



EMPLOYMENT TRIBUNALS

Claimant: Ms A Queiroz

Respondent: Medical Services International Limited

Heard at: London Central
(by Cloud Video Platform)

**On: 19, 20, 21, 22, 23, 26 and 27
June 2023**

Before: Employment Judge Joffe
Ms G Carpenter
Ms Marshall

Appearances

For the claimant: Represented herself

For the respondent: Ms Musgrave-Cohen, counsel

JUDGMENT

1. The claimant was unfairly constructively dismissed by the respondent
2. The claimant's claims of harassment related to disability contrary to section 26 Equality Act 2010 are not upheld and are dismissed.
3. The claimant's claims of direct disability discrimination contrary to section 13 Equality Act 2010 are not upheld and are dismissed.
4. The claimant's claims of unfavourable treatment because of something arising in consequence of disability contrary to section 15 Equality Act 2010 are not upheld and are dismissed.
5. The respondent failed in a duty to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010.
6. It is just and equitable to extend time for the claimant's claim of failure to make reasonable adjustments.

REASONS

Claims and issues

1. The parties had agreed a list of issues at a case management preliminary hearing before Employment Judge Elliott on 30 September 2022. That list was as follows:

AGREED LIST OF ISSUES

1. The claimant brings the following claims. For the purposes of the claim for disability discrimination, disability is admitted for the conditions of fibromyalgia and centralised pain sensitisation.

1.1 Failure to make reasonable adjustments under sections 20-21 Equality Act 2010 (“EqA 2010”);

1.2 Discrimination arising from disability pursuant to section 15 EqA 2010;

1.3 Disability related harassment pursuant to section 26 EqA 2010;

1.4 Direct disability discrimination under s13 EqA 2010;

1.5 Constructive dismissal under section 95(1)(c) of the Employment Rights Act 1996

(“ERA 1996”) / s98 ERA 1996

Preliminary Issues

Jurisdiction

2. The claimant contacted ACAS on 29 April 2022 as part of the Early Conciliation Procedure (‘EC’) and was issued with an ACAS Certificate on 10 June 2022. The claimant presented her claim on 24 June 2022. In respect of any act or omission that is alleged to constitute unlawful discrimination that occurred before 30 January 2022:

2.1 Do such acts/omissions constitute part of conduct extending over a period for the purposes section 123(3)(a) EqA which ended on or after 30 January 2022?

2.2 Alternatively, would it be just and equitable to extend time pursuant to section 123(1)(b) EqA?

3. Constructive dismissal

3.1 Was the claimant constructively unfairly dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996.

3.2 In the circumstances, did any or all of the following alleged conduct constitute an actual or anticipatory breach of the implied term of trust and confidence by the respondent:

3.2.1 failing to arrange a suitable redeployment opportunity for the claimant on a permanent basis and/or allowing the claimant to continue with her redeployment in the Pre-Assessment Clinic uninterrupted;

3.2.2 failing to respond to or acknowledging the claimant's enquiries and alleviating her concerns about the future of her employment and the unreasonable conduct of her colleagues directed at her;

3.2.3 failing to take any action to prevent the claimant from being bullied and harassed by her colleagues, in particular Ms Gerona, and did this create an intolerable work environment for her;

3.2.4 failing to take any action to prevent the claimant from being subjected to Ms Gerona's unreasonable conduct, in particular her micro-management of the claimant;

3.2.5 failing to address the claimant's request to change her shift patterns to Tuesdays, Wednesdays and Saturdays and/or accommodating any requests to swap shifts;

3.2.6 placing unreasonable demands on the claimant by expecting her to carry out additional tasks, such as phlebotomy, without additional pay and support on Saturdays and Sundays, days of heavier than usual workload;

3.2.7 subjecting the claimant to the events of 1 February 2022 by Mr Polines, which the claimant will allege left her feeling distressed and humiliated to the extent she was unable to remain at work and complete her shift;

3.2.8 subjecting the claimant to repeated remarks from colleagues, in particular Ms Gerona and Mr Polines, asking her to return to the Oncology Ward;

3.2.9 removing the claimant from her scheduled shifts without any explanation or discussion with her, and whether this left her to consider herself dismissed from her employment;

3.2.10 failing to investigate and address the claimant's concerns in a timely manner despite asking her to retract her resignation on more than one occasion;

3.2.11 assigning Mr Kennedy to investigate her grievance in the full knowledge that he was leaving his employment within a short period and failing to inform the Claimant of this fact.

3.3 Were the following 3 terms breached?

(i) The implied term of mutual trust and confidence;

(ii) The duty to provide a safe working environment; and

(iii) The duty to provide reasonable support. Is this an implied term into the claimant's contract of employment?

3.4 Were any of the alleged repudiatory breach(es) the reason why the claimant decided to terminate her employment?

3.5 If so, did the claimant delay in resigning and thereby affirm her contract of employment?

4. Ordinary unfair dismissal – section 98 ERA 1996

4.1 If the claimant was dismissed, what was the reason for the dismissal?

4.2 Is the reason a potentially fair reason within the meaning of sections 98(1) and (2) ERA 1996?

4.3 If so, in the circumstances (including the size and administrative resources of the employer's undertaking), did the respondent act reasonably in treating that reason as a sufficient reason for dismissal?

5. Disability related harassment (section 26 EqA)

5.1 Did any of the following amount to unwanted conducted by the respondent?

5.1.1 The matters listed at 3.2 above.

5.1.2 The alleged constructive dismissal.

5.2 If so, was the conducted related to the claimant's disability?

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

5.4 If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

6. Direct disability discrimination (section 13 EqA)

6.1 Did any or all of the following matters constitute less favourable treatment of the claimant by the respondent in comparison to a comparator because of the claimant's disability?

6.1.1 any or all of the matters listed at 3.2 above.

6.1.2 the alleged constructive dismissal.

6.2 The claimant relies on a hypothetical comparator.

6.3 Was dismissed the claimant within the meaning of sections 39(2)(c) and 39(7)(b) EqA. Was the claimant entitled, because of the respondent's conduct, to terminate her employment without notice? The claimant relies on the actions listed at paragraph 3.2 above as establishing her entitlement to termination.

7. Discrimination arising from disability (section 15 EqA)

7.1 Did the following arise in consequence of the claimant's disability?

7.1.1 her inability to carry out all the duties of her substantive role due to her fibromyalgia and central pain sensitisation.

7.1.2 her requirement for reasonable adjustments to her role.

7.2 Did any or all of the following matters constitute unfavourable treatment because of something arising in consequence of the claimant's disability?

7.2.1 any or all of the matters listed at 3.2 above.

7.2.2 the alleged constructive dismissal.

7.3 Was the claimant dismissed within the meaning of section 39(7)(b) EqA. Was the claimant entitled, because of the respondent's conduct, to terminate her employment without notice? The claimant relies on the actions listed at paragraph 3.2 above as establishing her entitlement to termination.

7.4 If so, was the claimant treated unfavourably because of the "things" listed at paragraph 7.1 above?

7.5 If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? In broad terms the legitimate aim is providing a safe place of work for the claimant and a safe environment for patients. The respondent has leave, as set out below and if so advised to give particulars of any other legitimate aim relied upon.

8. Reasonable adjustments (sections 20 and 21 EqA)

8.1 Did the respondent apply the following PCPs?

8.1.1 The requirement to undertake all the duties of the substantive role, in particular, the manual handling aspects.

8.1.2 The requirement to consistently work weekend shifts without flexibility.

8.1.3 The requirement to be paid at the normal rate of pay for weekend work.

8.2 If so, did this place the claimant at a substantial disadvantage in comparison with persons who are not disabled? The claimant asserts that it did, by placing her at risk of exacerbation of her health conditions, the uncertainty about the future of her employment which caused her a high degree of stress and placing unreasonable demands on her to work weekend shifts routinely without support and/or flexibility.

8.3 If so, was it reasonable for the respondent to have taken the following steps to avoid the disadvantage?

8.3.1 Allow the claimant to continue in her redeployed role uninterrupted.

8.3.2 Redeploy the claimant into another suitable role or within Pre-Assessment on a permanent basis.

8.3.3 Allow the claimant to change her shift pattern to Tuesdays, Wednesdays and Saturdays.

8.3.4 Pay the claimant the enhanced rate of pay for weekend work.

9. Reasonable Steps Defence

9.1 In the event of a prima facie finding of discrimination by any of the respondent's employees, did the respondent take all reasonable steps to prevent the alleged discrimination or acts of that description (section 109(4) EqA)?

NB Although this issue appeared in the list of issues the defence was not ultimately pursued by the respondent.

Findings of fact

The hearing

2. We had an electronic bundle running to 594 pages. A handful of additional documents were disclosed during the course of the hearing. We were provided with witness statements from and heard the evidence of:
 - a. The claimant;For the respondent:
 - b. Mr A Polines, formerly the lead nurse at the pre admissions clinic at the Cromwell Hospital;
 - c. Ms S Doran, clinical team leader, oncology, at the Cromwell Hospital;
 - d. Ms P Gerona, nurse at the Cromwell Hospital.
3. We also had a witness statement from Ms K Crichton, Head of Transformation at the Cromwell Hospital. Ms Crichton did not give live evidence as she was due to give birth the week of the full merits hearing. We read that statement which was controversial.
4. Each party provided us with a chronology and we also had a cast list.

Facts in the claim

5. The respondent runs the Cromwell Hospital, which is a relatively small private hospital with some 794 staff.

Relevant policies and procedures

6. We were not taken to many policies or procedures. The respondent has an anti harassment and bullying policy but reference does not appear to have been made to it during the events with which we are concerned.

7. We looked at the respondent's sickness absence policy, which contains provisions about making reasonable adjustments for employees with disabilities. A possible adjustment is redeployment to an alternative role. The policy says: '...(this is dependent on the availability of a vacant position and your suitability to the role itself). You should not be required to go through our normal recruitment process if a suitable role can be identified.'
8. We did not hear from a witness from the respondent's HR department and we were told very little about that department functioned and provided support to management.
9. The claimant started working for the respondent as a health care assistant on the oncology ward on 9 December 2013. We understood that this role, unsurprisingly given its nature, involved some heavy lifting.
10. The claimant's job description included phlebotomy and the claimant obtained a venupuncture qualification in 2015.
11. The claimant told us that phlebotomy was a 'band 3' task and commanded a higher rate of pay. Neither Mr Polines nor Ms Doran was able to comment on those assertions and we saw no documentary evidence which supported them or even referred to 'bands' for health care assistants.
12. The claimant's normal working hours were 37.5 per week which would be worked in 12.5 hour shifts any day in the week and on either day or night shifts. She said that she worked about 1.5 weekends per rota and she believed that this was an entitlement. We saw no documents relating to that arrangement.
13. At the relevant time, management of the oncology ward was in the hands of Ms Doran and Ms A Naveas-Diaz, ward sisters. At the time of the events we are concerned with, Ms Doran was new in role and was getting up to speed with her management responsibilities. We understood that Ms C Banton was the HR adviser with responsibility for that area and that she was Ms Doran's main HR contact.
14. We saw some vacancy lists / job bulletins which we were told were emailed weekly to all staff. The claimant had no recollection of receiving these. We bore in mind that she was not performing a desk based job.
15. On 13 May 2020, the claimant had an accident whilst caring for a patient on the oncology ward. She injured her lower back. She was absent from work with back pain between 5 and 28 June 2020 and had a second period of absence between 5 September 2020 and 18 October 2020. She was referred to occupational health by Ms Doran on 19 October 2020 with knee and back pain. On her return to work, Ms Doran made adjustments including providing

that the claimant should do no manual handling and that she work one day on and one day off with no nights. Ms Doran discussed looking into a department with a lighter workload with the claimant.

16. On 4 December 2020, the claimant emailed HR:

I work as HCA at Oncology ward since December 2013. In the last two years I have been experiencing back pain quite often. At the end of march 2020 I have had an unfortunate incident while helping a patient with an aneurism, fainting and falling on me then my back was twisted trying to prevent the patient to fall on the floor. It was very painful but I've thought it would go in few days. Unfortunately was getting worse until June I couldn't work and I had to call sick. Since I have been seeking my GP for several times for painkillers, phone consultation (As per Covid) and self exercises by physiotherapist at the GP.

Despite all of this I was trying all I can to get better then I went back to work and after few weeks I was worse in pain then I could not work again. Thanks Bupa insurance I was able to see an orthopaedic consultant and have an MRI done which showed nothing at spine but he said it is the muscles related which is giving a diffused back pain and it is exactly what is still happening. I have had examination with the physiotherapist and he said it is muscle related issues. I am still having physiotherapy at the hospital, I feel better but the pain still coming back after few days. I am doing all exercises daily but the pain still in place. My manager Rosemary sister Angels and Sarah are aware of all. A datix have been done to record it also.

The Occupational health advisor have spoken to me and advised to have a lighter duty but I have to say I still having pain in my back often and I'm trying to manage at work. The wards it can be demanding, multi tasks and duties has to be completed for the patients I totally agree and understand and which I have been doing for many years. I have to say that I am afraid that this pain will take longer to get better or happen again. I like working at Oncology but I'm not 100% physically capable to perform all my duties for now despite my problem persists and I'm afraid also the problem recur again. Also I have mentioned I totally understand that the nurses and the patients needs full help which sometimes perhaps it might be difficult to manage.

I am happy and will continue to work at Cromwell Hospital, I would like if I may ask for a transfer or apply to outpatients when there would be a vacancy there if it is possible please which it is a lighter duty. You can talk to my manager and or sisters about it if you want to.

17. Ms M Grimley in HR replied:

Sorry to hear you're having ongoing back pain issues, I sympathise having had issues myself.

Crystal will talk with Sarah Doran next week about the adjustments that are in place at the moment and the OH advice. I'm not sure if there are active vacancies in Outpatients just now and we'd need to talk through training requirements as the roles in OPD generally involve phlebotomy and cannulation skills. In the meantime if it may help you could email Cheryll Davies to see if she has any slots for staff massage as she has just started offering these again.

18. The claimant responded:

Thank you for your email. Oh dear, back issues are not nice at all. Yes as I said I will be interested on OPD when there would be a vacancy and I also do phlebotomy. I shall look for Cheryll. Thank you once again.

19. On 19 December 2020, Dr B. Almahdi, pain consultant, confirmed that the claimant was suffering from central pain sensitization and fibromyalgia: *The problem is a long-standing problem. It will not go away with treatment, but we are trying to improve your functionality with a prolonged course of physiotherapy, some pain medication and I am referring you also to acupuncture to try and build up the momentum; but there needs to be understanding that your health condition has changed and you need to adapt your physical tasks according to your new capacity and this needs to be addressed by the occupational health team where they should assign you the appropriate work according to your new capacity and adjustment of your work place accordingly.*

20. Between 20 December 2020 and 30 April 2021, the claimant was absent from work due to her impairment. She was referred to occupational health on 18 January 2021 and the occupational health nurse reported on 20 January 2021:

Based on the information available to me today in relation to the demands associated with Ms Queroz's¹ role, I understand that there may be limitations to the level of adjustments that is practical and possible for the business to accommodate. You may wish to consider having a meeting with her to discuss what may be possible: I would recommend for any adjustments implemented to remain in place until symptoms subside if possible.

