Case Number: 3332631/2018
3320811/2019
3320812/2019
3328251/2019

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Macleod	**v**	Royal Berkshire NHS Foundation Trust

Heard at: Reading

On: 31 January 2022
2 - 8, 10-15 February 2022
20, 21, 23 & 24 June 2022
7 & 8 November 2022
30 & 31 January 2023
3 February 2023
29 March 2023
13 June 2023

and in chambers:

1, 9 February, 22 June 2022
12, 14 June 2023,
4, 5, 26-28 July 2023

Before: Employment Judge Anstis
Mr C Juden
Mr F Wright

Appearances:
For the Claimant: In person
For the Respondent: Ms E Misra (KC from 27 March 2023) (counsel)

RESERVED JUDGMENT

1. The claimant was subject to direct disability discrimination by the respondent in respect of comments made by Dr Barker during a meeting on 3 May 2018 (as described below).

2. The claimant's other claims are dismissed.

REASONS

A. INTRODUCTION

Introduction

1. The claimant was employed by the respondent as a Trauma and Orthopaedic Consultant. His employment started in February 2008. We were told during the course of the hearing that his employment has since ended, but these claims are not about the termination of his employment.

2. The claimant brings claims of disability discrimination. He says that he has autism and that this amounts to a disability under the terms of the Equality Act 2010. The respondent accepts that at all material times the claimant was a disabled person by reason of autism. The claimant describes autism as "*a lifelong developmental disability that affects how people communicate and interact with others*".

3. Adopting the claimant's language, he describes individuals without autism as being "neurotypical". The claimant's witness statement addressed broad themes of the difficulties that people with autism have in a world that is predominantly neurotypical. We will come later to the specific allegations of discrimination that the claimant raises, but we acknowledge at the start of this decision the considerable difficulties that people with autism can face in a world that is predominantly neurotypical, as well as his general comments that autism is a "spectrum" condition that can encompass a diversity of other personal abilities and behaviours. We also note and acknowledge the points made by the claimant in relation to "masking" – that is, an autistic person attempting to adapt their behaviour to operate in a predominantly neurotypical world, and the consequences that may follow from that.

4. Although autism is a lifelong condition, the claimant only received a formal diagnosis of his condition later in life. The first record of this is a letter dated 12 June 2013.

5. The claimant's claims were submitted on four different claim forms, recorded under case numbers 3332631/2018, 3320811/2019, 33020812/2019 and 3328251/2019. There appears also to have been a fifth claim which was rejected by the tribunal as being a duplicate of 3328251/2019. These were consolidated by an order dated 12 April 2020 and, except for any arguments in relation to time limits, we have treated them in the hearing of the case as if they are one single case.

6. There are a number of later claims between the parties which are stayed, and the claimant submitted further claims during the course of this hearing. In this

decision we are solely concerned with the four claims that have been listed for this hearing. Given that there are other claims we are particularly conscious of the need in this judgment and reasons to keep to the matters at issue in the claims before us, rather than seeking to make any wider comments or observations on the relationship between the parties.

7. The claim form dates and relevant early conciliation dates are set out in the table that follows, alongside the broad scope of the claim:

Case no.:	**Day A:**	**Day B:**	**Date of ET1**	**General scope of claim (as originally submitted):**
3332631/2018	20 June 2018	3 Aug 2018	6 Sept 2018	*"events around October 2017"*
3320811/2019	2 June 2019	1 July 2019	25 July 2019	On-going issues in relation to reasonable adjustments.
3320812/2019	15 April 2019	15 May 2019	26 July 2019	*"two formal investigations my employer has placed me under"*
3328251/2019	21 Sept 2019	6 Oct 2019	29 Dec 2019	Further points in relation to investigations.

8. In each claim form, the claimant set out his claims in note or bullet point form and, in consequence, the respondent's replies have been equally brief. The claims have been subject to extensive case management across a number of hearings, culminating in an order of Employment Judge Gumbiti-Zimuto dated 18 November 2021 which permitted the claimant to amend his claim in the terms set out in a list of issues and separate table of allegations presented at that hearing. The list of issues and table of allegations are set out as Appendix 1 to this decision. As will appear below, the interpretation of that order has itself been in issue during the course of this hearing.

9. We noted during the February 2022 hearing that arising out of that process we had a list of issues, but no indication of which of those issues derive from which claim or which were added by amendment. We would need that in order to consider any individual points in relation to time limits that may arise. We asked the respondent to set out its position as to what was to be taken as the date of presentation for each of the individual allegations, which it did in the form set out in Appendix 2.

10. We will explain the significance of that in more detail later, but it appears to show that nothing depends on the fourth claim (3328251/2019). All the claims are dealing with were in the first, second or third claim or were added by amendment in November 2021.

11. The claims as identified in the list of issues were of disability discrimination only: direct disability discrimination, indirect disability discrimination and a failure to make reasonable adjustments.

The hearing and matters arising during the hearing

Day 1 – 31 January 2022

12. The first day of the hearing was largely taken up with discussions about what adjustments to the tribunal's normal procedures may be necessary in order to enable to claimant's full participation in the hearing. Ahead of the hearing the claimant had made what was titled an "urgent application", setting out adjustments that he wanted to be made. Adjustments had previously been considered to some extent during the case management process, with an order having earlier been made for the hearing to be recorded. However, there had been no formal "ground rules" or similar hearing to fully address any necessary adjustments.

13. The outcome of this was a protocol of adjustments, which is attached to these reasons as Appendix 3. This started as version 1, as it was anticipated that there may be a need to refine or revisit the adjustments depending on an assessment of how well they were working during the course of the hearing.

14. For the most part, the adjustments sought by the claimant were not opposed by the respondent, or were not opposed when subject to minor amendments that the claimant accepted. The only substantial matters that the tribunal ruled on were an application by the claimant for the respondent's witnesses to go first, and an application by the claimant for his cross-examination to be carried out primarily in written form. We refused both applications, but the protocol provided for an outline of the intended cross-examination to be given to the claimant the afternoon prior to the cross-examination. This process was concluded by the early afternoon of the first day, following which the tribunal took the remainder of the day as a reading day.

