeit in the second meeting the accompaniment was remote when the claimant attended in person). The claimant was invited to and attended a disciplinary hearing, conducted by an independent manager unrelated to the issues. That hearing was adjourned and continued on a second day. The claimant was accompanied by her RCN representative. She was given the opportunity to put forward her response to the allegations. As a result, the Tribunal found that (at the time Mr Johnston made his decision) the respondent had carried out a reasonable investigation. The Tribunal did have concerns about some elements of the investigation as explained below, but the Tribunal did not find that those concerns meant that the respondent had not carried out a reasonable investigation.

103. Issue 2.3.4 asked whether the respondent had followed a reasonably fair procedure. In considering this issue the Tribunal considered the ACAS code of practice on disciplinary and grievance procedures and also took account of the respondent's own procedure. As also recorded in relation to issue 2.3.3, a very full and detailed investigation report was prepared and provided. A fair hearing was undertaken when the claimant had an opportunity to have her say (accompanied by her RCN representative). A reasoned decision was provided. The claimant was also given a right of appeal. She appealed and her appeal was heard by a panel made up of very senior members of the Trust including a non-executive director. That hearing was full and fair, and an outcome was reached and provided to her.

104. The Tribunal did have some concerns about the process followed. This Judgment addressed delay separately below. The other concerns were as follows:

a. At the outset of the process, the issue was not first addressed informally as the respondent's procedure says it would (albeit for matters which were not gross misconduct). On a practical level, when it was brought to Ms Fenna's attention that the claimant might not have been on the ward on two occasions when she should have been, the respondent did not first approach the claimant and ask her where she had been and why that was the case? That would have enabled the claimant to have responded when memory of the days involved was fresh.

b. The investigation did not obtain statements about the two occasions raised and did not evidence what had been raised, save for the discussion with Ms Fenna noted about what she had been told (and one email which might have addressed one of the occasions but that was not clear).

c. Acting outside the procedure, the respondent had approached a second person to decide whether the issues should be addressed formally and that person had decided that the matters should be addressed informally. Rather than accepting that person's view, the respondent then sought a third opinion from the deputy director of nursing, and that opinion had been that the issue should progress to a formal hearing. The claimant's assertion was that the respondent had

chosen to seek the third opinion in order to obtain the decision it sought. The evidence of the respondent's witnesses was that it was outside the procedure. It was certainly not a process identified within the procedure. The decision to obtain a further (third) opinion, did appear to be the respondent seeking to obtain the answer that it sought.

105. In her arguments and submissions, the claimant was critical of the fact that it took Mr Johnston eight days to provide his decision. She was correct that the fact he did so failed to adhere to the five days set down in the procedure. The Tribunal did not find that delay and failure to follow the respondent's own procedure, meant that a fair procedure was not followed.

106. There were more significant issues of delay which the Tribunal did consider carefully when determining whether a reasonably fair procedure was followed. In her submissions the claimant asserted that the length of the delay in itself rendered the dismissal unfair. The ACAS code of practice requires the parties to deal with matters promptly. The delay was, in total, significant, as the period considered for the allegations was September to December 2018, but the decision to dismiss was not made until 30 March 2021 (and the appeal decision not made until 24 June 2021). The Tribunal accepted the respondent's submission that it was important to consider each of the reasons for the delay in the process and accordingly looked at each part of the process when doing so. The time taken could be broken down as follows:

a. The issues were first raised with Ms Fenna in December 2018 or January 2019. The fact finding commenced (as recorded in the document recording access to CCTV records) on 2 January 2019. Between the commencement of that fact finding and the claimant's ill health absence on 31 March 2020, the process was delayed for two reasons: because the fact finding was being undertaken; and because the matters were being considered by the fraud investigators and the advice given to Ms Fenna was that the claimant should not be informed whilst that fraud investigation was considered. The Tribunal was not provided with the evidence to explain which part of the initial three month period resulted from which of those reasons. The Tribunal considered that the loss of the opportunity to speak to the claimant during this three month period was significant and did mean that the claimant was not given the opportunity to address any allegations at a time when she could have recalled the reasons for her attendance in work at the particular times being investigated. The subsequent period of ill health meant that the loss of that opportunity was more significant, but nonetheless the three months initially taken to fact find and awaiting a decision regarding the fraud investigation was not addressing the matter promptly.

b. From 31 March 2019 the claimant was absent on ill health grounds. As the claimant emphasised, this period of illness was very significant. It was Ms Fenna's evidence that she decided not to progress with the formal procedure while the claimant was absent due to her health. The Tribunal accepted that as a reasonable and sensible decision. That accounted for the further period of delay until 14 October 2019. The

Tribunal did not see that there was any unfairness to the claimant in the fact that the occupational health referral during this period did not acknowledge the process, as it would have been unfair and unreasonable for the claimant to have discovered the process (or potential process) through the occupational health referral process.

c. The investigation was undertaken following the 14 October 2019. The claimant was interviewed on a number of occasions. It was reasonable for the investigation to take some time.

d. The use of the CCTV footage delayed the investigation process. The respondent's representative placed reliance upon the detailed account in the investigation report which explained why that was the case. Most significantly, for a period of approximately a month, the use of and access to the CCTV for the investigator was put on hold whilst the claimant's complaint about the use of CCTV was considered. It was right that the process was put on hold for that period. The Tribunal however noted that this period of delay would not have arisen at all if the CCTV had not been used as part of the investigation, and it should not have been for the reasons already explained.

e. For three months in early 2020 it was accepted that the process was put on hold during the early stages of the pandemic. The Tribunal understood and accepted that was a valid reason for the investigation to be delayed in the exceptional period being considered (and particularly for an NHS Trust faced with the specific challenges it faced at that time).