Ms Queroz advised that she is currently on annual leave and due to return to work next week. From my assessment today and based on the medical report, Ms Queroz is likely to struggle to continue undertaking all aspects of her job role in her current ward. She advised that the ward is a "heavy ward" and she would struggle with using a hoist, supporting heavier patients as well as pushing patients in a wheelchair. I would advise that you undertake a manual handling risk assessment as well as a risk assessment of her work duties and implement any indicated adjustments.

¹ The claimant seems to have been more often referred to as Ms Queroz than Ms **Queiroz** by the respondent.

You may also wish to consider supporting Ms Queroz in a suitable alternative role.

21. On 25 February 2021, there was a further OH referral resulting in a further report from an OH consultant on 12 March 2021:

Recommendations on adjustments and support:

- During the consultation, she mentioned to me that she has been struggling to undertake ward work, which involves manual handling. Pain is a subjective symptom, and it is difficult to measure the pain objectively. One has to rely on the symptom perception and address them.*
- She informed me that she is unable to continue in her employment as a ward-based care assistant. She feels that she should be able to undertake the role of an outpatient-based care assistant due to her physical limitations. It is for your organisation to consider redeployment in the light of the medical information.*
- As there is no serious pathology identified, it is possible that her symptoms may improve with some coping strategies and she should be able to undertake physically demanding tasks in the future. However, it is well known that patients with fibromyalgia make little improvement despite various interventions.*

Answers to additional questions:

-Please advise on recommendations required supporting return to work:

You may wish to consider a temporary redeployment into a less physically demanding role such as outpatient-based care assistant, if this is reasonable from your business point of view. She could consider returning to less physically demanding ward work once her symptoms are stabilised.

• Please advise on the assessment of fitness to continue in present role:

She would require evidence-based intervention to help address her pain symptoms, which include cognitive behavioural therapy, comprehensive pain management with medication, and other interventions such as epidural injections.

• Please advise on the recommendations on any adjustments within the workplace: I would suggest to management to hold an open discussion with her and agree on a temporary redeployment plan until her symptoms stabilise. It is possible that she should be able to undertake ward work at a ward that does not require a lot of moving and handling. You may wish to provide her additional support from a colleague while undertaking manual handling tasks.

...

Follow up recommendations:

I have not made any follow-up arrangements. I would be happy to see the employee again once the management has had an open discussion about redeployment issues. I would be happy to provide any additional advice if the management has identified an alternative role.

22. We noted that, after this point, the respondent treated the claimant as if it accepted that a return to full duties on a ward would not be possible. None of the subsequent dealings with the claimant suggested that anyone involved believed that the claimant would be fit to return to full ward duties within the foreseeable future. The claimant was never referred back to occupational health to ascertain whether she might be fit. Ms Banton decided a further referral was not required.

23. On 5 February 2021, Dr Almahdi confirmed his original diagnosis.

24. On 3 May 2021, the claimant had a return to work meeting at the oncology ward with Ms Doran, who recorded:

Adjustments:

We have stipulated no 'manual handling' within the work place; this includes hoisting, pushing or pulling trolleys/beds/wheel chairs/ commodes and alike with patients on board

- Angelah is happy with her current working environment and gives me permission to disclose our meeting and adjustments with the site leads, senior nurses etc particularly regarding amendments to practice.*

- She would like us to look into redeployment to a 'lighter' workload department and this will endeavour to be discussed at ward level with the fellow ward sister. I have said to Angelah at the moment with the current pandemic we may not be able to facilitate this and she understands.*

- She has suggested she would prefer to do 1 day on and 1 day off as per her current rota but working only 7.5hrs. This has been actioned and will be reviewed in 4 weeks.*

...

- She is happy to help turning patients but we have recommended only patients that are able to assist Angelah will only be there in a supportive role not to fully aid the patient.*

...

- I have advised Angelah to speak up to the NIC if she feels worsening pain and needs a rest and we will accommodate this as feasibly possible.*

- We have suggested a 10 minute break/respite off the ward every 2 hrs for the purposes of undertaking her physio exercises*

25. The claimant said that at this point she should have had a long term sickness meeting. It was not apparent to the Tribunal that such a meeting would have

been different from the meeting she had with Ms Doran, save that there would have been HR involvement.

26. Ms Doran wrote to the claimant about their discussions and in particular about a proposal to find an alternative role for the claimant: *We will endeavour to meet on the 26/05/2021 to review things but I understand that this is likely to be an ongoing problem for you in which we will support you. You have given me permission to cascade this across the site managers and senior nursing team.*
27. The claimant gave evidence that during her four weeks back on the ward, colleagues asked her why she came back to work if she could not work. She spoke to Ms Doran about how she would like to be redeployed as her colleagues were not happy that she was not fully capable of physical tasks.
28. Ms Doran began to explore other opportunities for the claimant. She spoke to a colleague in outpatients who said that they were proposing to establish a GP clinic which might require an HCA. This was only in the planning stages and they were waiting for a business case to be approved. She also looked for vacancies in phlebotomy and general outpatients but, due to low staff turnover, there was nothing in those areas.
29. Ms Doran became aware that the pre admissions clinic was busier as it had had to introduce weekend working due to covid testing being required; also some cover was required for staff absent for covid related reasons. There was no permanent vacancy but the department confirmed they could use the claimant to cover some shifts.
30. Ms Doran wrote to Ms J Wilcocks on 12 May 2021:
Jacks has asked me to touch base with you regarding a possible position for a HCA in pre admission clinic. I have approached Angelah and asked her and she is keen to transfer over albeit in the short term. However, she will need to continue to work alternate days but is happy to work weekends so tues, thurs, satu, mon, weds, fri, sun etc. May 2021
31. On 18 May 2021, Ms Wilcocks replied:
Many thanks for freeing up Angelah. Is she full time? The pre assessment unit works 4 days a week so working every other day she might not be able to meet her contracted hours. Is the every other day working an occ health recommendation? Would she be happy to supplement missing hours with AL or a long day on the ward or another day in pre assessment? I have copied in Tonee who manages pre assessment.
31. Ms Doran responded:
what are the hours per day you work? Do you cover weekends?

Currently she is on a phased return to work. Upon speaking with Angelah on her day back she has a preference to do alternate days as the day she works is so exhausting. I am scheduled to review her on the 26/05/2021 regarding shift patterns moving forward.

I await your reply before cascading

32. At this time, Mr Polines was the lead nurse of the admissions clinic. It had previously been a single nurse service. Ms Polines was joined by Ms Gerona and other nurses, Nicola and Kerry. There was also Helen, an administrator, and Nicole, an HCA. Kerry and Nicole were also redeployees. Nicole was waiting for a knee replacement. Some nursing staff who had been shielding worked in the clinic conducting telephone health assessments.
33. Ms Gerona mainly worked in the clinic at weekends and would be in charge in Mr Polines' absence.
34. The clinic was open 7 days a week, 8 am to 6 pm. Patients due to have a procedure would attend for necessary tests. On any day it would be a small service run by a nurse with one or two HCAs.
35. There were two patient rooms; in the first room the patient met with the nurse who would give the patient information about what to do before the procedure, take a medical history and give appropriate health education advice. The nurse would also administer a covid test.
36. The patient would then be seen by the HCA who would carry out blood tests and any other tests the consultant had ordered, as well as screening for MRSA.
37. At the relevant time, patients had to have a covid test 72 hours before procedures. Few procedures were carried out on Saturday and none on Sunday. The quietest days in the clinic were therefore Wednesdays and Thursdays. No HCAs were needed on those days. Nursing staff would carry out telephone health assessments on those days. Saturday and Sunday by contrast were busy days and HCAs were required.
38. There was a dispute between the parties as to whether there was work to occupy an HCA in the pre admissions clinic on a Wednesday. The claimant said that there were some patients for Saturday procedures. There was also admin to do – making up the packs for patients and filing. Mr Polines said there was not enough work. The nurse could cover the limited number of patients and there was an administrator to do the packs.
39. Mr Polines was happy to accommodate the claimant in pre admissions as he knew they she was a good worker. They needed additional resource but not

permanently. They expected the workload would ease when covid restrictions eased. They initially planned for the claimant to come to the pre admissions clinic for three months. That was subsequently extended for an indefinite period.

40. The claimant was aware when she went to pre admissions that phlebotomy was part of the role and that she would receive the same rate of pay as she had received on the ward.
41. From 31 May 2021, the claimant was redeployed to pre admissions. She also helped in the phlebotomy department on a few occasions and did some shifts on the ward. Mr Polines told other staff that the claimant was joining the clinic for an indefinite period of time and that she could only do minimal manual handling.
42. On 25 May 2021, Ms Doran emailed Mr Polines and others:
Hello team,
Firstly I'd like to thank Tonee and his team for accommodating Angelah in her redeployment. It really means a lot to all involved. We have agreed that as of the 31st May Angelah will predominantly work in pre admissions on the pattern i have included.
Her roster will comprise of a phased return to work pattern of 8-6 with the remaining
1.5hrs being annual leave. She will work 13 shifts per roster.
Tony, OPD Tonee wondered if Angelah should move over under his team whilst she's being redeployed? I have allocated all her shifts on the health roster to reflect that in the template i have sent to you. Angelah is aware of her shifts
43. Mr Polines said that the original arrangement was for the claimant to work Mondays, Tuesdays and Fridays which was not ideal as Saturday and Sunday were busy days. Ultimately the claimant ended up working Tuesdays, Saturdays and Sundays. This was because she was doing independent study on Mondays and Fridays, so this was an arrangement which suited her needs as well as covering busy days in the pre admissions clinic.
44. On 10 June 2021, Ms Doran met with the claimant, who was unhappy that her shifts were not set days and that some of tasks she was doing seemed menial. Because she was splitting her time, she did not feel she was in a team. Ms Doran said that she asked her to be patient and to continue looking at published vacancies. The claimant did not recall being told to look for vacancies and the advice was not written down. That day, Ms Doran sought to initiate an OH review and also wrote to Ms Banton:

I had a meeting with Angelah today to review how things are going with her phased return to work as its been 2 weeks. It saddens me to say that its not going well. Angelah enjoys elements of the work and although physically its lighter on her pain, mentally its sapping her completely and I'm not happy with this. I want to clarify that this is not a reflection on the preadmissions team as they have been nothing but accommodating. Angelah is 'slotting in' where needed and although this is serving a purpose for the hospital its not serving a purpose for Angelah as she is not in a 'team'. When in the preadmissions unit she may have to spend a morning in phlebotomy or when she's on the ward because we don't have visibility to her rota she's often tasked with essential but menial tasks.

I have agreed to trial for another 2 weeks with this current set up and will speak with the roster team to get Angelah's odd shift every week allocated to our rota so we can see what she's doing to make it a more seamless approach.

What i need from you is what we are going to do for Angelah moving forward and how we support her and her functionality to work. She is currently on a phased return to work and using up annual leave to make up the hours required to meet her contract. This is not sustainable long term. She wants to return to the ward but she is compromised with her pain to what she can physically do. I feel that BUPA as an organisation need to source a role that is suitable for Angelah rather than this makeshift approach we are doing at the moment. Angelah has worked with us for over 7 years now and we have an obligation to support her in this process.

I will process a further OH referral which i feel will be irrelevant in processing this, i await your response.

45. She wrote again to Ms Banton later that day:

Could we please try and sit with Angelah and discuss her options moving forward as i feel a more comprehensive plan would be useful for all of us to adhere to. It would be useful to consider her working pattern as currently she is on a phased return to work and i feel that we need to have a long term plan with her hours and how we will meet them. I am away the week commencing the 28/06/2021 but Jackie is around and happy to speak with Angelah following your recommendations

46. That meeting never happened.

47. On 24 June 2021, Ms Doran and the claimant discussed the situation and agreed that the claimant could transfer entirely to pre admissions on a temporary basis. The claimant was still keen to go to the outpatients department and commented that that department was using some bank staff.

48. Ms Doran wrote to Ms Banton:

I have sat with Angelah today and will draft another email later which I will cc you in. Wanted to clarify a few things.

So we have established she is to be redeployed into a lighter role and she agrees. She is prepared to increase the days in preadmissions so she's not on the ward odd days. When she has been in phlebotomy in outpatients they use bank and I am keen to talk to the sister there or lead nurse to establish if that's an opportunity to move to before we finalise anything.

If she stays with pre admissions their hours are only 8-6pm she would then only be working 123.5hrs per month instead of 150. I have explained that I would likely have to transfer her across to Tonee permanently under a flexible working plan so it reflects her annual leave etc is this correct.

I have some loose ends to tie up; she has OH today at 11. We have until the 15/08/2021 till her phased return to work will come to an end. If I get an outcome before then I will end it sooner.

49. She also wrote to Ms D O'Sullivan, lead nurse in diagnostics:

I'm not sure if you are aware but Angelah Queroz is currently working split mixed shift as a phased return to work within the preadmissions department. We have reviewed things a few times since her return and she is not fit to continue her current role as a ward based HCA. She has enjoyed her time in preadmissions although it's a little disjointed and finds the reallocation of her placement a little off putting.

She has worked with Geraldine a few times and cant speak highly enough of her. Geraldine had mentioned that they often use bank to cover their service and was wondering maybe Angelah could move across to there in a more permanent role. Her phased return to work comes to an end the week commencing the 16th august but i am keen to get some stability in place for her moving forward.

50. On 28 July 2021, Ms O'Sullivan replied to say that there were no current vacancies:

I don't think we currently have a HCA vacancy in the team but am still catching up so Geri would be best placed to advise.

Geri- would we have any bank/perm position we could discuss with Angelah?

51. On 7 July 2021, Ms Doran chased Ms O'Sullivan and Ms O'Sullivan replied:

We don't currently have any active vacancies for HCAs in OPD but we may have some coming up in the next few months.

*She would have to apply and go through the interview process, **we can make sure if any new roles are posted these are shared with Angelah to apply.***

[Emphasis added]

52. On 8 July 2021, there were emails about moving the claimant's Monday shift to Sunday in preadmissions. The emails do not reveal who initially suggested it, but it appears that the arrangement was agreed.

53. On 13 July 2021, Ms Doran wrote to HR:

Hi Jacks i have arranged a meeting to meet with Angelah Queroz on the 26/07/2021 regarding the current working pattern. So her phased return to work comes to an end on the 15/08/2021.

Deidre had proposed a HCA for the GPs in the mews but discussions are still in the pipeline and there are currently no vacancies. Angelah has developed her skills since moving to pre admissions, phlebotomy, ECGs and general assessment. She is an asset to the hospital and i don't want to let her health impinge on her employment.

I know there was a concern that from a budget point of view we would essentially be paying for her to work elsewhere but i want us to stick with this set up for at least 6 months in anticipation of the proposed opening becoming available. I haven't informed Angelah of the process after the 15th although she is aware that if there are no vacancies she could be terminated on medical grounds.