Day 2 – 1 February 2022

15. The second day of the hearing was taken by the tribunal as a reading day, and the parties did not attend tribunal on that day.

Day 3 – 2 February 2022

16. At the start of the third day, the employment judge declared an involvement that a family member had previously had with the respondent. On further discussion this prompted an application by the claimant for the employment judge to recuse himself from hearing the case. This application was refused by the tribunal, as recorded in the tribunal's order of 11 February 2022.

17. Further matters of case management were then addressed. The claimant's "urgent application" also made points in relation to late or non-disclosure of documents by the respondent. He said that he was not seeking any tribunal orders in respect of that, but reserved the right to draw the attention of the tribunal to this in any submissions or during the course of his cross-examination of any relevant witness for the respondent.

18. There was discussion about the list of issues and table of allegations that appeared at p333 onwards of the tribunal bundle, and which were agreed by both parties to be the "list of issues and table of allegations" referred to in Employment Judge Gumbiti-Zimuto's case management order of 18 November 2021 and described by the judge as a document that "*sets out fairly the matters that are in dispute between the parties*" and which "*contains those matters that will … form the basis of any findings of discrimination made by the tribunal*". Given that, it was unclear what the claimant intended by the separate table of allegations included in the bundle of documents that he had produced. In discussion, the claimant referred to para 3 of Employment Judge Gumbiti-Zimuto's order, which permitted the claimant to "*rely on other matters not set out in the said table of allegations. Any such other matters, if taking the form of new allegations or different allegations, will not be matters on which the tribunal will be making findings of discrimination but will only be by the way of background or supporting evidence.*"

19. During the course of discussion, the claimant explained that his table of allegations would be used by him as a reference point in addressing the "*background or supporting evidence*" that the employment judge had referred to. As will appear below, this point was revisited later in the hearing.

20. The late morning and early afternoon were taken up with discussion about the status of recordings that the claimant had taken of various meetings which had only been provided to the respondent during the first day of the hearing. Why these had only been provided at that point was a matter of dispute between the parties, which we did not ultimately have to address. The respondent indicated its intention to apply for those parts of the claimant's witness statements that recited extracts from transcripts of the recordings to be struck out, but on further consideration that application was not pursued. The hearing finished around 14:30 to allow time for the respondent to consider the recordings the claimant had provided (at least to the extent they were referred to by extracts from transcripts in his statement), of which the

most significant appeared to relate to a meeting on 3 May 2018 between the claimant and Dr Lindsay Barker, the respondent's medical director.

21. The claimant's claims were largely set out as claims of direct disability discrimination. In early discussions with the claimant the tribunal referred the claimant to para 3.29 of the EHRC Code of Practice, in which nature of the comparator in a direct disability discrimination claim is described.

22. It was also agreed as part of introductory discussions that this hearing should be to determine liability only.

Day 4 – 3 February 2022

23. Having reviewed the recordings, at 21:00 on the evening of 2 February 2022 the respondent served a supplemental witness statement from Lindsay Barker, and made an application for that statement to be admitted to evidence.

24. At the start of the hearing on 3 February 2022 it was apparent that the claimant had not yet seen that supplemental statement and application. The tribunal adjourned in order that the claimant could consider his response, eventually resuming at 11:30, having received a written response from the claimant.

25. Taking into account the submissions received from the parties, the tribunal permitted the supplemental statement to be adduced by the respondent, but also recognised that the claimant may wish to make his own application to rely on new evidence in response to this supplemental statement. Any such application (or further matters that the claimant may wish to raise arising from the supplemental statement) were to be addressed if and when it was made or the further matters arose.

26. The tribunal was thus in a position to commence the claimant's evidence from around 12:00 on the fourth day of the hearing, and the claimant gave evidence through to a lunch break at 13:00.

27. On resuming after lunch the claimant indicated that he had made a urgent application in writing over the lunch break. That had not at that point been seen by the tribunal, and the claimant was content to continue with his evidence pending later consideration of his application.

28. The claimant's application started "*The Claimant seeks clarity regarding the list of allegations and, therefore, what the tribunal can preside.*" The essence of the application was to question whether Employment Judge Gumbiti-Zimuto's order of 17 November 2021 had had the effect outlined by the tribunal the previous day, and whether it limited the claimant's claims to the

"list of issues and schedule of allegations" at p333 onwards of the tribunal bundle, or whether it also encompassed the wider allegations contained within the claimant's table of allegations. It appears that the application had been prompted by observations by the tribunal in the course of addressing the claimant's response to the supplemental statement. That response had said that the claimant's claim was (or included) a claim of discrimination arising from disability, but the tribunal had indicated during the course of discussion that the claimant's claims did not appear to contain a claim of discrimination arising from a disability – certainly there was no such claim set out in the list of issues and table of allegations at p333 onwards.

29. Following a break, discussions concerning this point took the rest of the afternoon. The respondent's position was that the tribunal's view (expressed the previous day) was correct and had not been disputed by the claimant at the time. Given the claimant's express preference to address matters in writing, the tribunal invited the claimant to present any further submissions in writing, and he agreed that he would do that by 09:00 the following day.

Day 5 – 4 February 2022

30. The claimant presented written submissions in respect of his position on the interpretation of the order of Employment Judge Gumbiti-Zimuto dated 18 November 2021. We heard oral submissions from the respondent on the point, and gave a decision. That decision (that the order of 18 November 2021 limited the scope of the claimant's claim to those matters described in the list of issues and table of allegations at p333 onwards) is recorded in a separate order. The claimant requested written reasons for our decision, which have been provided.

31. The remainder of the day was taken up with hearing the claimant's evidence, and making arrangements for the following week. By that time it was clear that the original twelve days set aside for the hearing would not be sufficient. The respondent anticipated questioning the claimant for the duration of the first two days of the next week, and set out a proposed timetable for its witnesses for the remainder of the week.