f. The Tribunal also noted the job title of the investigator and what she recorded in her report about the ongoing impact which the pandemic had upon her and her ability to focus on the investigation. The Tribunal accepted that as being an explanation, in part, for the investigation being further delayed.

g. From the end of the pause for the pandemic until the report being finalised, it took in excess of seven months (March 2020 until 13 November 2020). The Tribunal did not consider that to have been a period which accorded with the respondent investigating the matter promptly. In particular, following the final interview with the claimant on 11 September 2020, it took a further two months for the report to be produced. In the view of the Tribunal, the respondent should have prioritised concluding the investigation more quickly in the light of the considerable delay which had already occurred.

h. After the investigation was concluded, the issues were considered at a disciplinary hearing on 15 and 30 March 2021. Whilst the period between the report on 13 November 2020 and the hearing on 15 March 2021 could have been quicker and it is unfortunate that the respondent did not progress matters more quickly in the light of the previous considerable delays, the Tribunal did not find that period of delay was significant in the context of the delay generally.

i. Following the disciplinary decision on 30 March 2021, the appeal hearing took place on 24 June 2021. Whilst the claimant was critical of that particular delay because of the limited period for entering a Tribunal claim, the Tribunal did not find that period to be unreasonable, particularly when the seniority of the people who heard the appeal were taken into account.

107. In the light of the delay the Tribunal considered very carefully the claimant's submission that the delay in and of itself rendered her dismissal unfair. The delay was certainly significant. The respondent's representative in his submissions acknowledged that the process certainly took longer than anyone would have liked (but he submitted there were explanations and reasons for it). Had there been no explanation for the over-all significant total delay, the Tribunal would have found the dismissal to have been unfair as a result. However, the Tribunal noted that (as explained) there were valid explanations for significant periods of it, including the period due to the claimant's ill health and the period due to Covid. The Tribunal has noted the impact that the delay had upon the claimant's ability to address the allegations and recall her reasons for attending at the times in question. Some of the delay which most contributed to that, was due to the claimant's ill health. The Tribunal has concluded, on balance, that the delay did not in and of itself render the dismissal unfair in this case where nine months of the delay/time taken was explained by Covid and the claimant's ill health. It was unfortunate that the issues were not raised with the claimant before her lengthy period of ill health absence commenced in March 2019.

108. Taking account of all the matters addressed, the Tribunal found that the respondent did follow a reasonably fair procedure. The issues identified with the procedure were not so significant as to otherwise mean that the dismissal was unfair (considering and applying the test as it is set out in section 98(4) of the Act).

109. Issue 2.3.5 was whether the dismissal was within the band of reasonable responses of a reasonable employer. Based upon the decision made by Mr Johnston and the reasons which he gave for reaching that decision, the Tribunal found that it was. He emphasised the importance of safety and patients in the decision which he reached. He found a consistent pattern of the claimant not being at work during the hours she was required to work. He found that she had claimed for overtime on an occasion and on a day when she had not been present on the ward for all the hours claimed. Considering the breadth of the range of decisions which a reasonable employer could fairly reach, the Tribunal found that Mr Johnston did make a decision which fell within that band of reasonable responses (and it also found that it was a decision which the appeal panel could uphold on the same basis). The Tribunal noted that the claimant did not provide Mr Johnston with any evidence of telephone calls made or other relevant records. In reaching this decision, the Tribunal was mindful of, and would emphasise that, it was not the Tribunal's role to substitute the Tribunal's own decision for that of the respondent's decision-makers. Had the Tribunal needed to do so, the outcome may have been different.

110. Having considered the specific issues set out in the list of issues as they applied to the unfair dismissal claim, the Tribunal also considered more broadly the application of the test set out as it is stated in section 98 of the Employment Rights Act 1996, including, in particular, section 98(4). The Tribunal found that in all the

circumstances of the case and in accordance with equity and the substantial merits of the case, the respondent acted reasonably in treating the misconduct found as being a sufficient reason for dismissing the claimant from her role as ward manager.

111. As a result of the finding that the dismissal was not unfair, the Tribunal did not determine the issues of contributory fault, *Polkey*, or the impact of the ACAS code on potential remedy (as set out as parts of issue 3), as it was not necessary or appropriate to do so.

Wrongful dismissal/breach of contract

112. Issue four set out the wrongful dismissal claim, that is the claim that the claimant was entitled to damages for breach of contract on the basis that she was dismissed without notice. The claimant's contract of employment set out notice periods which applied based upon age and length of service. The maximum possible notice period under that clause was twelve weeks. The respondent's representative in his submissions acknowledged that (if notice was required) the appropriate period was twelve weeks. It was not in dispute that the claimant was not paid for that notice period.

113. Issue 4.3 asked whether the respondent could prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice? Technically, the question for the Tribunal to determine was whether the claimant fundamentally breached her contract of employment with the respondent, so that the respondent was entitled to accept that fundamental breach as having terminated the contract with immediate effect. In reaching its decision the Tribunal would emphasise that, whilst in many cases the outcome to an unfair dismissal claim and a wrongful dismissal claim will be the same, in practice the issues to be considered and determined for the two claims are fundamentally different. As already explained, the issues in an unfair dismissal claim focus on the respondent's decision-makers, the information they considered, and whether their decision was based on a reasonable investigation following a fair procedure. The issue in a wrongful dismissal claim is whether the Tribunal has found that the claimant fundamentally breached her contract of employment.