54. The claimant's evidence was that Ms Doran told her that there was a plan to terminate her contract on medical grounds. She says that she asked Ms Doran how the respondent could do that when she was still working and could still work. She said that Ms Doran said that there was no vacancy and that they would probably terminate her contract. The claimant said that she went to cry in the toilet.

55. It was accepted by the respondent that there was a conversation about the possibility that the claimant's employment could be terminated if a permanent vacancy was not found for her. We accepted that the claimant was alarmed by the conversation. The claimant's oral evidence was that she felt at risk from this time. We noted that there was no assurance that she had any secure tenure in pre admissions and that she was led to believe that managers / HR were looking for a permanent vacancy for her.

56. On 26 July 2021, the claimant wrote to Ms Doran:

Thank you for your time earlier.

As we spoken today I have made a sample of four weeks template accordingly with pre assessment and my capacity.

I am happy to do three days on pre assessment and I have to have the rest of the hours unpaid for now unfortunately.

57. Ms Doran wrote to Mr Polines:

I have spoken with Angelah today to keep her in the loop aware of the fact her roster with you comes to an end on the 16/08/2021. We have discussed things and as Angelah is not fit to return to the ward the redeployment will continue for now. If you are happy I'd like this to continue till the roster that ends the 07/11/2021.

You have privileges to amend her rota. She will still be down as a phased return to work however instead of the 1.5hrs after being used as annual leave it will be as unpaid leave. Angelah has drafted a mini rota to ensure she works predominantly with you. Any hours owing will be down as unpaid. Please liaise with the health roster team if you are unsure how to allocate her hours so long as you have the days she's working they can do the rest

58. The claimant said that she regularly asked Ms Doran if she would be offered a permanent transfer to pre admissions or somewhere else and what would happen. Ms Doran told her that she was still waiting for the senior manager to advise her what to do.

October 2021 incident with Ms Gerona

59. The claimant's evidence was that she requested a change of shift on a day when Ms Gerona was in charge of the pre admissions clinic and Ms Gerona told her she should go back to the ward as she was not suiting the clinic: *After I requested to swap a shift, Perry told me verbally that I do not suit the clinic on busy days, and therefore it would be better that I go back to the ward.*
60. In her witness statement Ms Gerona denied telling the claimant she should return to the ward. In oral evidence, she said that she did not recall saying that. She said that the claimant was asking her for a change of shift at short notice and sending messages to Ms Gerona's personal phone.
61. Ms Gerona sent the claimant a text message at this time:
Angela, you can work tomorrow as the clinic is busy. I put you on AL for Tuesday. Next time you want to change your shift, please speak to Tonee directly, not me. We will need to discuss about your shift patterns as it doesn't seem to suit the clinic's busy days. Maybe think of going back to the oncology ward to see if they can accommodate you better.
62. The claimant said that Ms Gerona was critical of her speed in front of patients and spoke to her rudely. Ms Gerona said that she wanted to ensure that patients were dealt with quickly and were not queueing in corridor (there was no waiting room). There were occasions when she had to tell the claimant to speed up her work. She said that the claimant had a tendency to be chatty. She did not monitor how long she spent on blood tests or ECGs or monitor her performance. She said that she would tell other HCAs to work more quickly too if appointments were overrunning. Ms Gerona said that her

criticisms of the speed of the claimant's work were not related to her health conditions.

63. As to her manner, Ms Gerona said that she had a loud voice and some colleagues might think she came across as rude but that was not her intention.
64. On 5 October 2021, the claimant wrote to Ms Doran about the incident::
As you are aware, I have spoken to Tonee before to put me on a rota pattern days of work.I have had also asked a few times to change some days as I was not able to do, as the Rota comes on different days then requested.
I was going to ask Tonee to work Tuesdays, Saturdays and Sundays.
Tonee is away for little while and I could not talk to him yet so I have had asked Perry to make some changes on the Rota this week which she was not very happy to
She has told me that I should go back to Oncology as I do not suit the clinic busy days of work.
Today Perry still not happy and as Tonee is not here I have asked Perry to speak to you If she still concern.
65. Ms Doran said that claimant approached her. The claimant told her that she had started some further education and that affected her ability to work certain days. She felt that Ms Gerona was not happy to make the shift changes.
66. Ms Doran wrote to Mr Polines:
We have spoken before and am happy for you to 'manage' Angelah within the pre admissions unit. She is currently undertaking further education and is unable to work Mondays and Fridays but is committed to working Tuesdays, Saturdays and Sundays. Perry seems to think this is unachievable. As you are the manager I will leave to you to review with Angela upon your return.
Not particularly happy that Perry threatens Angelah and says go back to your own department then.
I am sure you can accommodate this Tonee. I will be in the 13/10/2021 and 14/10/2021 if you need to discuss further
67. Mr Polines said he spoke with Ms Gerona and said that having the claimant was working well for them as it was reducing the need for bank staff and helping their budget performance.

68. Ms Gerona said that Mr Polines told her to be mindful of how she spoke to the claimant, reminded her that the claimant not used to working with her and said that he did not want the claimant to get the impression that Ms Gerona was angry with her.
69. The claimant said that Mr Polines did not tell her he had spoken to Ms Gerona and that he just told her not to take things personally. We accepted that Mr Polines spoke to Ms Gerona in the terms they both indicated but that he did not tell the claimant he had spoken to her. There was no evidence that the claimant received any meaningful feedback from anyone about this incident.
70. Mr Polines said about what happened on this occasion:
- Perry has a loud voice and can come across as abrupt and rude, not just with the claimant but with others. Her emotions can sometimes get the better of her. She utters words that are not well thought off. She had an argument with the claimant because she found her to be working too slowly and patients outside waiting. At this time, I spoke to Perry to remind her to speak to the claimant courteously and professionally. I reminded Perry to give extra consideration to the healthcare assistants and that the service is a walk-in service and let the patients wait, if necessary.*
71. After this, relations between Ms Gerona and the claimant appear to have improved somewhat until the incident in January 2022 referred to below.
72. In oral evidence, Mr Polines said that Ms Gerona was rude and could be hostile at times as well. Ms Gerona could be abrupt and could be misinterpreted as someone who was really rude because of her demeanour and how she talks. She got frustrated easily at times; her emotions got the better of her and sometimes she said inappropriate things. She had called him lazy. He had worked with Ms Gerona for a long time.
73. In 2020, there had been a complaint about Ms Gerona's behaviour, which was dealt with by HR; Mr Polines said that he had referred her to HR to see if she needed anger management. He said that occupational health had not agreed that Ms Gerona needed anger management. He had told Ms Gerona that she needed to try to control her emotions. When he spoke to Ms Gerona in October 2021, he had told her she needed to be careful given her previous record.
74. He said that Ms Gerona found the claimant to be a slow worker. He disagreed that the claimant had been bullied by Ms Gerona; he said that he had been bullied himself and was sensitive to it.
75. As to the incident itself, although the evidence we heard was not entirely clear, what was clear was that Ms Gerona had said that the claimant was too slow and that she had sent the text message about the claimant not suiting the clinic. We concluded that the tone of her interactions with the claimant would have come across as rude, harsh and hostile.

76. On 21 November 2021, the claimant sent a sick note sent to Mr Polines:

I wish all is well with everyone.

Here is the sick note to send to HR if they need.

I am having steroid injections this Thursday 4th of November for my neuropathic pain and if everything is alright I will be back on next Tuesday. I will keep you informed.

This was the point at which Mr Polines would have known more about the nature of the claimant's disability.

Jocelyn incident

77. At about this time there was an incident with another member of staff, Jocelyn Uy, a registered nurse. The claimant said: *Jocelyn told me in front of Perry Gerona: "We will call Maria back, we prefer Maria to work, this is Maria's post, you are getting a favour being helped"*.

78. Ms Gerona said in evidence that she did not witness this incident. Mr Polines became involved in the aftermath of the incident.

79. On 21 November 2021, the claimant emailed Mr Polines²:

Today, Sunday is very busy as normal, full clinic and Perry have made a good planning yesterday for Today as she could not get a second HCA for help today.

We had agreed that the nurses will do the swabs and I will do the bloods and ECGs, but this morning I have Jocelyn talking very laud to me saying that is my job and so on.

Tonee I really appreciate working here and I do all I can but I Can Not take staff behaving like that like she said she is doing me a favor as all of this is my job.

This is really distressing kind of to work with and I really find very difficult to maintain composed and do the job.

I did propose - as my choice, to work every full weekend doing extra skills such taking blood, EGC, swabs and I am not been paid for it but instead been told

That this is my job by staff and basically this is not enough for them. I am sorry about this.

I just want to share this with you and that you are right to choose the best for the clinic.

² Idiosyncrasies of spelling, punctuation and grammar are recorded in this and other messages as they appeared in the bundle.

Please Tonee feel free to talk and ask me anything you want as you are a such great soul and person to be and work with.

80. Mr Polines said in his witness statement that:

I spoke to the claimant to find out what Jocelyn had said to her and then I spoke to them both together and reminded them to behave professionally. I also clarified with the claimant that it was her job to do MRSA swabs and it is the job of the nurse to carry out COVID tests.

81. The claimant said in evidence that Mr Polines did not respond to her email or speak to her about it. Mr Polines accepted in oral evidence that he had not spoken to the two together but said that he had spoken to them separately to clarify whose role it was to do the swabs and to tell them to act professionally.

82. We accepted that Ms Uy had said to the claimant what the claimant reported. Mr Polines clarified whose role it was to do the swabs and there was no further incident with Ms Uy.

83. On 27 November 2021, the claimant emailed HR:

I am working on Pre Admission clinic since June of this year and since I am there I am doing Phlebotomy, ECG, Covid and MRSA swabs and my salary has not been reviewed since.

I believe I am on Band 2 since I started working on Oncology at 2013, but over those years I have gained skills and experience by working there and I am now working in Band 3 with those extra skills.

It would be nice if you could please review the working I am doing at pre assessment and the compatible salary please, if I am not wrong.

You may talk with Sarah Doran and/or Tonee Polines.

84. The claimant cross examined several of the respondent's witnesses about why she did not get a change to her terms and conditions in writing when she went to the pre admissions clinic. The witnesses said there was no change to her terms and conditions as she was employed as an HCA and there was no change to the requirements in terms of what hours she could be asked to work and so forth.

85. On 7 December 2021, the claimant wrote to Mr B Kennedy, oncology ward manager:

We haven't met personally yet but I know you are our manager to Oncology ward now, welcome!

You might have heard about myself through Sarah Doran and/or Angels Naveas.

I only want to be brief here.

As I am HCA to Oncology since December 2013 and this year June due to health circumstances I had to move to a lighter duty department which I am since June I have been working here.

Thanks to Tonee and Sarah Doran they have had kindly transferred me to working in Pre admissions for a time.

I wanted to ask you if you know what the management plan is, if are any change as a temporary contract from Oncology to pre admissions or I will continue as it is.

Also I do Phlebotomy, ECG, and all types of swabs and the salary it is not compatible with the skills I am doing since June, so I think the salary should be reviewed If I am not wrong.

86. The claimant received no reply to either of these emails.
87. In early January 2022, the claimant was off work for a period with covid. On 5 January 2022, Mr Polines gave notice of his resignation.
88. Around 11 January 2022, the claimant was expected back at work. There were text messages between the claimant and Mr Polines and Ms Gerona. Mr Polines and Ms Gerona suggested in evidence that the claimant gave conflicting reasons for her ongoing absence.
89. Mr Polines said that the claimant texted him that she was worried about her back but then told Ms Gerona that she was not coming back due to pain in her foot. He said that he and Ms Gerona were frustrated because of the conflicting reasons and very short notice given. He said that he explained to the claimant that she needed to be straight forward with them about reasons for absence. He said he talked to the claimant about the conflicting reasons and the claimant said she did not want people to know about her back complaint. He said that he explained that people knew about her back complaint and it was necessary for them to know to ensure adjustments were made.
90. The text messages between the claimant and Ms Gerona were as follows:
Claimant: Hello, I know it finished, but I told Kerry and text tonee yesterday that I'm no feeling well with my back, the I had to take med in the morning. I'm coming tomorrow if I'm better today. Angelah (10:01 am)
Ms Gerona: Angela, I need to know by midday today if you're coming tomorrow. The Clinic is busy and I need to organise my staffing for tomorrow, We will discuss your sickness and probably get HR involved next week. Use this number or hospital's preadmission number when you inform the unit... (11:10 am)

Claimant: *No Perry you need to get someone for tomorrow, I can't attend, I have shock in my r foot*

91. There were text messages between the claimant and Mr Polines:

Claimant: *Hi tonee, yes I know, I was worried as I have enough health problems already and being covid positive gave me extra worries which triggered my Neuro pain suddenly back but it's less pain now as I took extra meds. When I am well and at work I give my best as a I know well and love what I do...*

Claimant: *** I did not discussed my neuropathic pain with everyone. X*

92. In oral evidence, Mr Polines said that the claimant said on the phone that she was worried about returning and he told her there was nothing to worry about. The text messages followed..
93. Ms Gerona said in evidence that she was unhappy that the claimant did not return to work on the day she was due to return and gave conflicting reasons for her absence to her and Mr Polines.
94. We note that Ms Gerona was not in a formal management relationship with the claimant and would have had no role in getting HR involved in relation to her sickness absence. When asked what she meant in her text message by getting HR involved, she said that there was a policy to get HR involved in case they needed to report the claimant to OH for any reason to be reviewed. She also said that there was a policy to escalate if there were three periods of sickness in a year but it was different for long term sickness. She accepted that it was Mr Polines' job to contact HR.
95. Mr Polines in his evidence suggested that he later told Ms Gerona that she should not say to the claimant that she was going to get HR to review the claimant's sickness.
96. We were not persuaded that the claimant had been inconsistent about her reasons for absence, particularly given the nature of her disability, which could lead to pain in multiple parts of the body, but we concluded that the late notification had been stressful for Ms Gerona and Ms Gerona and Mr Polines erroneously concluded that the claimant was being inconsistent about the reason for absence. Ms Gerona was annoyed and sent the text about getting HR involved which was intended to be and was perceived as threatening to the claimant. It was inappropriate and hostile.

23 January 2022

97. The claimant gave this account in her claim form:

On 23 January 2022 the Claimant was working with a colleague, Frelan Gabatino, Health Care Assistant (Bank) when Ms. Gerona entered the room

looking furious and loudly announced to the Claimant, "If you cannot work alone on Sundays, you must go back to ward or find another job. Go and find work somewhere else! I cannot have two HCAs helping you every Sunday, and neither can I help you! You work too slow!"

Saturdays and Sundays were the busiest days in the Pre-Assessment Clinic. The Hospital policy at the time was that a Covid-19 test must be taken three days prior to the patients being admitted to the wards. The consultants and the theatres operated during weekdays only, therefore, the patients had to attend on weekends to be pre-assessed and have their Covid-19 tests carried out.

98. In her witness statement, the claimant described the incident:

Perry Gerona entered in the room I was working with bank HCA Frelan Gabatino and told me: It is better for you to find another job or go back to your ward. You work too slow and talk too much. I cannot have 2 HCA every Sunday. If you cannot work alone on Sundays, you better find another place to work. We need to work faster here.