Case management in respect of the first week of the hearing

32. The most substantial and contested case management decisions made by the tribunal during the first week of the hearing are consolidated and recorded in a formal case management order dated 11 February 2022. This order included the written reasons that had been requested for our decision on the interpretation of the order arising from the 17 November 2021 case management hearing, and recorded the following decisions:

    - the order in which evidence would be given,

- the manner in which the claimant's cross-examination would proceed,
- a variation of the order in respect of recording the proceedings,
- the decision on the recusal application,
- the respondent's application to rely on a supplemental statement from Dr Barker, and
- the correct interpretation of the order arising from the hearing on 17 November 2021.

Day 6 – 7 February 2022

33. Over the weekend the claimant made two further applications: to lift a stay that had been imposed on other proceedings between the parties, and for the tribunal to review its decision that the effect of Employment Judge Gumbiti-Zimuto's order of 18 November 2021 had been to limit the claimant's claims to those described in the list of issues and table of allegations at p333 onwards of the tribunal bundle.

34. We told the claimant we were not in a position to address the other proceedings between the parties. Any application by him to lift the stay would have to be dealt with by way of an application by him in those proceedings.

35. After hearing submissions from the parties, we were content that our earlier decision in respect of the effect of the order of 18 November 2021 was correct.

36. The remainder of the day was taken up with the claimant's evidence. The claimant confirmed that there was no need for any changes to the previously agreed protocol of adjustments.

Day 7 – 8 February 2022

37. It was apparent at the start of the day that the claimant was in some difficulties in giving his evidence. After a break we were able to proceed for around 45 minutes, but the claimant was late returning from a subsequent break and it was apparent to the tribunal that he was not in a position to continue with giving his evidence. The appropriate course of action was discussed with the parties, with the respondent accepting that the tribunal should break for the day to allow the claimant time for rest and recovery. The respondent suggested that the claimant should be invited to say by the end of the day whether he would be ready to resume his evidence the following day. On further deliberation and discussion, the tribunal considered it better to give the claimant a full day and a half to rest. This was not opposed by the respondent. Accordingly, the hearing broke around 12:00 intending to resume

at 10:00 on Thursday with a full day and a half for the claimant to rest. It was hoped that the claimant's evidence could be completed on Thursday 10 February, moving on to Mr Pollard's evidence on Friday 11 February.

Day 8 – 9 February 2022

38. The tribunal took the eighth day of the hearing as a chambers day, continuing its reading in anticipation of the respondent's evidence. The parties did not attend.

Day 9 – 10 February 2022

39. The claimant resumed his evidence on 10 February 2022 and was cross-examined on his evidence for the whole day, without any apparent difficulty.

40. It had been hoped that the claimant's evidence would have been completed by the end of the day on 10 February 2022, but it was not. The parties had previously agreed that if the claimant's evidence was not completed during 10 February 2022 the respondent's witness Tom Pollard would be interposed on 11 February 2022. This was because of Mr Pollard's professional commitments (including work with patients) which limited his availability.

41. Ahead of the claimant's cross-examination of Mr Pollard the tribunal indicated to the claimant (by reference to the list of issues and table of allegations) the areas it would expect the cross-examination to cover, and asked the claimant to note which of his questions amounted to priority questions, so that he could be sure to address those core points even if there was a dispute about the relevance of some of his other questions. The tribunal indicated that it did not consider that the cross-examination of Mr Pollard should take more than a day.

42. It had been evident for some time that this case was likely to go part-heard. Possible dates for resuming the hearing had previously been discussed in the first week of the hearing, and discussions continued on that point in the second week of the hearing.

Day 10 – 11 February 2022

43. 11 February 2022 was taken up with the claimant's cross-examination of Mr Pollard. Despite what had been hoped, and despite intervention from the tribunal, it was clear by early afternoon that the claimant's cross-examination of Mr Pollard would not be complete within the day. The respondent made an application that the tribunal should ask the claimant to move directly on to the priority questions he had answered. The tribunal declined to do this, on the basis that the claimant's questions appeared to be addressing relevant points, and also on the basis that the claimant, as a litigant in person, should be

allowed more time to get used to the process of questioning a witness and appropriately structuring his questions. However, the tribunal also noted that it would consider (on application by the respondent) exercising its powers under rule 45 in respect of the claimant's subsequent questioning of the respondent's witnesses – particularly those witnesses in clinical roles where unnecessarily long cross-examination would take them away from their roles in patient care. At the end of the day, Mr Pollard was formally released from his witness oath in anticipation that it may be some time before the tribunal could resume his evidence.

44. It was at this point that we invited the respondent to prepare the table on time limits that now appears at appendix 2.

Day 11 – 14 February 2022

45. The claimant was attending to an urgent family matter on 14 February 2022. As a result, the parties did not attend the hearing that day, but the tribunal sat in chambers to continue with its reading and contemplate the hearing and the evidence it had heard so far.

Day 12 – 15 February 2022

46. The claimant's evidence was completed on the morning of the 12th day of the hearing. The afternoon was taken up with arrangements for the resumption of the hearing, which are set out in a separate order made by consent.

The position at the end of the first set of hearing dates

47. At the end of the first set of hearing dates the tribunal had established the adjustments to be made for the claimant and heard his evidence along with part of the evidence of Tom Pollard for the respondent. Matters of case management had been dealt with. The hearing was listed to be resumed on 23 – 27 May 2022, 20 – 24 June 2022 and 1 September 2022. An order with further directions was made by consent at the end of the first set of hearing dates on 16 February 2022, setting out time limits on the claimant's questioning of the respondent's witnesses (under rule 45) and the anticipated timetable for the resumed hearings.

Resumption of the hearing in May 2022

48. On 5 April and 5 May 2022 the claimant made applications to vacate or adjourn the hearing listed for 23-27 May 2022. The second application was granted for reasons given in a separate order dated 18 May 2022.

Day 13 – 20 June 2022

49. On 9 June 2022 the respondent sent an email to the tribunal, with a copy to the claimant. Amongst other things, this proposed a timetable for witnesses for the hearing due to take place w/c 20 June 2022. This proposed timetable incorporated a break on the morning of Wednesday 22 June 2022.