114. The main focus of the decision to dismiss was on the hours when the claimant was recorded as having worked, when she was not recorded as being present on the ward. The claimant was unable to disprove the breakdown of hours for which she was not on the ward for the relevant period. However, her explanation was that some of her working time would not have been on the ward due to matters such as meetings, telephone calls when not on the ward, and (on one occasion) travelling to another hospital. More importantly, it was also the claimant's case that there was a degree of flexibility in operation, which reflected the fact that employees (and, in particular, senior managers) would work additional time when required outside of core hours including providing remote telephone support and undertaking paperwork, on a flexible basis, which would offset the need to spend all of the required hours in attendance on the ward. The Tribunal considered the evidence of Mr Woodward and Mrs Gates to be of particular importance on this issue. They were both very clear that the claimant worked hard, they were aware that she undertook work when not on the ward, and that there was a degree of flexibility in operation. Mr Woodward was able (on occasion) to leave the ward, collect his son from school,

and carry on working from home at the end of his shift without formally recording the time spent (albeit, for him, that was with agreement in advance with Ms Fenna that this could occur). Mrs Gates also evidenced that she worked outside the workplace on occasion and would work fewer hours in the workplace as a result. In practice it was the Tribunal's view that there was a disconnect between the way in which the requirement to be in the workplace was considered by Mr Johnston and the appeal panel, and the more flexible arrangements which were in practice in operation in the workplace for staff as evidenced by Mr Woodward and Mrs Gates. Based upon the evidence heard, the Tribunal found that the respondent did not in practice operate an absolute rule that working time had to be undertaken on the ward. Rather there was a degree of flexibility for senior managers, with regard to time taken to work outside the ward and the expectation to be present on the ward for all the requisite hours of work. On that basis the Tribunal did not find that the claimant had fundamentally breached her contract of employment by not being present on the ward for the hours demonstrated by the respondent.

115. The claimant was also dismissed for being paid for six hours of overtime on a day when she was present on the ward for only four. The Tribunal did consider very carefully what the evidence proved and whether the claimant had fundamentally breached her contract as a result. The Tribunal accepted that deliberately claiming as overtime hours which had not been worked, would have been a fundamental breach of contract. However, the Tribunal accepted that, in practice in this case, the claimant's approach to overtime claimed, similarly reflected a swings and roundabouts approach. She claimed for hours which she believed she had worked in and around the day in question on the matters which she needed to address at the time when she was not rostered to work, and she did not do so dishonestly, based as it was upon her understanding of the way overtime was operated by the respondent. The Tribunal was not taken to any document in which the claimant had made a dishonest statement or dishonestly claimed a specific amount, even though the evidence showed she had claimed six hours but been present on the ward for four. There were telephone records which showed the claimant making calls around that date (records which had not been available to the respondent during the internal procedures). As a result, the Tribunal also did not find that the claimant fundamentally breached her contract of employment when she was paid for overtime relating to the one occasion in December 2019 when she did undertake overtime worked but the additional hours paid did not match the time actually spent on the ward for that day.

116. The list of issues did not record that the claimant claimed an uplift arising from a failure to comply with the ACAS code for the wrongful dismissal claim. However, the relevant provisions do apply to such an award. Accordingly, whilst it was not set out specifically in the list of issues as applying to the wrongful dismissal claim, the Tribunal nonetheless considered the issue of the application of the ACAS code of practice on disciplinary and grievance procedures and whether the respondent unreasonably failed to comply with it, and whether it would be just and equitable to increase any award as a result.

117. The respondent did, on the whole, follow what was set out in the ACAS code of practice. As already explained in some detail, the respondent did not deal with matters promptly as the code of practice requires. To that extent the respondent did not follow the code. The Tribunal noted that an impact of the delay was that the

claimant remained employed by the respondent longer than would otherwise have been the case. The Tribunal has also already addressed the delay when considering reasonableness and identified the reasons for some of the delay. As a result, the Tribunal found that the respondent did not unreasonably fail to comply with the ACAS code. Even had the Tribunal found that the respondent unreasonably failed to comply with the code, the Tribunal would not have found it just and equitable to increase the damages awarded for breach of contract as a result of delay in the process and the fact that matters were not addressed promptly.

Detriment on the grounds that the claimant made a flexible working request

118. Issue five was the claimant's claim for detriment on the ground that she made a flexible working request (applying sections 47E and 48 of the Employment Rights Act 1996).

119. D1 in the list of issues, that is the detriment relied upon, was the allegation that the respondent started an investigation into allegations of dishonesty without/did so without informing the claimant. The respondent did commence the investigation without informing the claimant. A fact finding investigation was undertaken and the matter was considered as a potential fraud issue from the start of January 2019. The claimant was only informed shortly after her return from ill health absence in October 2019.

120. Issue 5.2 asked whether the claimant reasonably saw that act or deliberate failure to act as subjecting her to a detriment? She did. The Tribunal finds that it was clearly a detriment for the claimant to be investigated for dishonesty without being told about it (whatever terminology was used to describe the investigation undertaken).

121. The key question in determining that particular claim, was whether that was done on the ground that the claimant had made a flexible working request? The Tribunal did not find that was the reason why that was undertaken in that way. The claimant was not informed by Ms Fenna about the fact finding investigation (or the potential fraud investigation) because that was what Ms Fenna was advised to do, initially by an HR advisor and afterwards by the fraud team. The Tribunal found that the reason was not because the claimant had made her flexible working request in September 2018.

122. As a result of the Tribunal's findings on issue five, the Tribunal did not need to determine the parts of issue six regarding remedy, which it had been identified would be considered alongside the liability issues.

Disability

123. As already recorded, issue seven did not need to be decided as the respondent accepted that the claimant had a disability or disabilities at the relevant time as a result of her PTSD, anxiety and depression.

Discrimination arising from disability

124. Issue eight was the claimant's claim for discrimination arising from disability. The issues were set out in the appendix to the case management order (49) which

needed to be read alongside the further particulars provided by the claimant's solicitors (59). Issue 8.1 was not an issue to be determined. The respondent's representative in his submissions conceded that the respondent had the requisite knowledge of the claimant's disability (or disabilities), so issue 8.2 also did not need to be considered.