99. In her witness statement Ms Gerona denied the claimant's account. She said that she may have told the claimant and the other healthcare assistant to make sure they worked quickly and efficiently to avoid delays.

100. In oral evidence, Ms Gerona said that she did not recall saying that the claimant should go back to the ward or find another job. She would on occasions tell the claimant to work quicker if she was being slow. She said that when she was busy and stressed she had a loud voice and her emotions got the better of her.

101. The claimant said that she explained that she could only do what she could do and with her back pain she could not rush as much as Ms Gerona wanted her to. She said that Ms Gerona said that the clinic was busy and she needed to work faster.

102. On 25 January 2023, the claimant emailed Ms Gerona, copying in Mr Polines and Ms Doran:

I only wanted to ask you one favour from you if I may please.

You do not need to keep pushing myself here by telling me things you already said at work such as, " I should go back to Ward... I do not suit the Clinic... you will talk to HR...I should find another job..." please and sorry but I already have enough of those advice thank you. Also I only do what I can do. I will know when I am ready to go and I do not need help with that, or if HR says so.

Any concern or worries you might have, please do not approach me with such pushy harsh words, instead please do seek for support and guidance with HR, please. Feel free to talk to them regarding any questions you might have.

103. Ms Doran replied:

Thanks for cc'ing me in this email Angelah. Maybe we could sit down and discuss things.

@Tonee Polines this is slightly concerning to have received an email like this from Angelah. As her manager I would like to be informed if her colleagues feel there is an issue. As you are aware Angelah has been redeployed on medical grounds and advice that Perry is offering is counter productive.

I am very keen to discuss things further to support Angelah. I am in today if not maybe we could arrange for next weds/Thurs around 2pm

104. Neither Ms Gerona nor Mr Polines sent any reply to the claimant's email. Ms Gerona said that she could not recall receiving it but she might have done. She said that she probably did not reply because Mr Polines spoke to her before she did so. She said Mr Polines asked her what had happened on that day and told her to be mindful of how she spoke to the claimant.

105. It seemed to us that had Ms Gerona taken significant issue with the claimant's account of the facts in her email, she would have sent a reply outlining her version of events.

106. Ms Doran saw the claimant, whom she said had been very distressed. The claimant told her that Ms Gerona had shouted at her in front of patients and rushed her, telling her to work more quickly. Ms Doran did not remember the claimant describing her treatment as bullying and harassment. Ms Doran told her that she would speak to Mr Polines. She had a discussion with Mr Polines at around this date. She could not recall specifically what she had said, but said that it was along the lines of, she could not have the claimant coming to her in tears. She was assured that Mr Polines would speak with Ms Gerona. Mr Polines did not contact the claimant at this point in time to discuss the matter.

107. On 29 January 2022, the claimant spoke with Ms Doran and said they (Mr Polines and Ms Gerona) were really pushing and wanted her out of pre admissions. She said that she felt that Ms Gerona was bullying and harassing her by saying the things she had said and because of other occasions when Ms Gerona told her to hurry up in front of patients.

108. By 30 January 2022, Mr Polines had not spoken with the claimant about the matter. At the end of the working day the claimant wrote to HR:

I would like to share a staff matter with you if I may please.

I appreciate Sarah Doran and Tonee for the redeployment to pre-admissions. Tonee has been welcoming and supportive.

Also, since I have started working there Perry Geronda and Jocelyn Uy have shown resistance and discontentment.

I was told that Tonee is in charge of pre-admissions, but Perry seems to be the manager and in control of everything.

I was told not to take everything personal from Perry - which until at this time I haven't but now things have gone too far from her and it is hard coping to work here now.

She has spoken few things which is very upsetting such as: .. I should go back to ward.. I do not suit the clinic.. she will talk to HR... I should find another job..

Jocelyn Uy speaks unpleasantly and one day arguing with me she told me they want Maria to work there.(a Philippine HCA)

Pre-admissions are very busy specially weekends and Perry always approaches me with harsh, pushy, and loud voice demanding things to be done her way.

Despite my sickness absence, I have been working hard as much as I can to help then and even working all and every weekend, but it's not enough for nobody.

I feel like as I am not one of them, I am taking their colleague's workplace, so she has been picking on since the beginning.

Now I had enough of her disrespectful manner towards me and also by all those things she keeps saying

I just realized she is harassing me on everything I do, and she is never happy.

Last Sunday 23rd she came and spoke out loud that I must find another job as she will not help on Sundays anymore. (She meant not helping - e.g., doing covid test, when is very busy as 1 HCA must do bloods, ECG, covid, mrsa, mdr, observation for each patient and nurses go through patient's paperwork only)

I have sent Perry an email asking her to stop this extremely unpleasant behaviour and I have also informed Sarah and Tonee. Sarah is aware of, but Tonee don't respond.

I have informed Tonee in the past about both objectionable conduct towards me, but he had not replied and one day by occasion we had spoken about it and it seems it is out of his control those types of personalities or he is not interested.

I am sorry for disturbing with such matter, but I must share it with you.

109. Also on 30 January 2022, which was a Sunday, the claimant wrote to Mr Polines:

I would like to let you know that I will Not be able to work Sundays anymore from this Sunday 6th.

As I have said, there is too much to cope with such colleagues pushing and complaining. It is very busy weekends and I have done all I can to help but I cannot make Perry (and Jocelyn sometimes) happy still

I enjoy working here but it is impossible to win sometimes.

I can continue on Tuesdays, Saturdays and Wednesday if you want to.

I am very sorry about that, but I must be honest with you.

110. On Monday 31 January 2022, Mr Polines wrote to Ms Doran, copying in the claimant

Are you here tomorrow please? We surely need to meet re Angelah.

111. The claimant's next working shift was Tuesday 1 February 2022. She said that at about 4 pm on that day, Mr Polines saw her outside the room she worked in and asked her to have a quick chat. He asked why she was saying she could not work Sundays any more. She said that she was not happy with Ms Gerona's hostile attitude towards her and could not cope with her abusive manner any more.

112. She said in her statement:

Tonee told me he could not change the rota as was already done, and I had to work as per rota. I told Tonne that Perry was really pushing me out of preadmissions. I told Tonne also that: I was working every Saturdays and Sundays since around July or August 2021, I was getting no enhanced payment to work every single weekend specially Sundays, Perry still unhappy with me, Perry told me I work too slow, and she told me also I should go back to oncology ward or find another job.

I asked Tonee again please from that time to work on Tuesdays, Wednesdays, and Saturdays. Tonee Polines got upset and told me straight after that: "Angelah, is better for you find another job or go back to your ward - you are not happy here you can go, go, you can go". I said what did you just said? really? are you sure about this? He replied yes, that is all I wanted to tell you anyway. I then asked Tonee email Sarah Doran what he exactly told me, he said to me: I will. He then left

113. In oral evidence, the claimant said that Mr Polines mentioned that he wanted her to find another place that was safe. She told her colleague Nicole what had happened. She cried in the toilet. She went to see Mr Polines again but he was with a patient. She told Nicole to tell Mr Polines she had gone home as he had told her to go and she left the hospital.

114. Mr Polines said that he told the claimant that it was not possible to just change her shift based on her demand. Her shift should not just benefit her but the service as well. He said that he reminded her that changing her shift would not solve the problem as Ms Gerona still be around to work with her. He agreed that the claimant said that Ms Gerona was bullying her and had asked her to find a new job the week before. He said that he said that he would need to sit down and discuss this with the claimant and Ms Doran to decide what was best for her. He said that he did not dismiss her but that he did say that he wanted her to find a role where she would feel happy and safe.
115. He said that he did not seek any support from HR. He said that he wanted the claimant to leave immediately so that she would not be subject to further stress from Ms Gerona. When he subsequently spoke to Ms Gerona about the matter, he said that he told her that another person had gone and was now stressed; he mentioned her behaviour – her hostility and outbursts of emotion and said that she needed to be very careful. If the matter escalated, she could potentially be in trouble.
116. Mr Polines told the Tribunal that it was really disappointing but ‘these things do happen’. He understood why the claimant was stressed but he saw it as a choice between his temporary and permanent staff. If the claimant stayed in pre admissions, she would have to continue to work with Ms Gerona and Ms Gerona’s emotions might get the better of her again. He could not assure the claimant that this would not happen again.
117. We noted that Mr Polines characterised the incidents between the claimant and Ms Gerona as ‘arguments’ but Ms Gerona did not herself describe them in that way. Ms Gerona said that the claimant had never raised her voice with her. He agreed that Ms Gerona had behaved harshly to the claimant on two occasions but not that Ms Gerona had bullied the claimant. He agreed in oral evidence that the claimant’s disability could affect her speed.
118. When asked by the Tribunal, what he meant by a place which would be safe for the claimant. Mr Polines said he meant safe from everything, a safe environment where she would not be stressed. It was not fair for the claimant to suffer when he agreed that Ms Gerona would always be difficult to deal with. He said that he could potentially have given Ms Gerona a warning if things had progressed.
119. Both the claimant and Mr Polines remembered that on one occasion when they saw each other on 1 February 2022, Mr Polines was in a meeting / with a patient. Mr Polines thought this was the first time he saw that claimant and that he may have told her to ‘leave’ the meeting. The claimant thought it was the second time she encountered him. This became an issue in evidence because Ms Doran gave evidence that Mr Polines told her that he thought the

claimant might have got the wrong end of the stick and that he had not meant she should leave the department, he had simply asked her to leave the room when he was in a meeting. Ultimately, we concluded that differences in recollection were due to common issues with memory and did not reflect significantly on the credibility or reliability of either of the witnesses.

120. It was clear to the Tribunal that Mr Polines was at this point conveying to the claimant that she should leave pre admissions and find another role. He recognised that Ms Gerona's behaviour was problematic and was upsetting the claimant but he either would not or could not address it in an appropriate way.
121. After the claimant left the clinic, Nicole told Mr Polines that the claimant had left before the end of her shift in tears and that she said that she did not wish to work at the pre admissions clinic any more. The claimant said that she had not said that to Nicole, but given that this was the impression the claimant conveyed in her subsequent emails, we thought it likely she had said something to that effect.
122. At 17:40 on 1 February 2022, Mr Polines emailed Ms Doran:

Last year we agreed that Angelah will be redeploy to Pre-admission Clinic because of her back problem and I was honestly delighted as I know her, and I know she works hard.

Things have been running very good until very recently, she emailed us both complaining about behaviour of Perry towards her. I only managed to speak with Perry last week Thursday as that was the only time clinic was not busy. I admit Perry is difficult to deal with as myself is having difficulty dealing with her. I have explained the email sent by Angelah and told Perry that her behaviour towards other people is always her downfall. I recognised that Perry can be very rude, abrupt and what comes to her mouth sometimes are not nice.

I received another letter from her and again yesterday (31/01) and telling me that she can't be working anymore from this Sunday. I knew she is working today and it's a busy day and just looking for a perfect time to talk to her but finally I managed to catch her eventually and asked her to find out when will you be back so we can set up a meeting the three of us. She asked me if I managed to find another person already working this Sunday. I told her no, and she said she will never work again on Sundays. She even said she is not even paid for her Sunday's work. When in fact she was the one who choose her schedule of work as she is studying. I accommodated it and happy that I don't need to pay a bank staff on Sunday because she is around. I told her that we will have a meeting and decide what is best for her. I said if she thinks that this place is not healthy for her, we must find another place where she can work, where she will feel happy and safe.

I just finished doing telephone assessment when I was told she was in tears, and she left when her shift is not over yet. And said she will not come back to work in the clinic anymore.

If that's what she wanted, then its fine. I am just annoyed that, for someone who welcomed her in my unit, she will leave the work without telling me. And I don't understand why she is upset. There are only few HCA who does bank in the Pre-admission Clinic coz not all HCA can do bloods and ECG. If I can't find anyone, I might have to ask Nicole to cancel her annual leave to cover those shifts which is not fair. I also feel terrible that this happens to her , and she became unhappy with the unit because of one staff. She is due to come back on Sat and Sun, but I am sure she will call or message you anytime this week. Please extend my best wishes to her, I am just sad that this end to this.

Happy to talk if there is a need to

123. Also that evening, the claimant emailed Ms Doran:

Last Sunday I have emailed Tonee letting him know that I could not cope to work every Sunday anymore, because: Weekends are very busy - and there is a need of two HCAs to help sometimes, and also Perry has rudely told me off to go and find another job if I can not work alone on Sundays, that really putted me off!

Tonee was not happy by me removing myself from Sundays and he has told me I must come and work on Sundays as per rota and he could not change it. I have explained again and said that I was very sorry, I did work every weekend since last May, I have done my best as I could but they still were not happy. I have asked again to put me on Tuesdays, Wednesdays and Saturdays instead of all weekend.

At that time Tonee replied and stated to me the same words Perry have told me,

Tonee told me go back to ward or find another job! Yes, he did said it also to me today!

I have asked him to email you what he just told me. He said he will do. I was absolutely shocked, embarrassed and shamed to hear that as I did not expect it from him, as he is a sensible person.

After that I felt humiliated, broke down and I had to come home.

I am thankful for working there but there is no appreciation or thankfulness from them. I felt used and abused. I know it sounds really dramatic but that it is how I fell there lately.

I am very sorry but I can not return to work there anymore. Please let Tonee know that sister please.

(p.s: I have to have HR acknowledge about those facts also last Sunday) I am very sorry for this unfortunate.

124. Mr Polines said in evidence that he had tried to ring the claimant and texted her after she walked out. We saw no text message.
125. The following day, 2 February 2022, Ms Doran sent the claimant a series of text messages saying that she had tried to call her and asking if she was able to speak. The claimant said that she was too upset to speak. Ms Doran said that the claimant should let someone know she was on sick absence. She said that she had spoken with Mr Polines and would be escalating things. If the claimant wanted to speak to HR, she would support her. She was sorry that the claimant had had such an awful time. The claimant said that Mr Polines dismissed her; he had repeated it twice.
126. Mr Polines and Ms Doran also had a discussion that day and Mr Polines gave Ms Doran the account about asking the claimant to leave the room because he was in a meeting and how he believed she had got the wrong end of the stick.
127. Ms Doran wrote to Mr Kennedy:
- Hi I have tried to reach out to Angelah Queroz today following our earlier conversation.*
- I went to speak with Tonee earlier and it's very sad. Perry ultimately is the root of the problem. I'm slightly hesitant to escalate to Helen (who is covering for JW) as Tonee has had his own running's that haven't been productive for the team.*
- Angelah doesn't want to talk to anyone I have called and been messaging her. She is terribly upset. I have advised if she wants to raise it with HR I would support her and I also advised for her to notify someone of her absence rather than just be uncontactable and absent.*
- Deidre has said there is a HCA vacancy in outpatients which I was going to offer to Angelah but she doesn't want to talk to anyone.*
128. On 3 February 2022, Ms Doran emailed the claimant the outpatients phlebotomist vacancy, saying '*Found this...*'
129. The vacancy bulletin for the role said that it had a closing date of 4 January 2022. When further job bulletins were produced during the course of the hearing, it became apparent that the role had originally been advertised from late November 2021. The 4 January date was the original closing date.
130. The claimant's evidence was that, because of the January closing date, she did not believe the role was genuinely available when Ms Doran drew it to her attention.
131. Mr Polines was on leave from 3 to 7 February 2022.
132. Also that day the claimant emailed Mr Rahunoks in HR:

This is Angelah Queroz, HCA from Oncology Ward but redeployed to Pre admissions since last May 2021. I need to let you acknowledge a matter recently occurred at the pre admissions.