50. On 19 June 2022 (the day before the hearing was due to resume) the claimant sent an email to the tribunal saying that he had only seen the respondent's email that weekend (having been advised to not check emails in order to reduce the stress he was under). He said that he had told the respondent that he wanted correspondence by post, rather than by email. He said that he had prepared his cross-examination on the basis of the timetable for w/c 20 June 2022 that had been set out in the tribunal's order of 16 February 2022, and was not in a position to deal with the other witnesses the respondent now contemplated calling during that period. He also contended for breaks on the Tuesday and Thursday afternoon, and that any subsequent listing of the case should be for no more than two days at a time, with a minimum gap of three weeks between hearings.

51. This and other housekeeping matters were discussed on the morning of 20 June 2022, but no formal decision in relation to it was made by the tribunal. At 12:00 the claimant commenced his cross-examination of Dr Lindsay Barker. Dr Barker had been the subject of a rule 45 order, so the claimant's cross-examination of her was subject to a time limit of 1.5 days, which would take us to 15:30 on 21 June 2022.

52. Over the lunch break on 20 June 2022 the claimant sent an email proposing a revised timetable for the week. This matched the respondent's proposal through to Wednesday lunchtime, but not after that. The claimant wanted the whole of Wednesday as a rest day, then moving on to Suzanne Emerson-Dam on Thursday 22 June and Lynne Buttery on the morning of Friday 23 June 2022. Neither of those two witnesses was the subject of a rule 45 order. At this point it was agreed that Warren Fisher would not be heard on 22 June 2022 (as the respondent had originally intended) and so he would be released from the hearing for that week.

53. By that point the remaining issue on timetabling between the parties was whether Aaron Rogers could also be heard on Friday 23 June 2022. The claimant was reluctant to do this but was asked by the tribunal to consider the point overnight in case he considered it would be possible for him to prepare any questions for Mr Rogers during the intended rest day.

Day 14 – 21 June 2022

54. The claimant's cross-examination of Dr Barker was completed on 21 June 2022.

55. As regards Mr Rogers, the claimant said that he would not be in a position to cross-examine Mr Rogers on Friday 24 June 2022. While reserving our position on the rights and wrongs of that (in case of any later application by the respondent) we accepted it is a fact, and on that basis intended to hear evidence from Suzanne Emerson-Dam on Thursday 23 June and Lynne Buttery on Friday 24 June 2022.

Day 15 – 22 June 2022

56. The whole of 22 June 2022 was taken as a rest or recovery day for the claimant, with the parties not attending tribunal. As with the previous rest breaks, the tribunal panel met in chambers to consider matters so far and prepare for the evidence of Ms Emerson-Dam and Ms Buttery.

Day 16 – 23 June 2022

57. The claimant commenced his cross-examination of Ms Emerson-Dam on 23 June 2022. At around 12:00 we asked the claimant how far through his cross-examination he was. He said that he was "*not that far*" into it, that he would not complete his cross-examination that day but that he hoped to have completed it by the end of 24 June 2022.

58. This prompted an application by the respondent for a rule 45 order in respect of the evidence of Ms Emerson-Dam. We granted this and it is recorded in a separate order. On hearing our decision the claimant told us that he was going home for the rest of the day. The claimant did not attend on the resumption of the hearing at 14:00. We gave oral reasons for our decision then, and adjourned for the remainder of the day.

Day 17 – 24 June 2022

59. The claimant resumed his questioning of Ms Emerson-Dam from 10:00 through to the deadline of 13:00. He requested written reasons for our decision from the previous day, which were provided separately. Over the lunch break he sent to the tribunal an "*urgent application to appeal*" our decision of 23 June 2022. We declined to address this, and pointed out to the claimant that an appeal was not a matter we could address. We told him that if he wished to appeal our decision he should make his appeal to the Employment Appeal Tribunal in accordance with the rules applicable to appeals.

60. The remainder of the day was taken up with relisting the hearing and matters of case management, which are recorded in a separate order. This included (for reasons given orally at the time) further orders under rule 45, and also (subject to one minor exception agreed with the claimant) complied with the claimant's request that hearings be listed for a maximum of two days at a

time, with three weeks in between each hearing. That is noted in appendix 3 as being version 2 of the adjustments sought by the claimant and agreed by the tribunal.

61. We also asked the claimant to consider (in good time ahead of any closing submissions) his response to the respondent's position on time, as set out at appendix 2.

Postponement – 1 September 2022

62. The hearing listed for 1 September 2022 was vacated following an application by the respondent. The circumstances and outcome of that application are set out in the tribunal's order dated 31 August 2022.

Day 18 – 7 November 2022

63. Day 18 was to be for cross-examination of Dr Carl Waldmann. While it is clear that the claimant was dissatisfied the restrictions imposed by our use of rule 45, the events of the day led us to be concerned that we had been too generous in the time we had allowed under rule 45, rather than that we had been too restrictive.

64. According to the list of issues, Dr Waldmann was accountable for allegation 22: "*Failure to progress formal disciplinary investigations against myself*", which was further described as "*Requested formal processes are completed (either abandoned or progression of the formal process). This has been declined.*" This was said to be direct discrimination, victimisation and/or indirect discrimination, and was said to have occurred on various occasions for which dates were given.

65. What we were looking for in such circumstances were clear allegations of discrimination put by the claimant to Dr Waldmann, with the claimant setting out specific matters he alleged Dr Waldmann should have done at particular times, along with questioning on the reasons why he did not do them.

66. This did not occur. The claimant embarked on a wide-ranging cross-examination of Dr Waldmann, none of which seemed to involve any allegations of disability discrimination against Dr Waldmann.

67. The tribunal understood that the claimant's disability made it difficult for him to respond to interventions from the tribunal, and for that reason we were reluctant to intervene. However, it was necessary to do so multiple times, trying to draw the claimant's attention back to the allegations that were made against Dr Waldmann. Considerable time was taken up with reminding the claimant of the decision that had been made earlier that the list of issues attached to this decision was the definitive list of issues. The claimant

remained dissatisfied with that decision, and the possibility of appeals in respect of that point and the rule 45 orders was discussed.