125. Issue 8.3 was whether the respondent treated the claimant unfavourably in any of the ways alleged. In the further particulars it was explained that the one thing relied upon as constituting unfavourable treatment was the claimant's dismissal. The Tribunal found that dismissal was unfavourable treatment. The relevant statutory provision requires only unfavourable treatment not less favourable treatment, and it was clear that dismissing the claimant was unfavourable for her.

126. Issue 8.4 was whether the identified things arose in consequence of the claimant's disability? What was said by the claimant's solicitor at paragraph 10 of the further particulars (59) was that the claimant failing to work her weekly contracted hours on the ward arose in consequence of the claimant's disability as her disability meant that she may not be able to do a full shift on the ward because of tiredness, lack of concentration, or other symptoms of her PTSD and/or anxiety and depression.

127. There was no medical evidence provided to the Tribunal which evidenced that this was the impact of the claimant's conditions. There was also no evidence from the claimant that she could not work her contracted her hours as they were arranged in September to December 2019 (over four days a week) because of her impairments. She gave no evidence that her disabilities led to tiredness or lack of concentration, or that they were the reasons why she did not work all the hours required on the ward. She did request to work her contracted hours over four days a week and not five and she did explain as part of that request that she wished to do so because of work life balance. But she did not expressly request to do so because of her disabilities or because of an inability to concentrate, and she did not request to work fewer hours per week in total. The Tribunal did not find that the claimant had evidenced that the unfavourable treatment (the dismissal) was because of something arising in consequence of her disability, because she did not prove that the hours she did not work (or at least that she was not present on the ward) were because of something arising in consequence of her disability.

128. The Tribunal did not need to determine issue 8.6 in the light of the findings on issues 8.4 and 8.5. The respondent did not rely upon any legitimate aims and therefore it also did not need to consider issues 8.7 or 8.8.

Breach of the duty to make reasonable adjustments

129. Issue 9 was the claimant's claim for breach of the duty to make reasonable adjustments. That required consideration of the issues set out in the case management order (50) alongside the further particulars provided on the claimant's behalf by her solicitors at the time (55). Those issues are complex and raised a number of questions and those are addressed below. As already recorded, the respondent's representative conceded knowledge of the disability, so the first issue which actually needed to be determined was issue 9.3, that is whether the respondent had the PCPs relied upon (a PCP is a provision criterion or practice).

130. At paragraph 3(1) of the further particulars (55), the first PCP relied upon was the requirement for the claimant to do full time hours on the ward (37.5 hours) and/or to work on the ward five days a week on a 7.30-3.30 shift. The practice of the respondent was to require its employees (and ward managers) to do full time hours on the ward (albeit subject to the findings already recorded on how flexibility was in fact applied). The respondent also applied the PCP of requiring the hours to be worked over five days per week, following the decision made in the claimant's flexible working request and appeal.

131. The second PCP relied upon (paragraph 3(2)(56)) was using a formal procedure to investigate allegations of insufficient hours being undertaken. That was a PCP which the respondent applied.

132. The third PCP relied upon (paragraph 3(3)(56)) was the use of CCTV as part of working hours disputes and/or showing employees CCTV footage as part of working hours disputes. The Tribunal also found that was a PCP applied/followed by the respondent and applied in the claimant's case (in a way which supported a contention that it would be applied on other comparable occasions).

133. The fourth PCP relied upon (paragraph 3(4)(56)) was the use of a 17 week reference period to determine if the claimant had worked sufficient hours on the ward. The Tribunal did take into account the EHRC code of practice and the fact that it says that a one-off event can be a PCP. However, the Tribunal found that this was not a PCP applied by the respondent as required for the test in the Equality Act 2010 (see paragraph 88 above). What was in issue was a unique decision made regarding the matter being investigated for the claimant. Ms Fenna evidenced why a three month period had been used (and the Tribunal accepted that explanation). That was a specific decision about the facts being investigated involving the claimant. Using a 17 week or three month period for the investigation was not a practice operated by the respondent nor was it something which would be applied in other circumstances. The Tribunal did not find it to be a genuine PCP. As a result, the claim for breach of the duty to make reasonable adjustments based upon that PCP did not succeed (and the Tribunal did not go on to determine each of the other questions which would have applied had it been considered to be a PCP).

134. Issue 9.4 was whether the PCPs found put the claimant at a substantial disadvantage compared to someone without a disability/the claimant's disability. The basis upon which a substantial disadvantage was contended by the claimant (when represented by solicitors) was recorded at paragraph 4 of the further particulars (56).

135. What the further particulars said about the full time ward hours PCP was recorded at paragraph 4(i) (56). To an extent what was said reflected the matters already addressed when considering issue 8.4 and for which there was no evidence. To the extent that the PCP being considered was the requirement that the claimant worked full time hours in a week and/or worked those hours on the ward, the Tribunal found that the PCP did not place the claimant at a substantial disadvantage for the same reasons as explained for 8.4 (in summary, that was not evidenced). However, what was said at paragraphs 3(1) and 4(1) went further. It contended that the requirement to work five days a week placed the claimant at a substantial disadvantage because she had more difficulty than a person without a disability in doing so. On that basis the Tribunal did find that the practice of requiring five day a

week working did place the claimant at a substantial disadvantage (when compared to someone without a disability) based upon the claimant's own evidence about the impact which five day a week commuting and working had upon her. There was no medical evidence which supported that evidence, but nonetheless the Tribunal found that, based upon the claimant's own evidence, for her being required to work five days a week with her commute did place her at a substantial disadvantage with her disabilities when compared to someone without a disability (albeit that commuting that distance for five days each week would have some negative impact on anybody).