I wish to notify that Tonee has unfairly Dismissed myself yesterday 1st of February 2022 from Pre Admissions at 4pm. Supported by Nicolle Worell HCA I had to go home in completed distress.

As I have mentioned to you on the email (sent to HR) sent last Sunday 25th of January that Perry has told me to go and find another job, so has Tonee repeated the same words as Perry yesterday when I kindly informed him that I could not work every weekend anymore but instead I could do Tuesdays, Wednesdays and Saturdays.

He said then that ALL he wanted to say to me was to go back to ward or find another job, I could go!

He clearly stated it twice. Then I asked him to email Sarah Doran what exactly he told me. He said he would do, but he did not mention exactly what he told me, I was told.

Despite my health condition I was able to work in that department and was able to do all the tasks i supposed to do. It happened that I was not well accepted by the Philippine staff specially Perry which has bullied and harassed with saying as mentioned before.

I have mentioned also that I have email Tonee informing himself of those but he never replied and he was never interested to put things together and let Perry command as her wish.

Finalising all, I have nowhere to return to work as I have been dismissed twice from Pre admissions by telling me to go to ward or find another job, very firmly yesterday Tonee said that as well.

Also I am in huge distress now which began just after 12 days of that I had covid and returned to work and Perry kept trying to threatening me saying she will talk to HR about it.

I wish this message reaches whom may concern.

133. Mr Ruhunoks replied:

I am really sorry to hear about the situation you found yourself in. My colleague Emily is going to find out more from the parties involved and one of the managers will be in touch with you to discuss this in more detail. Let me reassure you that you have not been dismissed from the organisation but bear with us while we are finding the appropriate manager to investigate this properly and agree the next steps.

134. On 4 February 2022, the claimant emailed Mr Polines (who was still on leave), copying in Ms Gerona:

As per our conversation on last Tuesday February 1st, you have told me that I should go back to the ward or find another job, I could go - you have told me just like Perry's words previously

After that, unfortunately it was impossible to continue my work as I was in such distress and I had to come home, so I kindly asked Nicolle to let you know that and she has done so I just wanted to confirm and I am assuming that I should not come back to work on pre admissions as I am not down to work tomorrow 5th as I previously were. So I assumed I am not expected to come to work this weekend as there is staff replaced already and you are fully covered.

135. Neither Mr Polines nor Ms Geona replied to that email but the claimant logged on to the healthcare roster and saw that her Saturday 5 February 2022 shift had been removed. The following day (5 February 2022), she logged in and saw that her Sunday 6 February 2022 shift had also been removed. Mr Polines told the Tribunal that these shifts were cancelled because the claimant had told Nicole that she was not coming back to the clinic.
136. It was not clear to us from the evidence which we heard whether it was necessary to cancel the claimant's shifts to book bank staff to cover. The claimant suggested it was not necessary but we had no clear evidence on the issue. The claimant seemed to have derived from the cancellation of her shifts a message that she had indeed been dismissed. Ultimately we were satisfied that whatever activity was undertaken to cancel shifts or book bank staff was undertaken to make sure there were staff to cover the shifts.
136. On 7 February 2022, the remainder of the claimant's February shifts were removed from the roster. Mr Polines told the Tribunal that he needed to arrange cover by using bank staff. If the claimant had said she was returning, the bank staff would have been cancelled.
137. On 7 February 2022, Mr Polines saw the claimant's email of 4 February 2022. He wrote to Ms Doran

I got this email from Angelah which somehow upsets me but not really. She must have taken what I told her in a different context.

I will be the last person to tell her to find another job and that she should go back to the ward, me knowing her back problem.

I also did not understand that she is suddenly unsure if she will still be needed over the weekend when she was the one telling me she will not work over the weekend. I texted her the day she left, and I asked her to call me back but never heard from her.

Do I need to reply on this email or what? Did she not get in touch with you at all

As mentioned, her shifts are on Tues Sat and Sun only

138. Also that day the claimant commenced sick leave and contacted her Royal College of Nursing representative who in turn contacted HR.
139. On 8 February 2022, HR contacted Mr Polines to get an account of what had happened: Mr Polines wrote to Ms Yates in HR:

Angelah is an HCA staff working in Oncology Ward. Sarah Doran the Siqter came to me and asked if I have a place for Angelah as she has a back problem. I said I need as much help I can, so I accepted Angelah as a staff being redeploy in Pre-admission clinic.

Things are doing well to be honest. She even has a changed of her schedule base on her needs and I welcomed it.

Angelah was complaining about one of the senior nurses that's giving her a bit of stress. The first email happened the 25th of January.

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I asked the Senior Nurse about it. I must admit that the senior nurse can be difficult to deal with. But Angelah has been here for almost a year now, and this only happened very recently. The senior nurse finds Angelah very slow, but I told the senior nurse that it's a walk-in service and let the patient wait. No need for unnecessary emotions and stress.

Monday the 30th of Jan, I received another email form Angelah and this time telling me that she will not work every Sunday anymore starting the 6th of Feb. I saw her on the 1st, and I told her to speak to Sarah Doran her manager and find out when she is free for all of us to sit down and talk about her situation. I told her that I am not prepared to give her an answer unless we sit down with her manager. I said I don't know if you will still be here or what but let's see.

In less than an hour, I was told Angelah was in tears and she left and abandoned her post. Because of stress it radiated to her nerved and to her back. I texted her but never got a reply. I send an email to her Sarah Doran the sister about Angelah going home. The 2nd of Feb I had a chat with Sarah and explained the situation. I did not unfairly dismiss Angelah. As I explained to Sarah, I want her to work in a place where she feels she is safe. If the other HCA will not be present on days that they are together coz annual leave or sickness, she will be working still with the same senior nurse. She will feel stress and back problem will happen. I suggested that Angelah can work in Phlebotomy Room as she does take bloods anyway.

Angelah emailed me on the 4th and asking if she will still be working on the 5th and even on the 6th, when she herself said she will not be working. Unfortunately, I was on annual leave on the 3rd and 4th, hence I only managed to get her messaged Monday the 7th. I was expecting Angelah would have had discussion with Sarah or vice versa as I informed Sarah of Angela going home.

This is basically what transpired. Again, I did not unfairly dismiss her here. She needs a place of work she will feel safe and no stressor considering her back issues.

140. On 9 February 2022, the claimant's RCN representative wrote to HR:

Thanks for taking the time to speak with me.

You asked if I could jot down the main points which in summary are:

- Angelah was temporarily redeployed to Pre-Assessment, but with no end date. There was no LT sickness meeting prior to the redeployment to sort out all the formalities*
- Staff in Pre-Assessment appear to have become increasingly upset and unfriendly to Angelah over time. Angelah thinks this is due them perceiving her as taking their shifts, in particular weekend shifts, which in turn prevented them and their colleagues/friends from taking bank shifts that attract a higher rate. (It should be noted that Angelah is/was happy to swap shifts and offered to but this was not approved by Tonee – indeed I understand she wasn't even receiving the higher rate of pay for weekend work, perhaps voluntarily?)*
- Over the last 2-3 weeks Perry and Tonee both told Angelah multiple times that she should work elsewhere*
- Angelah usually works Tues, Sat and Sun. She was removed from the rota for Sat 5th, Sun 6th and Tues 8th Feb. She emailed Tonee and Perry on Friday 4th to confirm that this was correct but did not receive a response. She therefore did not go into work on those days but was otherwise ready to work*

Sorry for not getting this to you sooner. Did you discuss with Tonee already?

I haven't been able to get hold of Angelah following our discussion but will come back to you once I have.

141. On 10 February 2022, the claimant produced a sickness certificate saying that she had work related stress and neuropathic pain. She was signed off work for one month.

142. Ms Yates that day emailed Mr Kennedy asking him to contact the claimant and establish her current circumstances and make clear she has not been dismissed: *I believe this is a result of a breakdown in communication. However, we need to look to rectify this swiftly if possible.*

143. Ms Yates asked if Ms McGarvie, patient safety manager, could investigate the claimant's unfair dismissal allegation and Ms McGarvie agreed.

144. On 11 February 2022, Ms Yates chased Mr Kennedy:

Please could I ask you to let me know when you have spoken to Angelah.

Her trade Union representative has contacted me to advise that she is due to work this weekend and is unclear on the current situation.

145. We saw no evidence that showed Mr Kennedy had tried to get hold of the claimant at this point and there were emails between Ms McGarvie and Ms Yates on 15 February 2022 which suggested that he had not.

146. On 16 February 2022, Ms Doran telephoned the claimant and left two voice messages. We were provided with transcripts of the messages.

147. In the first message, Ms Doran said:

I'm so angry, I'm really so angry for you. Nobody knows what's going on. I don't expect anybody to call you back today, and I know you don't.

You just want the least really done with the hospital as it is. That means what they've put there It means authorised unpaid leave. I've just got off the phone after screaming at Arthur and said this is totally unacceptable.

I said I'm being kept out of the loop as her manager. I said, yeah, the people that have been managing her have been treating her like a bit of shit. I said now I'm asking about it, nobody wants to tell me anything. I said if she's if she's off because she feels she's been. Dismissed from work, she should be getting paid until this is resolved.

148. In her second message, Ms Doran said (with respect to the post in outpatients):

When I spoke to Deidre and although you say it's an old post and like I say it was really difficult to hear what you were saying at the time. It's a new post. It is available and they are recruiting into it's the healthcare system post. Although I'm not quite sure how it would work with your hours. Hmm!

So you all getting paid.

The key message that they want to reinforce is that you haven't been dismissed. There was clearly a massive communication error on Tony's part, and he's cocked up big time, but I don't know where you wanna go from here and I don't know where we go from here. You haven't been dismissed, so in our eyes you are to come back to work. We want you to come back to work, and if you don't want to be in pre admissions we would look at trying to support you in going somewhere else.

149. On 17 February 2022, the claimant texted Ms Doran to thank her for the voice messages.

150. On 23 February 2022, the claimant sent a resignation letter to HR:

Please accept this letter as notice of my involuntary resignation from my position as Healthcare Assistant from Oncology Ward upon a verbal constructively dismissal by the Pre Admissions SRN IC Tonee Polines. My last effective day of employment was February 1st of 2022.

After 8 dedicated years of my services to Cromwell Hospital, unfortunately I have felt under a rising of pressure which have completely forced me to leave without any notice.

I have done all that I could to remain employed at the hospital. I have offered my full services within my capability and capacity, but unfortunately, I was prevented and stopped from continuing with my job.

There have been a series of incidents which had restricted myself from performing and pursuing my job which I would like you to know.

1. May 2020 – An accident at Oncology Ward with a very high risk of falls patient which has felt on me. This circumstance has compromised my health condition since and the ability to work at full capacity as I was at the beginning.

2. Twice the hospital representatives have denied the personal injury explaining that there was no evidence of a Datix report recorded that could support the investigation. Angels Naveas have created the Datix report of this accident on 19/06/2020. Upon research, this Datix report could no longer be found. Angels Naveas have created a new retrospective Datix on this accident on 23/11/2021. Unfortunately, this case has to be and it is going forward and will be fully properly investigated.

3. I was sustainably bullied and harassed by some of pre-admission staff. I was compelled to leave my job twice by two members of staff.

4. I was not given any support from Senior Managers to remain employed despite I have asked twice.

5. February 1st I was imposed finally to go and find another job. February 4th, I have asked for confirmation of the removal of the shifts from 5th and 6th, but no reply was given. By February 7th all my shifts were completely removed from the health roster without my permission and consent. A new staff were booked in to replace the shifts. Yes, I have been verbally dismissed then effectively on February 7th I had lost all my job.

I have enjoyed all these 8 years at my workplace, specially at the Oncology Ward which I am very fond of! I am grateful that Cromwell Hospital has allowed me to stay all these years. It has given me great experience and knowledge which I hope to use again one day whether back at Cromwell or somewhere else. I am leaving with no other reason apart from pity of all that has happened this way. I sincerely will do all I can to make everything easily and smoothly with grace and peace.

151. On 24 February 2022, Ms Yates wrote to Mr Kennedy asking him to send this email to the claimant and Mr Kennedy did so:

Dear Angelah,

I have been notified about your resignation letter.

I would like to take this opportunity to clarify that you were not dismissed from your role. I have attempted to contact you on several [sic] occasions, to discuss this with you.

Sarah Doran also contacted you to reassure you that you were getting paid for this period of absence, whilst we resolve things and she reinforced that you had not been dismissed.

You have raised some allegations, which are very concerning that I would like the opportunity to investigate. Therefore, can I ask you to consider retracting your resignation. This will allow me to investigate this matter and deliver an outcome to you.

Please take the time to reconsider this and let me know by Monday what you wish to do.

152. On 28 February 2022, Mr Kennedy obtained a mobile phone number for the claimant and they had a phone conversation in which the claimant agreed to retract her resignation whilst Mr Kennedy investigated the situation. The claimant put in a grievance statement.
153. On 10 March 2023, the claimant emailed Mr Kennedy, having not heard anything further in the intervening period. As it happened this was the date Mr Kennedy's employment with the respondent ended, he having previously given notice. The following day, 11 March 2022 (a Friday), the claimant received an automatic reply message when she emailed Mr Kennedy. That message informed her that Mr Kennedy had left the organisation.
154. The claimant then wrote to HR at 15:22 to ask who was looking after her case. She received an out of office message from Mr Rahunoks saying that he was back on 14 March 2022.
155. The claimant emailed Mr Rahunoks again on the evening of Sunday 13 March 2022.
156. On Tuesday 15 March 2022 at 16:59, Mr Rahunoks wrote to the claimant:
- I am sorry to hear that Brian has not provided any feedback in relation to this. I have reached out to the Modern Matron that covers pre-assessment service to discuss as it is likely that she will take this over. Just need to discuss the background with her as she came back from annual leave.*
- Brian mentioned to me that you were on annual leave. Would you confirm what dates you have taken as annual leave please?*
157. On the morning of 17 March 2023, the claimant sent a letter resigning with immediate effect:
- I am here to express my disappointment once again at how the organisation has dealt with my grievance, where I stated that I felt discriminated against bullied and victimised.*

After I resigned previously due to the above behaviour, the organisation requested that I withdraw my resignation so that it could investigate my grievance. However, I have since learned that the person who was going to deal with my grievance (Brian Kennedy) has left, without me being informed. The organisation knew he was leaving yet still assigned him to deal with my grievance, thereby knowingly delaying the investigation and resolution of my concerns, though failing again. To this date, I have only been notified of a potential replacement to look into my grievance.