68. While the claimant's actions in respect of any appeals were a matter for him, the tribunal pointed out to the claimant that if, as he contemplated, he were to wait to the conclusion of the case before making appeals in respect of earlier orders, then not only may he fall foul of the strict deadlines that apply to appeals, the outcome of any successful appeal was most likely to be a remission to another tribunal to hear the case again from the start, not that this tribunal would be directed to make findings (on the basis of evidence already heard) in respect of more extensive allegations of discrimination.

69. There was further discussion about the nature of a direct disability discrimination claim, and the comparator that would be required for such a claim. The claimant was of the view that the comparator in such circumstances would be a "neuro-typical" consultant who did not display the communication difficulties the claimant had, and he said that he had conducted research into the point. The tribunal told the claimant that its view (subject always to any detailed legal submissions from the parties) was that the comparator had to be someone who displayed the same communication difficulties that the claimant had, but who was not disabled.

70. We repeated to the claimant that if (as appeared to be the case from the list of issues) he was saying that Dr Waldmann had committed any disability discrimination he should put those allegations to Dr Waldmann. His position in respect of this was that he would take legal advice on his closing submissions and at that point would be able to draw together the threads of evidence and tell us what the disability discrimination was. We explained that we did not consider this to be a proper course of action, and that allegations against a witness must be put to them.

71. By the end of Dr Waldmann's evidence we were still not clear what, if any, disability discrimination the claimant alleged he was responsible for. The claimant had not put any allegations of discrimination to Dr Waldmann and without understanding what those were we were unable to put the matters ourselves. The claimant had taken a full day in questioning a witness against who we understood only one substantial allegation was made (albeit perhaps repeated on a number of occasions) yet we remained unaware of what exactly that allegation or allegations were.

72. No clear allegation of disability discrimination was ever put to Dr Waldmann. We told the parties that while we would consider the evidence we had heard from Dr Waldmann, given that no allegations had been put to him we did not consider that we could fairly make any findings that any of his actions amounted to disability discrimination.

73. In the week of this hearing the claimant had internet difficulties at home, so the protocol in respect of his recordings was varied. At the end of the hearing day he provided the SD card with the recordings to the respondent's solicitor, who forwarded links to the files to the tribunal. She kept a copy of the recording, and the SD card with the files on it was returned to the claimant for his use. All other precautions in respect of recordings (including destruction of them by the claimant and respondent) remained in place.

Day 19 – 8 November 2022

74. The morning of 8 November 2022 was taken up with the evidence of Lynne Buttery. Like Dr Waldmann she was said to be accountable for "*Failure to progress formal disciplinary investigations against myself*", although it appears that in her case the claimant had in mind her grievance investigation (which may have lead to disciplinary proceedings) rather than a disciplinary investigation as such.

75. There was some noticeable improvement in the relevance of the questions asked by the claimant, although by the end of her evidence we were no clearer as to how, even if a negative view were taken of her actions, they could amount to direct disability discrimination. The claimant accepted that no question of victimisation arose in respect of the allegations against her, and the claimant had not asked any questions that may have established the PCP necessary for a claim of indirect discrimination. As we did not know the PCP alleged nor how this was said to be direct discrimination we could not put the necessary questions ourselves.

76. The afternoon of 8 November 2022 was taken up with the evidence of Steve McManus, who, in common with the previous witnesses, was said to be accountable for one particular allegation of discrimination, albeit on multiple different occasions. The claimant was able to make some progress in putting his case in respect of possible failures or breaches of procedure by Mr McManus, but the only allegation of discrimination against Mr McManus was one of direct disability discrimination and there was little in the claimant's questions that helped with the construction of a comparator or suggested that the fact of the claimant being a disabled person had affected Mr McManus's behaviour.

77. We were concerned that some of the claimant's difficulties in putting questions in relation to direct disability discrimination stemmed from a misunderstanding of the nature of such a claim and the comparison that it required. At the end of the day we invited the claimant to consider the provisions of para 3.29 onwards of the EHRC Code of Practice. Ms Misra reminded us that we had made the same point by reference to the Code of Practice at the start of this case in February 2022.

78. At the end of the day there was discussion around the listing of the remainder of Mr Pollard's evidence. This is the subject of a separate order and (at the claimant's request) written reasons dated 9 November 2022.

79. There was discussion at the end of the day about arrangements for closing submissions and any adjustments that may be necessary for the claimant. Resolution of that was put off to a later day.

Day 20 – 30 January 2023

80. In the break prior to this hearing the claimant had raised a number of applications or reminders about applications that he considered to be outstanding. At the start of the day he said that he would be applying to lift or extend the rule 45 restriction on his cross-examination of Dr Fisher (who was due to give evidence that day). In line with the agreed protocol of adjustments, no decision was made or argument heard on those matters prior to the claimant's cross-examination of Dr Fisher, and it was agreed that any outstanding matters other than those directly relevant to Dr Fisher (the rule 45 restriction and admission in evidence of a transcript of a meeting) could be dealt with in the late morning or afternoon of Friday 3 February, which had specifically been set aside for case management.

81. Subject to a reservation of rights in respect of any laws that may have been breached by a surreptitious recording, the respondent did not object to the transcript being adduced into evidence, so it was not necessary for us to decide on that.

82. The tribunal was mindful that one adjustment had been for the claimant to have the opportunity to make any applications in writing, and he had not made any written application to lift or extend the rule 45 restriction. After further discussion with the parties we said that we would allow the claimant to make his application in writing and would consider it on Friday, when part of the day had been set aside for case management.