136. The substantial disadvantage which it was said followed from the application of the formal procedure PCP, was recorded at paragraph 4(ii) of the further particulars (56). What was said was that the use of the formal procedure meant that there was considerable delay before the claimant's version of events was ever sought, which prejudiced her ability to defend herself by virtue of her difficulty in recalling things. The Tribunal did find that the fact that the informal procedure was not initially followed and that the claimant was not asked about events much sooner than she was, did place her at a substantial disadvantage in recalling things (than others without a disability) due to the impact which her disability had upon her longer term memory and ability to recall matters. The delay would have impacted upon anybody's ability to recall why they had not been on the ward at the relevant time, but the disadvantage was more significant for the claimant with her disability or disabilities.

137. The third substantial disadvantage was in relation to the use of CCTV and was set out at 4(iii) of the further particulars (56). It was explained that the claimant became upset and mentally unwell upon seeing CCTV because of her disabilities, which made it difficult to respond to allegations. This was stated to be specific to the claimant's disability, with reference to a former abusive relationship and the flashbacks and bad reaction she had to viewing CCTV evidence which resulted. The Tribunal found that to have been something which placed the claimant at the substantial disadvantage asserted.

138. Issues 9.5 and 9.6 did not apply as the claimant's claim relied upon PCPs only and not physical features or auxiliary aids.

139. Issue 9.7 was whether the respondent knew or could have reasonably been expected to know that the claimant was likely to be placed at the substantial disadvantage relied upon? This issue differed from knowledge of the disabilities (which was conceded), as it related to knowledge of the specific disadvantage. The Tribunal found that the respondent either knew about the claimant's substantial disadvantage or would reasonably have been expected to know about it if they had applied their minds, to the disadvantages relied upon for the first and second PCP (and the respondent's representative did not argue specifically that there was a lack of knowledge for either of them). The knowledge issue was carefully considered for the third PCP regarding CCTV, where the further particulars emphasised that the claimant's reaction to the use of CCTV was specific to her impairments and her history of abuse and the triggers which resulted.

140. The claimant emphasised the documents from 2011 and 2013 with regard to this issue. The medical report of her treating consultant physician of 6 July 2011

which it was understood had been sent to the respondent's occupational health physician at the time (S11), did address some of the historic events which triggered the claimant's disabilities, but the Tribunal did not find that the contents of that report were such that they would have meant that the respondent knew, or should reasonably have been expected to have known, about the particular disadvantage at which the claimant would be placed if CCTV footage was used. However, the notes of the investigatory interview held on 5 September 2013 (S16) contained within them a detailed account by the claimant about her abusive relationship and the use of CCTV in that relationship (S24). The majority of the Tribunal (Employment Judge Phil Allen not agreeing) found that the respondent should reasonably have been expected to have known at the time of the interview about the likely impact that the use of CCTV would have on the claimant from what she said in the interview. However, the Tribunal (unanimously) did not find that, when conducting an investigation approximately six years later and in circumstances where the notes were no longer retained on the respondent's systems, the respondent knew or could reasonably be expected to know about the disadvantage which the claimant would suffer because of what she had said during an interview in 2013. Even though, as the claimant emphasised, the HR note taker in 2013 and the HR support to the investigation in 2019 was the same person, the Tribunal did not find that the respondent knew or should reasonably have been expected to know about the disadvantage the claimant would suffer if asked to consider CCTV images in 2019, based upon what had been said in 2013.

141. Issue 9.8 was whether the respondent failed to comply with the duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The adjustments which the claimant asserted should have been made (as they applied to the PCPs for which this needed to be considered) were set out in the further particulars at 6(i) and 6(ii) of the further particulars (57).

142. For the full time ward hours PCP, what was suggested at adjustments (a), (c) and (d) were not adjustments which would have addressed the disadvantage which the Tribunal has found that the claimant suffered. The disadvantage found arose from the requirement to work five days per week, rather than the same number of hours compressed into four days per week (primarily because of the additional commuting time required). None of those three adjustments would have avoided the disadvantage suffered. They might have addressed being dismissed for not being present on the ward for the hours rostered, but that was neither the PCP found, nor the disadvantage found to have been suffered.

143. The adjustment which would have avoided the disadvantage suffered was that recorded as 6(i)(b). The adjustment would have been not to have required the claimant to work her hours over five days per week, as was required following the outcome of the flexible working request appeal (until the claimant worked at the alternative location where she was able to work her hours in four days per week). The question for the Tribunal was, accordingly, whether that adjustment was a reasonable one which the respondent was legally obliged to make. The Tribunal considered very carefully the reasons given for not allowing the claimant to continue to work four days per week as a ward manager as they were set out in Ms Fenna's decision in the flexible working request of 28 November 2018 (261) and, in considerably more detail, in Ms McCormack's decision in the appeal against that outcome of 17 January 2019 (265). The latter reasons, in particular, were detailed

and comprehensive. They addressed a number of factors specific to the workforce. The Tribunal will not reproduce all that was said in the letter in this Judgment. It included communication issues which had ben identified from the four day per week pattern and questions about how cover could operate. The respondent's emphasis was on patient safety in a very challenging environment. On that basis the Tribunal did not find that the adjustment sought was one which was reasonable in the circumstances and in the context of the claimant's role as a ward manager.

144. For the formal procedure PCP, the adjustments sought were set out at paragraph 6(ii) of the further particulars (58). Of those, (b) was giving the claimant access to work records and documents prior to asking her questions where there had been a significant lapse in time. That was not a reasonable adjustment which avoided the disadvantage relied upon. In the disciplinary process the claimant was able to access work records and documents to endeavour to address the issues raised. The ability to do so did not address the disadvantage, which was issues with remembering why she had attended on the ward at the specific times identified, many months after she had done so. Where documents or records addressed the issue, the claimant was not at any greater disadvantage than anyone else without her disabilities.