I feel massively let down and have completely lost my trust in the hospital. I feel there is no other choice but to resign.

Therefore, I am hereby resigning today with immediate effect.

I would like to request that the investigation is still carried out. I will make myself available to cooperate with the investigation, and would like to be informed in writing of the outcome.

158. Shortly after that, Ms McGarvie wrote to the claimant:

I am the interim Matron for Surgery and have stepped in as Brian has now left

I would very much like to chat with you about the events leading to the current situation

I have been trying to call you on two mobile but have had no luck so I hope you don't mind me reaching out via your personal email

I have [number] and [number]

I hope to chat to you soon – I am not at work tomorrow or Monday but am at work today and then from next Tuesday

159. There was other documentary evidence that Ms McGarvie had tried to telephone the claimant over the course of 16 March 2023. There was some confusion about what was her correct mobile number. The claimant said that she had no calls on the 16th but some on the 17th. Ultimately we accepted that if Ms McGarvie had tried to telephone her, the claimant had not been aware that it was her telephoning and had not picked up the phone. They spoke after Ms McGarvie sent her email on 17 March 2022.
160. Ms McGarvie began interviewing witnesses for the claimant's grievance. She interviewed Ms Doran on 22 March 2022 and Ms Gerona on 23 March 2022.
161. Ms McGarvie wrote to the claimant summarising her understanding of the claimant's grievance on 23 March 2022. The letter was set via email on 25 March 2022. In that email, Ms McGarvie told the claimant that she was aiming to have the report ready by the end of the following week. She told the claimant she was happy to explore her further employment with the respondent.

Summary of your grievance

At the grievance meeting you confirmed the areas of concern were as follows:

- Lack of clarity about your permanent position and the location you were based in.*
- That you understand you were verbally dismissed from your position .*
- That you have been subject to bullying and harassment by staff*
- That you feel you have not been supported by senior managers*

I would like to clarify that Brian Kennedy, Modern Matron for Oncology, was investigating your concern as a lead for Oncology Service and he was trying to reach out to you on a few occasions to have a conversation about your return to work and look into your concerns, however, you did not pick up your phone. He had about a month before his last day of work with us at the time and therefore it was reasonable to expect that he could conclude the investigation timely, which unfortunately did not happen.

I am informed that you did speak to the Matron for Oncology on the 28th February and that you did retract your then resignation about that you did not wish to return to work . at that time you were not able to describe anything that would assist you in returning to work.

Following our conversation, I have arranged to meet with the following staff Sarah Doran , Perry Gerona and Tonee Polines to investigate your concerns and I will provide you with feedback once the investigation has been concluded.

I would very much like to put this right for you and retain you in the job in a location that would be suitable for your skills.

162. The claimant replied on 26 March 2022:

As I have mentioned to you and Brian before, unfortunately I am not able to continue working at hospital any longer. The frustration is huge and it has been since I came back from my third long term sickness, May 2021 - as I have been waiting and have asked many times for a permanent transfer somewhere else but it was not approved.

Now the hospital is asking me to continue working after all of this very embarrassing and humiliating situation I've been through, it is impossible, specially people there might be thinking I must have done something very wrong to be asked to leave and the shifts being removed out of the rota.

I have said I am very fond of Cromwell Hospital, I've been working there long time, but I really felt ignored and not longer needed to be their staff as the transfer to other department was not approved, as I am not able to work with manual handling anymore. I feel their offer to continue employed it is not genuine as I waited for it long time. I'm sorry for been honest but that is how it appears to me

Following February 1st when Tonee told me go and find job somewhere, I went home straight after in shock and I was totally unable to speak for a week with anyone from the hospital. Sarah texted me and I replied to her, I couldn't talk at all. I refused to speak with the Oncology manager Brian Kennedy because he has always, always ignored me, he has never said hi once when he passes. I emailed him once and I introduced myself and congratulated him to be our manager, and explained a little about my situation, he never replied! So when everything went on the floor, what he wanted to speak with me for? Too late, that's the point. But I have spoken to him once on 28th of February and agreed with his request to withdraw the resignation as he wanted to investigate it properly, but unfortunately his notice ended few days later.

My condition is a very intriguing kind of which include the nerve system, at any kind of stress or lifting aggravate and triggers the pain back - which is Neuropathic Pain. - followed by trauma to the nerve. I must be away of much stress as possible to have some quality of life still.

Thank you for your kindness and time. I can talk to you if you have any questions, just let me know

163. No one from the respondent then contacted the claimant until she wrote to ask about the report on 26 April 2022. On 27 April 2022, she contacted Mr Rahunoks and he replied. Ms McGarvie wrote to say that the report was with HR and was being reviewed.
164. On 7 June 2022, Ms McGarvie wrote to the claimant to say that the report was finalised and with an HR colleague; she was hoping to share the final report that week.
165. The claimant's RCN representative chased for the report on 15 and 20 June 2022 and it was finally sent to the claimant by email on 21 June 2022. We note that in her interview for the grievance, Ms Doran had said that it was clear by August 2021 that the claimant would not be fit to return to the ward.
166. The claimant's complaints were not upheld although Ms McGarvie found that there was poor behaviour from Ms Gerona on more than one occasion. The report contained the following section:

The following policies have been consulted and referenced to in regard to the alleged behaviours as part of this investigation – all of which are available at <https://teams.bupa.co.uk/sites/manage-my-team/SitePages/ManageMyTeam.aspx>

- 1) *Grievance Policy*
- 2) *Disciplinary Policy*
- 3) *People – appendix to Disciplinary Policy*
- 4) *How to manage disciplinaries*
- 5) *Disciplinary FAQs*

6) Potential Conduct rules breach – process flow chart

167. We note that there was no reference to the bullying and harassment policy.
168. The claimant subsequently submitted a grievance appeal which was heard by Ms Crichton. She commenced Early Conciliation on 29 April 2022, received her EC certificate on 10 June 2022 and commenced proceedings on 24 June 2022.

Evidence about effect of her disabilities on claimant's speed

169. The claimant told us in evidence that she worked more slowly due to her disability. She said she if she turned suddenly she would get pain and that if she was under pressure to work more quickly that would exacerbate her pain. We note however that there was no suggestion in the claim form that the claimant was slower in her work due to her disability and that the medical evidence did not seem to support the proposition that the claimant would be slow performing tasks which were not outside of her abilities, such as manual handling.
170. Ms Gerona's evidence was that the issue was about the claimant chatting to patients to an unnecessary extent, which was something she would become aware of when she entered the room the claimant was working in to hand her notes for the upcoming patient.
171. The work in the pre admissions clinic did not involve heavy lifting. We heard that the claimant had a reasonable opportunity to take breaks between patients.
172. We were not satisfied on the basis of the evidence we had that any perceived slowness by the claimant in carrying out duties in the pre admissions clinic was caused by her disability. Although Mr Polines in evidence agreed that her slowness could be due to her disability, this did not seem to be a correlation anyone including the claimant, drew at the time.

Law

Harassment

173. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.
174. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

175. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

‘an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so...Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.’

176. An ‘environment’ may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Discrimination arising from disability

177. In a claim under s 15, a tribunal must consider:

- Whether the claimant has been treated unfavourably;
- Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
- Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

178. There are two aspects to causation:

- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve

consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.

179. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.
180. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.
181. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification': Dominique v Toll Global Forwarding Ltd EAT 0308/13. The EAT commented that it was difficult to see how a disadvantage which could have been alleviated by a reasonable adjustment could be justified.

Failure to comply with a duty to make reasonable adjustments

182. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.
183. In considering a reasonable adjustments claim, a tribunal must consider:
 - The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
 - The identity of non-disabled comparators (where appropriate) and
 - The nature and extent of the substantial disadvantage suffered by the claimant.Environment Agency v Rowan [2008] ICR 218, EAT.
184. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how

similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.

185. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.
186. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.
187. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.
188. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:
- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
 - The extent to which it was practicable for the employer to take the step
 - The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
 - The extent of the employer's financial and other resources
 - The availability to the employer of financial or other assistance in respect of taking the step
 - The nature of the employer's activities and the size of its undertaking
 - Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

Constructive dismissal

189. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.
190. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee’s resignation; and (iii) the employee must not, by his or her conduct, have affirmed the contract before resigning.
191. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.
192. In this case the claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.
193. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer’s conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: Woods v Car Services (Peterborough) Limited [1981] ICR 666. It is the impact of the employer’s behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462. It is not however enough to show that the employer has behaved unreasonably although “reasonableness is one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach”: Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445.
194. The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In Omilaju v Waltham Forest LBC [2005] ICR the Court of Appeal said that the final straw may be relatively insignificant but must not be utterly trivial: “The test of whether the employee’s trust and confidence has been undermined is objective.”

195. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract: Ahmed v Amnesty International [2009] ICR 1450.
196. In Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;
- a. What was the most recent act (or omission) on the part of the employer which the employee says cause, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed together amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).
 - e. Did the employee resign in response (or partly in response) to that breach?
197. Employers have a duty to take reasonable care to ensure the safety of their employees whilst at work.
198. It is of course somewhat artificial to require an employer who denies having dismissed an employee to show a reason for the dismissal. The Court of Appeal addressed this problem in Berriman v Delabole Slate Limited [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign. This is determined by analysis of the employer's reasons for so acting, not the employee's perception (Wyeth v Salisbury NHS Foundation Trust UK EAT/061/15).

Direct disability discrimination

199. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective

cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

200. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision."
201. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA

from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

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

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

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

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

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

202. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.
203. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

204. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.
205. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'
206. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.
207. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.
208. In some cases, the question of whether there is 'less favourable treatment' is so intertwined with 'the reason why' that a sequential analysis can give rise to needless problems and should be dispensed with: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

Time limits

209. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.
210. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

Submissions

211. We had written and oral submissions from both parties and we took these carefully into account. We refer to them below only so far as is necessary to explain our conclusions.

Conclusions

212. We would comment that the representative who assisted the claimant in pleading her case such that every allegation was presented as multiple causes of action did no favours to the Tribunal, which has had to deliberate about dozens of different causes of action, even where some matters obviously did not sensibly fall under a particular head of claim. This wastes Tribunal time and delays the production of judgments.

3. Constructive dismissal

3.1 *Was the claimant constructively unfairly dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996.*

Issue: 3.2 In the circumstances, did any or all of the following alleged conduct constitute an actual or anticipatory breach of the implied term of trust and confidence by the respondent:

3.2.1 failing to arrange a suitable redeployment opportunity for the claimant on a permanent basis and/or allowing the claimant to continue with her redeployment in the Pre-Assessment Clinic uninterrupted;

213. The respondent argued that occupational health had not advised that the claimant needed a permanent redeployment opportunity and therefore there could have been no failure by the respondent to provide one.
214. This was an approach to the case which only arose in submissions. It was not put to the claimant and we did not consider it was properly supported by the evidence. We note that Dr Hampapur's recommendations were made in a context where he had said: *it is possible that her symptoms may improve with some coping strategies and she should be able to undertake physically demanding tasks in the future. However, it is well known that patients with fibromyalgia make little improvement despite various interventions.* We did not read this as suggesting that Dr Hampapur believed it was at all likely that the claimant's symptoms would improve to any great extent.
215. Ms Doran, the manager who was responsible for the claimant, did not give any evidence to the effect that the respondent took the view that the claimant did not require permanent redeployment. Ms Doran was a line manager who knew the claimant well and also knew the work to be done on the ward well. It

was obvious that she took the view that the claimant was not capable of returning to full duties on the ward in any reasonable future time scale and required a permanent redeployment opportunity. The claimant's consultant, Dr Almahdi, described the problem as being longstanding and it is clear that the respondent understood the suggestion by the occupational health consultant that the claimant might be able to return to 'less physically demanding ward work' as not something likely to happen in a period of time which would obviate the need for her to be permanently redeployed, even if 'less physically demanding ward work' was something which existed. We heard no evidence to suggest it did.

216. There was no evidence that there was any suitable permanent redeployment opportunity available prior to November 2021 when the outpatients vacancy was advertised.
217. The respondent did not seem to have any good system in place for identifying redeployment opportunities for the claimant. There appears to have been no one in HR keeping an eye on the situation and Ms Doran seems to have understandably taken her eye off the ball at this stage. Ms O'Sullivan said that the claimant would be alerted to vacancies which became available in outpatients, but no one followed through on that undertaking. We found that no one told the claimant in terms that it was her responsibility to monitor the vacancy lists. We considered that there was a culpable failure by the respondent from late November 2021 to alert the claimant to the vacancy and consider her suitability for the role.
218. The further allegation about not allowing the claimant to continue to work in the pre admissions clinic unhindered is considered under the overlapping allegations below. We accepted the respondent's evidence that there was unlikely to be a permanent role for the claimant in pre admissions but the issue of whether she was effectively forced out of her temporary role by her treatment by other staff is dealt with under other allegations below.

Issue 3.2.2 failing to respond to or acknowledging the claimant's enquiries and alleviating her concerns about the future of her employment and the unreasonable conduct of her colleagues directed at her;

219. There were two failures to respond to the claimant's emails in 2021. The email of 27 November 2021 to HR was about the claimant's pay and grade. The 7 December 2021 email to Mr Kennedy was about pay but also about the future of the claimant's employment.
220. By the time the claimant sent this email, there was a permanent redeployment opportunity the claimant should have been considered for.

221. The respondent suggested in submissions that the claimant was addressing her enquiries to the wrong people, however we could see nothing wrong with her escalating the issue to Mr Kennedy. He could have referred her back to Ms Doran and /or asked Ms Doran to investigate the situation. He did neither of those things. We considered that the failure to engage with the claimant's situation at this point was unreasonable. These were failures which we did not conclude on their own would have amounted to a breach of the implied term of trust and confidence, however we had to weigh them up with other matters.
222. In terms of whether the respondent failed to engage with the claimant about the unreasonable conduct of her colleagues towards her:
- a. In terms of the claimant raising concerns about Ms Gerona's behaviour in October 2021, we considered that the feedback by Mr Polines was inadequate. He did not tell the claimant that he had spoken to Ms Gerona and he simply told the claimant not to take her behaviour personally;
 - b. In relation to the incident with Jocelyn in November 2021, Mr Polines seems to have dealt with the matter in a way which prevented further incidents with Jocelyn. We did not have sufficient evidence to conclude that there was a material failure by Mr Polines to deal properly with this matter;
 - c. The behaviour of Ms Gerona on 11 January 2022 seems to have been reported after the incident on 23 January 2023;
 - d. So far as the 23 January 2023 incident is concerned, it seemed to us that although Ms Doran promptly sought to arrange a meeting, so far as the claimant was concerned there was simply no response at all from Mr Polines.
223. The claimant then came up with a plan to stop working Sundays to avoid Ms Gerona. When she spoke with Mr Polines about that plan on 1 February 2022, his response was to say that she should leave the clinic to be safe. He had effectively minimised what was going on by describing it as 'arguments' despite the fact that he was aware of Ms Gerona's behaviour. He did nothing at all to alleviate her concerns; he simply suggested she would have to leave in circumstances where she was not fit to return to ward work and no one had drawn to her attention any other redeployment opportunity.
224. We concluded that there were culpable failures by the respondent under this head.