Day 21 – Tuesday 31 January 2023

83. Day 21 was to be taken up with the evidence of Aaron Rogers. Mr Rogers gave evidence and was questioned by the claimant. However, after two hours of questioning it remained unclear what the claimant's allegations in respect of Mr Rogers were. The list of issues says that he is answerable for claims of direct discrimination, victimisation and indirect disability discrimination in respect of a "*failure to progress formal disciplinary investigations*" against the claimant. It has not at any point been suggested by the claimant that Mr Rogers was aware of any protected act that might found a victimisation case. Most of the claimant's questioning in relation to Mr Rogers's awareness of his disability seemed to be in agreement with Mr Rogers's position that he was

not aware that the claimant was disabled, and we were not at all sure what the claimant intended his indirect disability discrimination claim to be.

84. On prompting by the tribunal, the claimant questioned Mr Rogers about evidence that suggested he was aware of his disability, but it remained unclear how the claimant was going to say that that affected Mr Rogers's actions towards the claimant. The main thrust of the claimant's questioning seemed to be that Mr Rogers should have made adjustments to his process to take account of the claimant's disability, but there is no claim of a failure to make reasonable adjustments that involved Mr Rogers at all.

85. On further discussion it was also entirely unclear which of the dates given for the allegations Mr Rogers may have been responsible for. The claimant was not able to say. It appears that Mr Rogers's involvement with the process only commenced around January 2019 and he took no steps until February or March 2019, in which case the only dates of actions (or inaction) that could apply to him were 11 March 2019 or 22 March 2019, but the claimant was unable to say what Mr Rogers did or did not do on those dates that amounted to disability discrimination.

86. The tribunal asked the claimant to explain what he considered Mr Rogers had done wrong and how it related to his disability, but it was not at all clear how any of what he said related to the allegations set out in the list of issues. In further discussions, the claimant invited the employment judge to consider what he had said and to then go on to ask any further questions of Mr Rogers that the judge considered necessary and relevant. The tribunal adjourned to consider this, agreeing to take the lunch break then in order that the employment judge could consider the claimant's invitation and whether there were, in fact, any further necessary and relevant questions to be asked.

87. Consideration over the lunch break led to one further relevant question being put to Mr Rogers, with the remainder of the day being concerned with case management ahead of the hearing on Friday 3 February 2023.

Day 22 – Friday 3 February 2023

88. On 2 February 2023 the claimant made an application to vacate the hearing due for 3 February 2023. The tribunal refused this application and proceeded to hear evidence from Don Fairley and make further case management orders, in the absence of the claimant. Our order of 6 February 2023 includes full reasons for this decision. The order also set out arrangements for closing submissions.

Day 23 – Wednesday 29 March 2023

89. 29 March 2023 was the second day of Tom Pollard's evidence. This was completed in accordance with the rule 45 order previously made, and concluded the evidence in these claims.

Day 24 – Monday 12 June 2023

90. Our order of 6 February 2023 had provided for the parties to exchange written closing submissions by 4pm on 12 May 2023. We had set aside the whole of week commencing 12 June 2023 for this case, with the intention that the tribunal panel would meet in chambers on 12 June 2023 to review the closing submissions. We would convene with the parties on 13 June 2023 for any oral replies to those closing submissions (or a written reply in the claimant's case) with the remainder of the week being set aside for chambers meetings to come to our decision on the case.

91. At the deadline of 4pm on 12 May 2023 both parties sent emails attaching pdf versions of their written submissions.

92. In the case of the claimant he has password protected his submissions. The password he had given opened the document, but when opened the document was illegible. The respondent described the position in an email of 16 May 2023 (at that point the respondent was not sure if the tribunal had got the submissions, but that is not an issue):

> *"While the Claimant emailed this firm with a 455 page attachment at 3:59pm, the Tribunal was not copied in, and the text of attachment when opened was not readable – it appears the document is corrupted.*
>
> *We notified the Claimant of this at 4:20pm on 12 May 2023, requesting that he resend an accessible/readable copy as a matter of urgency that same day ... We received no response from the Claimant.*
>
> *We sent a further reminder to the Claimant at 10:15am on 15 May 2023, again requesting he resends his written submissions. To date we have not received an acknowledgement, response or copy of the Claimant's written submissions that we can read.*
>
> *…*
>
> *We hereby request an urgent order requiring the Claimant to provide his written submissions in a format that is accessible and readable to this firm on behalf of the Respondent and to the Tribunal by no later than midday 17 May 2023. We reserve the Respondent's position on costs in relation to the need to chase the Claimant and the making of this application."*

93. On 24 May 2023 the employment judge prepared a response to the parties, which was sent to them on 5 June 2023. It says:

> *"The tribunal notes the respondent's email of 16 May 2023.*
>
> *The claimant's submissions were received by the tribunal by email on 12 May 2023. They were password protected but, as the respondent describes, were 455 pages long and unreadable once opened by the password.*
>
> *At present the tribunal has no legible written submissions from the claimant.*
>
> *There already exists an order for the claimant to provide his written submissions by 12 May 2023. The claimant has not produced legible submissions by that date and it appears there is little purpose served by a further order when the claimant is ostensibly in breach of the earlier order. The claimant must provide legible submissions as soon as possible, and the tribunal notes that the respondent reserves its position in respect of costs."*

94. By the start of the day on 12 June 2023 there had been no response from the claimant. It then appeared that the claimant had sent another email with his written submissions to the respondent (but not to the tribunal) around 10:00 that day. The respondent forwarded this to the tribunal. The written submissions were just over 900 pages long.

95. At about 10:30 the claimant submitted the same document to the tribunal, under cover of an email saying, amongst other things, that he would not be attending the hearing set for 13 June 2023.

96. The email spoke of the agreement that the claimant could submit a response in writing and answer any supplementary questions from the tribunal in writing, but said "*there was no guidance of how I should approach this*". Arrangements for any written response and questions were set out in the order of 6 February 2023: a written response would need to be submitted by 10:00 on 13 June 2023 and written answers to questions (if any were required) would be dealt with following the hearing on 13 June 2023.

97. That email did not comply with rule 92 as it was not copied to the respondent. It was forwarded on to the respondent by the tribunal.