145. The adjustment which the Tribunal found, which was one which would have avoided the disadvantage and which it was reasonable for the respondent to have made, was to have used the informal procedure at the start of the process and to have discussed any issues with hours with the claimant immediately after they were identified, or at least shortly after the matters had been identified and the hours had been worked (when the claimant would have had a greater chance of being able to recall why she had not been on the ward at the relevant times). At some time between the issues being identified at the start of January 2019 and the start of the claimant's ill health absence at the end of March 2019, the Tribunal found that it would have been reasonable for the respondent to have raised with the claimant the occasions when it was said that she was not on the ward when she should have been. That would have been a reasonable adjustment which would have avoided the disadvantage suffered.

Time limits/jurisdiction

146. Having found that there was a breach of the duty to make reasonable adjustments, the Tribunal then considered issue one in the list of issues as it applied to that breach. As that was the only discrimination found, it could not be part of a continuing course of conduct with any other events. The decision to refuse the claimant's flexible working request was made (at the latest) in the appeal decision on 17 January 2019. That was the date when the respondent failed to comply with its duty to make reasonable adjustments. At the very latest, the last breach of the duty would have been prior to the claimant starting her extended period of sickness absence in March 2019. The claim was entered at the Employment Tribunal on 28 June 2021. The claim was entered at least two years and three months later. The claim was not entered in the period of three months required (even when any extension for ACAS early conciliation between 10-12 April 2021 was taken into account).

147. The Tribunal therefore needed to determine whether or not it would be just and equitable to extend time. Neither party particularly relied upon, or emphasised, any matters about this in their submissions. Having considered all of the circumstances, the Tribunal did not find that the claim was entered within such further period as it considered to be just and equitable. In making that decision the Tribunal, in particular, took account of the following:

a. The length of the delay, which was significant;

b. There was no evidence given of any reason for the delay, save for the fact that for some of the period the claimant had periods of ill health and it was self-evident that the claimant would have found issuing a claim earlier to have been stressful;

c. The claimant had trade union support at her flexible working meeting and appeal meeting, as well as at subsequent meetings. The claimant could have accessed support and advice from the RCN;

d. The claimant did raise numerous issues with the respondent within the period of the delay, including raising formal complaints and grievances;

e. The claimant is an intelligent person who held a senior management position. She would have been more capable than many others to find information about Tribunal time limits (information which is readily available);

f. The prejudice of not extending time for the claimant was significant because she will not be able to have Judgment entered for her in an otherwise meritorious claim and she will not recover a remedy as a result;

g. For the respondent there is some prejudice in the delay because recollections reduced over time; and

h. Time limits are there for a good reason and an extension should be the exception and not the rule.

148. The Tribunal found that, taking into account all of the factors but particularly in the light of the significant delay in the claim being entered, it was not just and equitable to extend time (even though the factor listed at (f) above was a significant one to be weighed in the balance).

Summary of the findings in the duty to make reasonable adjustments claims

149. In summary, with regard to the duty to make reasonable adjustments, the Tribunal found the following:

a. For the first PCP relied upon and set of adjustments sought (regarding the full time ward hours PCP and the adjustment to allow the claimant to work her hours over four days per week rather than five), the adjustment sought was not one which was reasonable for the reasons

set out in Ms McCormack's appeal decision letter of 17 January 2018 (265).

b. The application of the second PCP (dealing with matters formally) did place the claimant at a substantial disadvantage and the respondent did fail to comply with its duty to make reasonable adjustments by not initially approaching the claimant and discussing the shortfall in hours with her when memories were relatively fresh, but the claim was entered out of time and it was not just and equitable to extend time for that allegation.

c. The respondent did not know and could not reasonably have been expected to know about the substantial disadvantage which the claimant suffered as a result of her disabilities from the application of the third PCP relied upon (the use of CCTV).

d. The fourth PCP (the 17 week reference period) was not in fact a PCP.

Victimisation

150. Issue ten was the claimant's victimisation claim. The issues were set out in the case management order (51), with further particulars provided at paragraph 11 (59).

151. The claimant relied upon two things as being protected acts in the further particulars (although only one had been identified in the case management order). Those were: the flexible working request on 3 September 208; and the dignity at work complaint made on 19 October 2018.

152. Section 27(2) of the Equality Act sets out what is required for something to be a protected act. As relevant to these proceedings, the relevant provision is (d): making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010. To be a protected act the person does not have to refer to the Act or use specific terminology such as discrimination or harassment, but the complaint does need to identifiably assert in some way that unlawful discrimination has occurred with some identification of the protected characteristic upon which reliance is made (using common and not necessarily technical language).

153. The Tribunal carefully considered the flexible working request of 3 September 2018 (254). That was a request for flexible working and contained what was required for such a statutory request. The Tribunal did not find that what was said contained an allegation that the respondent had contravened the Equality Act 2010. The letter did not contain any allegation of discrimination at all.

154. Whilst it was not entirely clear from the pleadings, the claimant confirmed that what was relied upon as being a protected act in October 2018, was the email which she sent to Ms McCormack on 19 October 2018 (204/5). That email raised a complaint about micro-management and Ms Fenna's clumsiness with interactions. It made a reference to the fact that the claimant did not come to work to be physically threatened. Towards the end of the email there was a reference to the claimant

having been attacked in 2017 and the trauma, but the way that was referred to made it clear that the assertion was that the claimant would have expected Ms Fenna to have been more sensitive as a result. It was not referred to or relied upon as being a protected characteristic which had led to or been connected to unlawful discrimination or harassment. The email did not genuinely rely upon or relate to any protected characteristic. It did not assert anything which could be understood as an allegation of discrimination.