Issue 3.2.3 failing to take any action to prevent the claimant from being bullied and harassed by her colleagues, in particular Ms Gerona, and did this create an intolerable work environment for her;

225. As we have discussed under the previous allegation, we did not consider that enough action was taken to deal with Ms Gerona's treatment of the claimant In January / February 2022. In circumstances where Mr Polines considered that the claimant was 'unsafe' due to the treatment of Ms Gerona, he took no disciplinary or other action to prevent Ms Gerona from behaving in that way or to remove her from the claimant's workplace whilst the matter was investigated.

Issue 3.2.4 failing to take any action to prevent the claimant from being subjected to Ms Gerona's unreasonable conduct, in particular her micro-management of the claimant;

226. The only 'micro management' which was raised in evidence was Ms Gerona's injunctions to the claimant to speed up. Mr Polines did tell Ms Gerona in October 2021 that there was no need for speed and that patients could wait if necessary. Ms Gerona told the Tribunal that she continued to take the view that the HCAs should hurry up if the service was busy and so would continue to tell them to speed up.

227. Ultimately, in January / February 2022, Mr Polines seems to have thrown up his hands about addressing Ms Gerona's behaviour and to that extent we considered there was a failure under this head.

Issue: 3.2.5 failing to address the claimant's request to change her shift patterns to Tuesdays, Wednesdays and Saturdays and/or accommodating any requests to swap shifts;

228. The issue that arose in January / February 2022 was fundamentally about whether the claimant could tolerate working with Ms Gerona. Although the solution the claimant came up with was to switch to a Wednesday shift, we accepted that there was no useful role for her to perform on a Wednesday in the pre admissions clinic. We did not consider that it was culpable of the respondent not to accommodate this request, The failure was the failure to properly address Ms Gerona's treatment of the claimant.

Issue: 3.2.6: placing unreasonable demands on the claimant by expecting her to carry out additional tasks, such as phlebotomy, without additional pay and support on Saturdays and Sundays, days of heavier than usual workload;

229. The evidence we had was that the claimant had chosen those shifts as the shifts which suited her out of the days the pre admissions clinic required an HCA. Working those shifts fell within the terms of her contract. We had no evidence that performing phlebotomy, which had always formed part of the claimant's job description, entitled the claimant to be paid at a higher rate. The documents we had did not suggest that there were different bandings for HCAs with different pay entitlements.
230. The claimant pointed to the fact that bank staff were paid more for working weekends, however that is characteristic of bank working. Permanent staff have other benefits.
231. We did not consider that the demands were unreasonable or that this matter contributed to a breach of the implied term of trust and confidence.

Issue: 3.2.7 subjecting the claimant to the events of 1 February 2022 by Mr Polines, which the claimant will allege left her feeling distressed and humiliated to the extent she was unable to remain at work and complete her shift;

232. We considered that Mr Polines had culpably mishandled the situation on 1 February 2022 for the reasons we have outlined above.

Issue: 3.2.8 subjecting the claimant to repeated remarks from colleagues, in particular Ms Gerona and Mr Polines, asking her to return to the Oncology Ward;

233. We concluded that both Ms Gerona and Mr Polines had suggested that the claimant should or would have to go back to the oncology ward and that this behaviour towards the claimant was blameworthy.

3.2.9 removing the claimant from her scheduled shifts without any explanation or discussion with her, and whether this left her to consider herself dismissed from her employment;

234. The situation after the claimant left work on 1 February 2022 was, we found, somewhat confused. The claimant had said that she was not coming back and there would have been a need to make sure her shifts were covered. Although Mr Polines and Ms Gerona did not inform the claimant of what they were doing, Ms Doran was seeking to have a conversation with the claimant but the claimant was too upset to speak with her.
235. It seemed to us that although the claimant was upset and confused, Ms Doran was doing what she reasonably could to try and tell her that she was not dismissed. Ms Doran was the right person to attempt to speak to the claimant given that the claimant was upset with Mr Polines and Ms Gerona because of their behaviour. It was reasonable for the respondent to engage

bank staff to cover the claimant's shifts. Looked at from another angle, they had reasonable and proper cause to do so.

Issue: 3.2.10 failing to investigate and address the claimant's concerns in a timely manner despite asking her to retract her resignation on more than one occasion;

236. Although we were not concerned with the delay after the claimant's second resignation, we note that it was extensive and not explained to the claimant or to the Tribunal.
237. We considered that the delay in telling the claimant that there would have to be a new investigator because Mr Kennedy was leaving the respondent's employment was very poor. It must have been fairly obvious by the time Mr Kennedy contacted the claimant that he would not be available to see the investigation through. No one contacted the claimant to tell her that was the situation and she only found out because she chased Mr Kennedy when she heard nothing from him.
238. The failures are hard to understand in circumstances where the respondent had persuaded the claimant to retract her resignation but it would have been obvious that her trust in the respondent had been significantly damaged.

Issue: 3.2.11 assigning Mr Kennedy to investigate her grievance in the full knowledge that he was leaving his employment within a short period and failing to inform the Claimant of this fact.

239. As we have observed under the previous head, this was a significant and damaging failure.

Issue: 3.3 Were the following 3 terms breached?

(i) *The implied term of mutual trust and confidence;*

240. Looking at the matters we found made out in the round, we considered that they were likely to destroy or seriously damage the relationship of trust and confidence.
241. We bore in mind that the claimant was a disabled employee in a precarious position. She did not have a permanent role and had been told that she faced dismissal if a permanent role was not found for her. She faced hostile behaviour from Ms Gerona in her role in the pre admissions clinic which was not properly addressed by Mr Polines, who ultimately left the claimant in the position of having to leave the pre admissions clinic to be 'safe'. The respondent then entirely dropped the ball in the way it dealt with the claimant's concerns after she retracted her resignation.

242. We could see no reasonable or proper cause for this behaviour.

Issue: (ii) The duty to provide a safe working environment;

243. Although arguably, the environment was 'unsafe' for the claimant because of the hostile behaviour of Ms Gerona, this seemed to us a less good fit for the facts we have found than breach of the implied term of trust and confidence. We did not have any clear evidence that the respondent would or should have been aware of the likelihood of harm to the claimant's health and were not persuaded there was any breach of this implied term.

Issue: (iii) The duty to provide reasonable support.

244. We agreed with the respondent's submission that there is no such implied term in the authorities. It seemed to us to be too vague and, insofar as such a duty exists, it is properly to be regarded as a facet of the implied term of trust and confidence.

Issue: 3.4 Were any of the alleged repudiatory breach(es) the reason why the claimant decided to terminate her employment?

245. We concluded that the matters which we have identified as being a breach of the implied term of trust and confidence were also the primary reasons for the claimant's resignation. We accept that the claimant was not aware at the time she resigned that the respondent had failed to redeploy her to the outpatients role in November 2021 so this could not have formed part of her reasons for resigning, but the other matters together were a breach of the implied term of trust and confidence which the claimant did know about and which were a substantial cause of her resignation.

Issue: 3.5 If so, did the claimant delay in resigning and thereby affirm her contract of employment?

246. We concluded that nothing the claimant did could properly be regarded as affirming her contract. In the period when she retracted her resignation, she brought a grievance about the matters for complaint and made it very plain that she was not waiving the breach.

247. It follows that we found the claimant was constructively dismissed.

Issues 4. Ordinary unfair dismissal – section 98 ERA 1996

4.1 If the claimant was dismissed, what was the reason for the dismissal?

4.2 *Is the reason a potentially fair reason within the meaning of sections 98(1) and (2) ERA 1996?*

4.3 *If so, in the circumstances (including the size and administrative resources of the employer's undertaking), did the respondent act reasonably in treating that reason as a sufficient reason for dismissal?*

248. There was no potentially fair reason for the dismissal and we therefore concluded that the dismissal was unfair.

5. Disability related harassment (section 26 EqA)

Issues 5.1 Did any of the following amount to unwanted conducted by the respondent?

5.1.1 *The matters listed at 3.2 above.*

5.1.2 *The alleged constructive dismissal.*

5.2 *If so, was the conducted related to the claimant's disability?*

5.3 *If so, did the conduct have the purpose of violating the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her?*

5.4 *If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?*

249. We considered each of the factual allegations in turn.

Issue: failing to arrange a suitable redeployment opportunity for the claimant on a permanent basis and/or allowing the claimant to continue with her redeployment in the Pre-Assessment Clinic uninterrupted;

250. We considered that this was unwanted conduct. We did not consider that it had the proscribed purpose. We had no evidence that anyone in management or HR had anything other than benign intentions. Nor did we conclude that the conduct had the proscribed effect, although we accepted that these were matters of significant concern to the claimant and that the lack of job security caused her great anxiety.

251. We considered the issue about the claimant not remaining in the pre assessment clinic under other overlapping allegations of harassment below.

Issue: failing to respond to or acknowledging the claimant's enquiries and alleviating her concerns about the future of her employment and the unreasonable conduct of her colleagues directed at her;

252. We accepted that all of this treatment was unwanted by the claimant.

253. So far as the failures by Mr Kennedy and HR to respond to correspondence in late 2021 were concerned, we had no evidence at all that would lead us to conclude that there was a proscribed purpose. The more natural inference to draw was that people were busy and the failure to respond was an oversight.
254. Although we understood that the failure to respond would have caused the claimant to be concerned, it seemed to us it would cheapen the words of the section to suggest that failures of this sort could reasonably have the proscribed effect, at least in these circumstances.
255. We considered whether failures by Mr Polines to feed back to the claimant had the proscribed purpose or effect. We accepted that Mr Polines' intentions towards the claimant were not to subject her to the prohibited environment or to violate her dignity. We accepted that what Ms Gerona said in October 2021 and January 2022 created a hostile and humiliating environment for the claimant (and that it was reasonable for it to have that effect) and that Mr Polines failed to ameliorate that situation rather than creating the environment himself.
256. We were not persuaded that Mr Polines' treatment of the claimant was related to her disability. We considered that Mr Polines was to a degree simply taking the path of least resistance; he did not feel able to manage Ms Gerona's behaviour or was unwilling to do when she was otherwise a useful member of staff and someone with whom he had had a long working relationship. We formed the impression that he was not someone who liked conflict.
257. We did not conclude that Mr Polines would have managed the situation differently or better if the claimant had not had a disability. We noted that part of his explanation for his treatment of the claimant on 1 February 2022 (encouraging her to go somewhere where she would be 'safe') was that that would avoid her working with Ms Gerona and suffering stress which could exacerbate the symptoms of her disability. If we had accepted that that consideration had played a material role in his handling of Ms Gerona's behaviour, that could have established the necessary relationship with disability, however, we concluded that what was really at work was his apparent helplessness to address Ms Gerona's behaviour. The professed concerns about the effects on the claimant due to her disability were, we think, cosmetic and *ex post facto*.

Issue: failing to take any action to prevent the claimant from being bullied and harassed by her colleagues, in particular Ms Gerona, and did this create an intolerable work environment for her;

258. This issue is essentially the same as the second part of the previous complaint and we have concluded that the harassment claim is not made out for the reasons set out above.

Issue: failing to take any action to prevent the claimant from being subjected to Ms Gerona's unreasonable conduct, in particular her micro-management of the claimant;

259. This again is essentially the same complaint as we have dealt with above about how Mr Polines handled Ms Gerona's treatment of the claimant. We have rejected the harassment complaint for the reasons set out above.

Issue: failing to address the claimant's request to change her shift patterns to Tuesdays, Wednesdays and Saturdays and/or accommodating any requests to swap shifts;

260. We did not consider that not allowing the claimant to work on a day when the pre admissions clinic did not require an HCA had either the proscribed purpose or the proscribed effect and we did not uphold this claim of harassment.

Issue: placing unreasonable demands on the claimant by expecting her to carry out additional tasks, such as phlebotomy, without additional pay and support on Saturdays and Sundays, days of heavier than usual workload;

261. We noted that all of these features of her placement in the pre admissions clinic were subject to the claimant's agreement in the first instance, although she subsequently felt she should have been paid more. We had no evidence that she could have had a reasonable expectation that she would receive any enhanced pay and we did not consider that there was a proscribed purpose or that this treatment could reasonably be regarded as having the proscribed effect.

262. The only relationship with disability was that the claimant required redeployment in the first place because of her disability.

263. For those reasons we did not uphold this complaint of harassment.

Issue: subjecting the claimant to the events of 1 February 2022 by Mr Polines, which the claimant will allege left her feeling distressed and humiliated to the extent she was unable to remain at work and complete her shift;

264. This was clearly treatment which was unwanted by the claimant. We concluded that Mr Polines did not have a proscribed purpose but the effect of his failure on the day was to continue a hostile and humiliating environment for the claimant.

265. As we have indicated above, however, we did not conclude that his behaviour was materially influenced by / related to the claimant's disability.

266. We did not uphold this complaint of harassment.

Issue: subjecting the claimant to repeated remarks from colleagues, in particular Ms Gerona and Mr Polines, asking her to return to the Oncology Ward;

267. Although this conduct was unwanted and did have the proscribed effect, we did not conclude for reasons we have set out above that it was related to the claimant's disability. Ms Gerona was annoyed about the claimant's speed of work and her requests to change shifts; Mr Polines had failed for reasons of competence or personality to find an appropriate way of resolving the situation which had arisen because of Ms Gerona's treatment of the claimant. We did not uphold this harassment claim.

Issue: removing the claimant from her scheduled shifts without any explanation or discussion with her, and whether this left her to consider herself dismissed from her employment;

268. We did not consider that this had the proscribed purpose or effect. Ms Doran was trying to get hold of the claimant to discuss the situation. Ms Gerona and Mr Polines were separately trying to make sure that the shifts were covered. We did not consider that the claimant could reasonably have believed these matters violated her dignity or created the prohibited environment. She knew that Ms Doran was trying to discuss the matter with her; she would also have been aware that the shifts needed to be covered.

269. We did not conclude in any event that there was a relationship with disability. Mr Polines and Ms Gerona were acting to cover the shifts because they needed someone to do the work and the claimant was indicating that she was not coming back to the pre admissions ward.

270. We accordingly did not uphold this claim of harassment.

Issue: failing to investigate and address the claimant's concerns in a timely manner despite asking her to retract her resignation on more than one occasion;

271. Our overwhelming impression about the handling of the claimant's complaints was that they were not dealt with with sufficient care or competence. We had no evidence that anyone involved had the proscribed purpose. As to effect, whilst we accepted that the treatment would have been frustrating and probably baffling to the claimant, we did not consider it could reasonably have been said to violate her dignity or to create the prohibited environment. We did not conclude that there was any evidence from which we could properly infer the requisite relationship with disability.

272. We accordingly did not uphold this claim of harassment.

Issue: assigning Mr Kennedy to investigate her grievance in the full knowledge that he was leaving his employment within a short period and failing to inform the Claimant of this fact.