98. The hearing had been listed in person to facilitate the claimant's attendance and participation. As he had now said that he would not be attending the hearing, around midday the tribunal notified the parties that the hearing would be by video (CVP) only. This was with a view to saving costs, particularly

given doubts about how effective the hearing could be in these circumstances. The change in the mode of the hearing was expressly said to not limit any further applications that may be made by the parties in respect of the hearing.

Day 25 – Tuesday 13 June 2023

99. Although she said she had not comprehensively reviewed the claimant's written closing submissions, Ms Misra indicated that her instructions were to reply to that as best she could that day in the interests of avoiding further delay. She reserved her client's position concerning any further applications the respondent may make in respect of the length and apparent late submission by the claimant of his written closing submissions, and its consequences.

100. Ms Misra's primary point was that in considering the claimant's written closing submissions we should be wary of what she called "mission creep". By this she meant the claimant's written submissions going beyond his case as stated on the list of issues and seeking to introduce new claims and new evidence.

101. Ms Misra wanted it noted that the respondent did not accept that everything the claimant said arose from his disability in fact arose from his disability. That seems to have limited relevance to this claim but may be more relevant in the stayed claims.

102. In his email of 12 June 2023 the claimant said (amongst other things) "*It was agreed that the FMH would be recorded. Can someone ensure the meeting tomorrow is recorded and the file sent to me? I will follow the normal rules of deleting this within 7 days as per the agreement.*" Arrangements for the recording of the hearing are set out in a tribunal order of 8 July 2020 and were varied by an order dated 11 February 2022. The order of 8 July 2020 was that "*The claimant shall be given the facility of an audio recording of the proceedings at the final hearing being made.*" The order of 8 July 2020 was varied so that from 1 February 2022 onward the recording was to be made by the claimant, subject to particular conditions. We do not regard this as requiring the tribunal to make its own recording of a hearing in the event that the claimant has chosen not to attend the hearing, and accordingly no recording of the hearing on that day was made or provided to the claimant.

103. The claimant goes on to say "*It was agreed that I could submit a response to the respondent's submission in writing and also answer the supplementary question from the panel in writing. There was no guidance of how I should approach this.*" Arrangements for this had been set out in the order of 6 February 2023, with any written response to the respondent's submission to be presented by the claimant on the morning of 13 June 2023 and any

questions from the panel to follow in writing. There was no written response provided by the claimant, and the tribunal panel had no questions for the claimant.

104. At this point the liability hearing was complete and we reserved our decision. In accordance with our usual practice, we set a provisional remedy hearing for 2 & 3 November 2023 in case a remedy hearing was necessary following our liability decision. That hearing would also provide the opportunity for case management of the claimant's other, stayed, claims.

Day 26 – Wednesday 14 June 2023

105. The length of the claimant's submissions, and their late delivery to the tribunal and respondent, made it impossible for the tribunal to complete its deliberations and prepare a decision as originally intended during w/c 12 June 2023. Indeed, it seemed likely that simply to read the claimant's submissions would take most if not all of the time that had previously been allocated to making our decision.

106. There was a further complication, as on reading into the claimant's written submissions it appeared that the document the claimant had submitted may not be complete.

107. This extract from the text of the email sent by the tribunal to the parties on 15 June 2023 explains the problem and the action taken by the tribunal:

> *"On reading further into the claimant's closing submissions, it appears to the tribunal that the version of those submissions that he sent to the respondent and tribunal may be incomplete.*
>
> *The first section of the written submissions is set out as a table of contents. Pages 3 & 4 appear to show that the claimant had intended a section referring to Mr Pollard's evidence between sections referring to Mr McManus's evidence and Mr Rogers. However, between p691 and 692 of the document the claimant seems to move directly from Mr McManus's evidence to Mr Rogers, and we cannot find any specific section referencing Mr Pollard's evidence.*
>
> *It may be that there is such a section in the document, and it may be that there are other sections missing. The difficulty with such a long document is it is impossible for us to be sure that it is complete.*
>
> *In case this submission was incomplete, the tribunal is prepared to allow the claimant one further opportunity to check and resubmit his closing submissions.*

If the claimant considers that the written submissions delivered to the respondent and the tribunal were not in their final form he must provide the complete submissions to the respondent and the tribunal on or before 23 June 2023. Any further submissions provided by in accordance with this order must make it clear in what way they differ from those submitted on 12 June 2023. This is not intended as an opportunity for the claimant to revise or extend his submissions, or to reply to the respondent's submissions, but is intended simply as an opportunity for the claimant to correct an error if his previous submissions accidentally omitted sections that he had intended to include.

If no further submissions are received by that time then the version received on 12 June 2023 will be treated as the claimant's final closing submissions.

This decision is without prejudice to any applications that the respondent may wish to make in respect of any further submissions. If the respondent has any matter arising from any revised submissions provided by the claimant that it wishes the tribunal to consider prior to reaching its decision on liability it must make any application in writing on or before 30 June 2023, failing which the tribunal will proceed to consider any further submissions submitted by the claimant (or if no further submissions are received, the submissions received on 12 June 2023).

The tribunal anticipates reconvening for private discussions, without the parties, on 4, 5, 26, 27 & 28 July 2023, following which it will produce its reserved decision on liability."

108. Given the uncertainty around whether there was anything more to the claimant's submissions, the tribunal adjourned its chambers discussions on 14 June to the July dates given above, and did not meet as intended on 15 & 16 June 2023.

109. The claimant replied on 21 June 2023 stating that the submissions he had sent in were in the form he prepared by 12 May 2023 – in other words, there were no accidental omissions. He says "*I had run out of time before the May 12th deadline – so hadn't completed Mr Pollard's section into a legible document.*" He sought a further extension of time to 26 June 2023 to complete his submissions.

110. On 22 June 2023 the respondent wrote opposing the claimant's application, and saying that to allow any further submissions in those circumstances was not what the tribunal had intended. Running out of time did not amount to the kind of error that the tribunal had in mind.