155. For those reasons, the Tribunal did not find that either of the documents relied upon amounted to a protected act.

156. In her arguments before the Tribunal, the claimant referred more generally to the various matters which she had raised and the need to consider all of the matters which she had raised when considering whether she had done a protected act. The Tribunal accepted that what was said in the two documents relied upon had to be considered in the context in which they had been sent and in the light of previous events, but it was still important and necessary for the Tribunal to determine whether the documents relied upon were (or contained) protected acts, applying the definition in the Equality Act 2010.

157. Had the Tribunal been asked to do so, the Tribunal would have found the claimant's letter of 18 August 2020 in which she made a dignity at work complaint (211) to have been a protected act, as that contained within it allegations of harassment and sufficient information for it to contain an assertion that what had occurred was unlawful on the grounds of, or because it related to, what could be broadly understood as being a disability, that is a protected characteristic.

158. Having determined that the matters relied upon were not protected acts, the victimisation claim did not succeed. However, the Tribunal also went on to consider whether it would have found that the matters relied upon at (i) and (ii) (60) were detriments (issue 10.3) and were because the claimant had done a protected act (issue 10.5). The Tribunal would have found that an investigation was a detriment, but the Tribunal accepted Ms Fenna's evidence that she did not investigate the claimant's working hours because of the flexible working request or the claimant's email to Ms McCormack. The Tribunal also accepted Mr Johnston's evidence about why he dismissed the claimant, so that, whilst dismissal was clearly a detriment, the Tribunal did not find that it was because of (or in any way influenced by) either of the protected acts relied upon or the letter of 18 August 2020 (which was not relied upon as a protected act).

159. The Tribunal did not need to determine the remedy issues arising from discrimination or victimisation (issue 11), even for those which it had been identified would be considered alongside the liability issues.

Remedy

160. In her schedule of loss, the claimant had recorded that her gross losses per week were £855.53. The respondent did not object to that figure being used to calculate damages for breach of contract and did not put forward an alternative figure. It was confirmed that, as the payment was for notice, the respondent's view was that any damages would need to have deductions made for tax before payment

was made to the claimant, and therefore the gross figure was the appropriate one to use. On that basis, the Tribunal multiplied that figure by twelve to calculate the damages equivalent to twelve weeks loss. It found that the appropriate remedy was £10,269.96. Neither party raised any objection to that figure and therefore Judgment was entered for that amount.

Summary

161. For the reasons explained above, the Tribunal found for the claimant in her wrongful dismissal/breach of contract claim and awarded her damages of £10,269.96. The claimant's other claims did not succeed and were dismissed. The Tribunal would have found that the respondent had breached its duty to make reasonable adjustments by not using the informal procedure to first investigate the disciplinary issues (that is, it did not speak to the claimant about the allegations when memories were fresh), but as the claim for the breach had been entered out of time and it was not just and equitable to extend time, the Tribunal did not have jurisdiction to determine that claim because it had not been entered at the Tribunal in the time required. The claimant's other claims did not succeed for the reasons explained.

Employment Judge Phil Allen
26 July 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
2 August 2023

FOR THE TRIBUNAL OFFICE

Annex
List of Issues

1. Time limits

1.1 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

Dismissal

2.1 Was the reason or principal reason for dismissal that the claimant made a request for flexible working. If so, the claimant will be regarded as unfairly dismissed.

2.2 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

Or:

2.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 The respondent genuinely believed the claimant had committed misconduct;

2.3.2 there were reasonable grounds for that belief;

2.3.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.3.4 the respondent followed a reasonably fair procedure;

2.3.5 dismissal was within the band of reasonable responses.

3. Remedy for unfair dismissal

Only the issues to be determined alongside the liability issues are included in this Judgment

3.1 .

3.2 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?

3.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.3.1 .

3.3.2 .

3.3.3 .

3.3.4 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?

3.3.5 If so, should the claimant's compensation be reduced? By how much?

3.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.3.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.3.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.3.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.3.11 .

3.4 .

3.5 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. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

5. Detriment (Employment Rights Act 1996 section 48)

5.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 Started an investigation into allegations of dishonesty without/ did so without informing the claimant

5.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?

5.3 If so, was it done on the ground that she made a request for flexible working?

6. Remedy for Detriment

Only the issues to be determined alongside the liability issues are included in this Judgment

6.1 .

6.2 .

6.3 .

6.4 .

6.5 .

6.6 .

6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8 Did the respondent or the claimant unreasonably fail to comply with it?

6.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

6.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

6.11 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

7. Disability

Issue 7 did not need to be determined

8. Discrimination arising from disability (Equality Act 2010 section 15)

8.1 *[Further particulars were provided (59)]*.

8.2 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8.3 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

8.3.1 [This was set out at paragraph 9 (59)] The unfavourable treatment alleged to have occurred was the claimant's dismissal on 30 March 2021.

8.4 Did the following things arise in consequence of the claimant's disability:

8.4.1 [This was set out at paragraph 10 (59)] The claimant's case was that her dismissal, the unfavourable treatment, was "because of" failing to work her weekly contracted hours on the ward and this "arises in consequence of" the claimant's disability as her disability means she may not be able to do a full shift on the ward because of tiredness, lack of concentration or other symptoms of her PTSD and/or anxiety and depression.

8.5 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

8.6 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

8.7 If not, was the treatment a proportionate means of achieving a legitimate aim?

8.8 The Tribunal will decide in particular:

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

8.8.2 could something less discriminatory have been done instead;

8.8.3 how should the needs of the claimant and the respondent be balanced?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

9.1 *[Further particulars were provided (55)]*.