273. For very much the same reasons as in respect of the previous complaint, we did not uphold this complaint of harassment.

6. Direct disability discrimination (section 13 EqA)

Issue: 6.1 Did any or all of the following matters constitute less favourable treatment of the claimant by the respondent in comparison to a comparator because of the claimant's disability?

6.1.1 any or all of the matters listed at 3.2 above.

6.1.2 the alleged constructive dismissal.

6.2 The claimant relies on a hypothetical comparator.

274. In the absence of an actual comparator, we took a Shamoon approach of considering whether there was evidence from which we could reasonably conclude that the claimant had been treated less favourably than a non disabled hypothetical comparator because of disability.

275. So far as the failure to consider the claimant for the outpatients vacancy is concerned, we concluded that the respondent behaved unreasonably and failed to have appropriate systems in place.

276. We could see no evidence however, that the respondent would have had better systems in place or would have behaved more reasonably in respect of a non disabled employee who required redeployment. Ms Doran, we considered, was extremely supportive of the claimant but did not get the structured support she needed from HR. It seemed to us that whenever the claimant had the attention of Ms Doran or others in management, there was a desire to help. Ultimately it seemed to us that the natural inference to draw was not that the claimant was treated unreasonably for a reason related to her disability but that she was treated unreasonably because of inadequacies in the respondent's systems.

277. So far as the failure to respond to the two items of correspondence in 2021 was concerned, again that seemed to us to be unreasonable, however again there was nothing from which we could properly infer that the unreasonableness was materially caused by the claimant's disability.

277. So far as Mr Polines' failures were concerned we have made findings above that these were not related to the claimant's disability. We similarly did not find evidence from which we could reasonably conclude that he treated the claimant less favourably than he would have treated a non-disabled comparator because of disability.

278. In respect of treatment by Ms Gerona, the evidence we had was that she behaved in ways that were felt to be harsh / rude / hostile by other non-disabled members of staff including Mr Polines. Although the claimant's disability put her in the vulnerable position where Ms Gerona's suggestions she return to the ward were particularly upsetting to her, we did not conclude that the evidence pointed to the claimant's disability as a part of Ms Gerona's reasons for treating the claimant as she did. Ms Gerona wanted things done in her own way and with speed and she was irritated when the claimant was seeking to change her shifts.
279. So far as the requirement to carry out phlebotomy tasks and to work without additional pay on Saturday and Sunday, we have found that these aspects of her redeployment were by agreement with the claimant and in accordance with her contract. There was simply no evidence which could shift the burden of proof.
280. We could find no evidence that the removal of the claimant's shifts after she left the ward on 1 February 2022 was because of her disability. If the burden had shifted, we were satisfied by the respondent's explanation that it needed to cover shifts in the pre admissions clinic in order to provide a service.
281. There were issues in relation to the grievance which we found to have been handled unreasonably. There was, however, nothing beyond unreasonableness from which we could infer that disability played a role. Again the natural inference to draw from the evidence we had, which included the respondent making spurts of concerted effort to address the claimant's issues and then failing for periods of time, was a lack of resources, systems or sustained effort. We could see no evidence that this was connected with the claimant's disability, particularly in circumstances where the respondent repeatedly encouraged the claimant to retract her resignation.
282. For these reasons we did not uphold the claims of direct disability discrimination.

Issue: 6.3 Was the claimant dismissed within the meaning of sections 39(2)(c) and 39(7)(b) EqA. Was the claimant entitled, because of the respondent's conduct, to terminate her employment without notice? The claimant relies on the actions listed at paragraph 3.2 above as establishing her entitlement to termination.

283. Because we did not find that any of the matters which led to the constructive dismissal constituted direct discrimination, we also did not find that the constructive dismissal was directly discriminatory.

7. Discrimination arising from disability (section 15 EqA)

Issue: 7.1 Did the following arise in consequence of the claimant's disability?

7.1.1 her inability to carry out all the duties of her substantive role due to her fibromyalgia and central pain sensitisation.

284. It was clear from the medical evidence, and the claimant's own evidence and it was clearly accepted by the claimant's managers that she could not carry out all the duties of her substantive role, in particular heavy lifting, due to her disability.

Issue: 7.1.2 her requirement for reasonable adjustments to her role.

285. The flip side of that coin is that the claimant required adjustments due to her disability if she were going to remain employed by the respondent.

7.2 Did any or all of the following matters constitute unfavourable treatment because of something arising in consequence of the claimant's disability?

7.2.1 any or all of the matters listed at 3.2 above.

Issue: failing to arrange a suitable redeployment opportunity for the claimant on a permanent basis and/or allowing the claimant to continue with her redeployment in the Pre-Assessment Clinic uninterrupted;

286. The need for a redeployment opportunity was a consequence of the claimant's disability; the failure to notify the claimant of the vacancy which arose in outpatients was not, on our findings, because she required such an opportunity.

287. We consider the treatment of the claimant in the pre admissions clinic under other allegations below.

Issue: failing to respond to or acknowledging the claimant's enquiries and alleviating her concerns about the future of her employment and the unreasonable conduct of her colleagues directed at her;

288. On our findings above, the failure to respond to the claimant's correspondence in late 2022 was carelessness or incompetence. We did not find any facts from which we could reasonably conclude that it was the somethings arising from disability which caused the failure to respond.

289. We have made positive findings about the reasons why Mr Polines did not deal differently with the claimant's concerns about her colleagues which do not include the somethings arising from disability.

Issue: failing to take any action to prevent the claimant from being bullied and harassed by her colleagues, in particular Ms Gerona, and did this create an intolerable work environment for her;

290. This essentially crosses over with the previous allegation and again, our findings as to Mr Polines' reasons do not include the somethings arising from disability.

Issue: failing to take any action to prevent the claimant from being subjected to Ms Gerona's unreasonable conduct, in particular her micro-management of the claimant;

291. This also crosses over with the previous allegations and again, our findings as to Mr Polines' reasons do not include the somethings arising from disability.

Issue: failing to address the claimant's request to change her shift patterns to Tuesdays, Wednesdays and Saturdays and/or accommodating any requests to swap shifts;

292. We have made positive findings that the claimant's request to work Wednesdays was rejected because there was no requirement for an HCA in the pre admissions clinic on a Wednesday.

Issue: placing unreasonable demands on the claimant by expecting her to carry out additional tasks, such as phlebotomy, without additional pay and support on Saturdays and Sundays, days of heavier than usual workload;

293. We did not consider that this was unfavourable treatment, since the claimant was being asked to work in accordance with her contract in circumstances where weekend working in the pre admissions clinic suited her and she required redeployment. Redeployment was not itself unfavourable treatment because of something arising in consequence of the claimant's disability.

294. So far as the pay was concerned, we had no evidence that any other permanent employee working in the pre admissions clinic at the weekend would have received the enhanced pay available to bank staff so there was no evidence that the failure to increase the claimant's pay was because of something arising in consequence of her disability.

Issue: subjecting the claimant to the events of 1 February 2022 by Mr Polines, which the claimant will allege left her feeling distressed and humiliated to the extent she was unable to remain at work and complete her shift;

295. Again, our findings as to the reasons for Mr Polines' inability to manage the situation with Ms Gerona more appropriately do not include the somethings arising from the claimant's disability.

Issue: subjecting the claimant to repeated remarks from colleagues, in particular Ms Gerona and Mr Polines, asking her to return to the Oncology Ward;

296. This was unfavourable treatment but on our findings the reasons for it were not the somethings arising from the claimant's disability. We found no evidence from which we could infer that Ms Gerona would have treated an HCA she considered to be working slowly and asking for too many shift changes more pleasantly if that HCA did not have the claimant's requirements arising from her disability, Similarly, we found no evidence from which we could properly infer that Mr Polines would have managed the situation better had the claimant not had the identified somethings arising in consequence of her disability.

Issue: removing the claimant from her scheduled shifts without any explanation or discussion with her, and whether this left her to consider herself dismissed from her employment;

297. We have made positive findings as to the reason why the claimant's shifts were cancelled which do not include the something arising in consequence of her disability.

Issues: failing to investigate and address the claimant's concerns in a timely manner despite asking her to retract her resignation on more than one occasion;

assigning Mr Kennedy to investigate her grievance in the full knowledge that he was leaving his employment within a short period and failing to inform the Claimant of this fact

298. Again, we considered that the evidence shows that these matters arose from incompetence / ineptitude not the somethings arising in consequence of the claimant's disability.

Issue 7.2.2 the alleged constructive dismissal.

7.3 Was the claimant dismissed within the meaning of section 39(7)(b) EqA. Was the claimant entitled, because of the respondent's conduct, to terminate her employment without notice? The claimant relies on the actions listed at paragraph 3.2 above as establishing her entitlement to termination.

299. We have not found that any of the individual matters amounted to unfavourable treatment because of something arising in consequence of disability so it follows that the constructive dismissal was not itself a breach of section 15. For all of these reasons we have not upheld any of the claims under section 15.

7.5 If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? In broad terms the legitimate aim is providing a safe place of work for the claimant and a safe environment for patients. The respondent has leave, as set out below and if so advised to give particulars of any other legitimate aim relied upon.

300. We did not have to consider the issue of whether any unfavourable treatment because of something arising in consequence of disability was justified as we found no such treatment.

8. Reasonable adjustments (sections 20 and 21 EqA)

8.1 Did the respondent apply the following PCPs?

8.2 If so, did this place the claimant at a substantial disadvantage in comparison with persons who are not disabled? The claimant asserts that it did, by placing her at risk of exacerbation of her health conditions, the uncertainty about the future of her employment which caused her a high degree of stress and placing unreasonable demands on her to work weekend shifts routinely without support and/or flexibility.

Issue: 8.1.1 The requirement to undertake all the duties of the substantive role, in particular, the manual handling aspects.

301. For employees working on the oncology ward, there was clearly, absent any adjustment, a requirement to carry out fairly heavy manual handling.

302. That PCP put the claimant at a substantial disadvantage in comparison with person who are not disabled because she was unable to do those tasks and unable to continue to work on the oncology ward.

Issue: 8.1.2 The requirement to consistently work weekend shifts without flexibility.

303. The practice in pre admissions was that HCAs would have to work shifts on Mondays, Tuesdays, Fridays, Saturdays and Sundays. There could be said to be a practice that an HCA who could only work one of those weekdays would have to work on Saturdays and Sundays, although it was a practice of limited application.

304. We could not find that the claimant was put at a substantial disadvantage compared with persons who did not share her disability. Anyone who was undertaking study and therefore was limited as to which weekdays they could work, as the claimant was, would have had to work weekend shifts instead. We had no evidence that at the relevant time, the claimant was less able than anyone else to work weekends, because of her disability. She had previously not been working two days in a row but by this point, there was no evidence

that she was not able to work two consecutive days and she did not suggest that that was the case.

Issue: 8.1.3 The requirement to be paid at the normal rate of pay for weekend work.

305. Our understanding was that permanent staff employed to work shifts throughout the week would not be paid enhanced rates for working at the weekend but bank staff would.
306. The claimant was not in this respect at a substantial disadvantage compared with non disabled staff. Any permanent staff in her position would have had to work at weekends without additional pay.

Issue: 8.3 If so, was it reasonable for the respondent to have taken the following steps to avoid the disadvantage?

Issue: 8.3.1 Allow the claimant to continue in her redeployed role uninterrupted.

307. The claimant was not herself pressing for this as an adjustment. During the period when she worked on the oncology ward, she was clearly conscious of her limitations whilst working on that ward. She appears to have accepted that what she really required to perform a useful function was redeployment to an area where there was no requirement for heavy manual handling.

Issue 8.3.2 Redeploy the claimant into another suitable role or within Pre-Assessment on a permanent basis.

308. We concluded that redeploying the claimant to the outpatients role would have been a reasonable adjustment. The evidence we had was that there was a role in outpatients which Mrs Doran believed was suitable for the claimant. Although there was some question raised in evidence and submissions over whether the claimant's hours would have suited a full time role, it was for the respondent to satisfy us that the role did not represent a reasonable adjustment, in circumstances where we were satisfied that there was a PCP that put the claimant at a substantial disadvantage and that there was a prima facie reasonable adjustment which could have been made. The respondent did not call any evidence which established that the claimant's availability would have ruled her out for this role. The role was available in November 2021. There was no evidence from anyone that the role would not have been appropriate for the claimant to perform or that she would not have happily accepted the role had it been proffered at the time it arose, a time when the claimant was anxious to find a permanent role.
309. Although there was a suggestion that the claimant failed to look at the vacancy lists, the respondent's own procedure places the onus on the employer to find a role for the employee. The claimant reasonably believed

that is what was going to happen. She was waiting for a vacancy in outpatients and her discussions with Ms Doran would have led her to believe someone would contact her as and when a suitable vacancy became available.

310. We concluded that the respondent had failed in a duty to make reasonable adjustments in not offering the claimant the vacancy in outpatients.

Issues: 8.3.3 Allow the claimant to change her shift pattern to Tuesdays, Wednesdays and Saturdays.

8.3.4 Pay the claimant the enhanced rate of pay for weekend work.

311. These proposed adjustments related to PCPs which we did not conclude placed the claimant at a substantial disadvantage compared with persons who did not share her disability. They were not adjustments which would have alleviated the disadvantage we identified was caused by the PCP which we considered did place the claimant at such a disadvantage.

Preliminary Issues

Jurisdiction

2. The claimant contacted ACAS on 29 April 2022 as part of the Early Conciliation Procedure ('EC') and was issued with an ACAS Certificate on 10 June 2022. The claimant presented her claim on 24 June 2022. In respect of any act or omission that is alleged to constitute unlawful discrimination that occurred before 30 January 2022:

2.1 Do such acts/omissions constitute part of conduct extending over a period for the purposes section 123(3)(a) EqA which ended on or after 30 January 2022?

2.2 Alternatively, would it be just and equitable to extend time pursuant to section 123(1)(b) EqA

312. So far as the failure to make a reasonable adjustment which we found occurred, the adjustment of placing the claimant in the outpatients role should reasonably have been put in train from late November 2021, which would have seen the claimant in the role perhaps in the course of December 2021 but perhaps in January 2022; we did not have any clear evidence as to how long the process would have taken.
313. We considered that it was just and equitable to extend time for this claim. The claimant did not know the vacancy existed in November 2021 and in fact the respondent did not disclose the information until the final hearing. At the time when she was looking to commence proceedings, the claimant had been

informed that the vacancy was available in February 2022, not that it was being readvertised and had been available significantly earlier.

314. Also relevant to our conclusion was the fact that the claimant had sought for a prolonged period to pursue a grievance about the various matters which formed the subject of these proceedings and had faced prolonged delays by the respondent. The respondent did not point to any prejudice caused to the respondent by the delay in presenting this claim, which if it existed, was very short.
315. The claimant has been successful in her unfair dismissal claim and in one aspect of her claim for breach of a duty to make reasonable adjustments. There will be short case management preliminary hearing to list a remedy hearing.

Employment Judge Joffe
London Central Region
09/08/2023

Sent to the parties on:
10/08/2023

For the Tribunals Office