9.2 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9.3 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs [These were set out at paragraph 3 (55)]:

9.3.1 The requirement for the claimant to do full time hours on the ward (37.5 hours) and/or to work on the ward 5 days a week on a 7.30 am – 3.30 pm shift ("Full Time Ward Hours PCP");

9.3.2 Using a formal procedure to investigate allegations of insufficient hours being undertaken, which includes asking the claimant during interviews and without access to work records, information in relation to specific work days ("Formal Procedures PCP");

9.3.3 Use of CCTV as part of working hours disputes and/or showing employees CCTV footage as part of working hours disputes ("CCTV PCP");

9.3.4 Use of a 17 week reference period to determine if the claimant had worked sufficient hours on the ward ("Reference Period PCP").

9.4 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that [the substantial disadvantages were set out at paragraph 4 (56)]:

9.4.1 With respect to the Full Time Ward Hours PCP: the claimant's PTSD and/or anxiety and depression affects her ability to work for prolonged periods of time without sufficient breaks and means there are times when she is too tired/unable to concentrate. In summary, the claimant has more difficulty compared to the non-disabled in working a regular 4-5 day a week shift pattern from the ward which in turn led to her dismissal for failing to meet this PCP;

9.4.2 As regards to the Formal Procedure PCP: the claimant's PTSD and/or anxiety and depression affects the claimant's memory/ability to recall events especially after a period of time has lapsed, and in this regard she performs worse compared to those who are non-disabled. The use of the Formal Procedure PCP meant that there was a considerable delay and amassing of evidence before the claimant's version of events was ever sought which prejudiced her ability to defend herself by virtue of difficulty recalling things. The same is true in asking the claimant questions 'in the blind' (that is without having access to work records and materials);

9.4.3 In relation to the CCTV PCP: the claimant's PTSD and/or anxiety and depression meant she became very upset and mentally unwell upon seeing the CCTV, which in turn made it difficult for her to respond to the allegations. This is specific to the claimant's disability in that she had an abusive former relationship where she was routinely surveyed by her partner and therefore has flashbacks/bad reaction to viewing CCTV type evidence. Most non-disabled people would not have any reaction;

9.4.4 With respect to the Reference Period PCP, the claimant's disability means there is more likely to be poor periods/fluctuations in her working hours compared to the non-disabled and so she is potentially at greater risk from the use of a shorter reference period which may coincide with her being more symptomatic.

9.5 [No physical features were relied upon]

9.6 [No lack of an auxiliary aid was relied upon]

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

9.8 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable [which were set out at paragraph 6 (57)]:

9.8.1 With respect to the Full Time Ward Hours PCP:

a) Allowing greater flexibility with her working hours;

b) Changed her working hours, as she sought to do via her flexible working request that was declined;

c) Include time worked away from the ward in assessing completion of her hours (be it time dealt with calls away from the ward or tasks completed that were not on the ward or outside of regular working hours);

d) Not dismissing her for apparently failing to rigidly maintain her at ward full time working hours;

9.8.2 As regards the Formal Procedure PCP:

a) Using the informal procedure, that is immediately discussing any issue with hours with the claimant;

b) Giving the claimant access to work records and documents prior to asking her questions where there has been a significant lapse in time;

9.8.3 In relation to the CCTV PCP:

a) Not using the CCTV evidence in such allegations, there being other more pertinent evidence in relation to working hours;

b) Not showing the claimant the CCTV, but merely describe the matters to allow her to challenge it as appropriate;

9.8.4 With respect to the Reference Period PCP: using a much longer reference period.

9.9 By what date should the respondent reasonably have taken those steps? The claimant's views on this were set out at paragraph 7 (58).

10. Victimisation (Equality Act 2010 section 27)

10.1 Did the claimant do a protected act as follows:

10.1.1 Raise a complaint under the dignity at work policy about the manner in which she was spoken to and the language used towards her. 18 [or 19] October 2018, Ms Fenna; and/or

10.1.2 [as stated in the further particulars at paragraph 11 (59) but not the case management order] the claimant's flexible working request on 3 September 2018.

10.2 Did the respondent do the following things:

10.2.1 Instigate and investigation into allegations of dishonesty of the claimant. [In the further particulars at sub-paragraph (i) of paragraph 11 (60) the claimant detailed that detriment as follows:] In or around January 2019, the claimant's line manager starting an investigation into her working hours. The claimant asserts this is linked to the earlier request/protected acts as the claimant was working the hours flexibly and rather than informally discussing matters with the claimant instead launched a formal investigation in the hope of a formal sanction;

10.2.2 [In the further particulars at sub-paragraph (ii) of paragraph 11 (60) the claimant detailed a second alleged detriment as follows:] the claimant's dismissal. The claimant asserts that this is linked to the earlier request/protected acts as the genesis of the issue that led to the formal process was a formal investigation that the claimant submits was only commenced owing to the earlier request/protected acts. Additionally, the claimant asserts that there should have never been such a harsh sanction of dismissal and this step was taken in retaliation to the earlier requested/protected acts.

10.3 By doing so, did it subject the claimant to detriment?

10.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

10.5 If so, has the respondent shown that there was no contravention of section 27?

11. Remedy for discrimination or victimisation

Only the issues to be determined alongside the liability issues are included in this Judgment

11.1 .

11.2 .

11.3 .

11.4 .

11.5 .

11.6 .

11.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

11.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

11.9 Did the respondent or the claimant unreasonably fail to comply with it?

11.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

11.11 By what proportion, up to 25%?

11.12 .

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2408038/2021**

Name of case: **Miss C O'Brien** v **Cheshire and Wirral Partnership NHS Foundation Trust**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 2 August 2023

the calculation day in this case is: 3 August 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.