111. On 23 June 2023 the employment judge prepared an order refusing an extension of time and limiting the claimant's written submissions to those submitted on 12 June 2023. Full reasons were given with that order. In order to limit any difficulties caused by delay in formal promulgation of the order, the terms of the order were communicated to the parties by 23 June 2023 on the basis that a formal order and reasons would then follow.

112. On 24 June 2023 the claimant made further applications, which are addressed by the tribunal's order of 7 July 2023.

Days 27-31 – 4, 5, 26, 27 & 28 July 2023

113. The tribunal met in chambers to deliberate.

Formal case management orders made

114. During the course of the hearing the tribunal produced written orders on the following dates:

11 February 2022 (incorporating written reasons)

16 February 2022

23 June 2022 (with written reasons following on 24 June 2022)

28 June 2022

9 November 2022 (incorporating written reasons)

6 February 2023 (incorporating written reasons)

115. For paper applications made outside hearing dates, the following formal orders were made:

18 May 2022 (incorporating written reasons)

31 August 2022

19 October 2022

23 June 2023 (incorporating written reasons)

7 July 2023 (incorporating written reasons)

116. Although the claimant indicated on a number of occasions his intention to appeal our decisions (particularly in respect of the rule 45 orders) as far as we are aware there are no outstanding appeals.

B. THE FACTS

The claimant's role

117. The events we are concerned with occurred during the claimant's employment as a trauma and orthopaedic consultant in the respondent's trauma and orthopaedic department. The claimant's duties for the respondent were carried out at the Royal Berkshire Hospital and other sites operated by the respondent. For some but not all of the time the claims relate to the claimant also had a private practice, but that is not an issue in the claims.

118. The trauma and orthopaedic department carried out two kinds of work: elective and non-elective. Elective work was planned work. Non-elective work was urgent, unplanned work. Typically the trauma work would be non-elective. The trauma work was, by its nature, unpredictable and required staff to be adaptable and respond to changing circumstances throughout the day. The elective work was much more predictable and, on the whole, operated according to pre-planned timetables.

119. Both trauma and orthopaedic work, and elective and non-elective work, required consultants to work as part of a medical team, often across specialisms. Most obviously, a trauma and orthopaedic consultant would need to work closely with an anaesthetist, but they would also work with more junior doctors and specialist nursing staff – in preparing patients for surgery, during surgery and in the patient's after-surgery recovery. They would, of course, also have to work with the patient themselves and their friends or relatives, often in difficult circumstances.

120. The trauma and orthopaedic department comprised around 20 consultants (including the claimant) along with more junior doctors and other medical and administrative staff. The consultants were managed by the clinical director, who in turn reported to the care group director. The care group director reported to the respondent's medical director. The position of medical director was the most senior medical role within the respondent's organisation.

121. During the period we are concerned with, the following individuals held the following managerial roles:

Clinical director:	Warren Fisher (to February 2017)
	Tom Pollard (from February 2017)
Care group director:	Warren Fisher (from February 2017)
Medical director:	Dr Lindsey Barker (to July 2019)
	Dr Janet Lippett (from July 2019)

122. As well as their managerial roles, both the clinical director and care group director were consultants in their own right and retained patient care responsibilities, during the course of which they would occasionally work with the claimant on patient care.

123. The claimant was employed on a standard consultant's contract. Consultants' contracts are supplemented by a "Job Plan" negotiated annually between them and the clinical director. The Job Plan sets out their duties by reference to (for a full-time consultant) ten "programmed activities" – essentially blocks of time during which they will be carrying out particular work, typically on a weekly cycle.

124. Those programmed activities are divided into two categories. The first are periods of "direct clinical care" ("DCC") – essentially work directly concerned with patient care. For someone such as the claimant this would include clinic work, ward rounds and acting as a surgeon in an operating theatre. The second are periods of "supporting professional activities" ("SPA"). A SPA would not relate directly to patient care, but could include things such as being involved in governance and/or management of the department, carrying out research or keeping up to date with the latest developments in the individual's field.

125. A typical job plan for a full-time consultant would be split on the basis of 7.5 DCC and 2.5 SPA. It was accepted by the various professional bodies that a consultant should have a minimum of 1.5 SPA in their job plan as this was considered the minimum necessary to meet the requirements of professional revalidation.

126. Every doctor has to undergo "revalidation" every five years. This process authorises them to continue practising as a doctor. For the respondent's doctors, it is carried out under the general supervision of the medical director, who is the officer responsible for managing revalidation within the respondent. It is a complex process, but for our purposes it is sufficient to say that it involves, amongst other things, formal annual appraisals and multi-source feedback (or "MSF") which includes a process of staff who work with a doctor offering their opinions on the doctor.

127. In addition to the programmed activities, for most of the period of time we were concerned with the claimant also carried out "on call" duties.

128. A consultant would be "on call" for a day. From what we heard this did not require (or very rarely required) the consultant's physical attendance at the respondent's premises. However, patients admitted to the department within a consultant's on call period would be admitted under the care of that consultant. Although trauma was non-elective (and therefore urgent) work, it does not appear that this meant that the patient had to be operated on

immediately. Those who required immediate surgery would typically be dealt with at regional trauma centres, not including the Royal Berkshire Hospital. What happens at the Royal Berkshire Hospital is that on admission a patient will then be prepared for surgery to be carried out the following day, or possibly later in the week.

129. The on-call consultant would chair the "trauma meeting" that took place the following morning. This started at either 07:45 or (in the claimant's case) 08:00 and took the form of a review of the previous day's admissions and arranging the day's theatre lists. It lasted through to around 08:30. It was chaired by the outgoing on-call consultant and would be attended by many clinical staff concerned with trauma care, including more junior doctors and nursing staff.

130. The trauma and orthopaedic department operated two regular gatherings of consultants and other staff outside the context of direct patient care. These took place on Friday afternoons. The first was the "governance" meeting. This addressed formal matters of governance, including such things as care audits and professional practice more generally within the department. The second was the "departmental" or "consultants" meeting. This included all consultants, with the clinical director acting as chair. There were two other attendees. More general matters in relation to the operation of the department were discussed at that meeting. We heard that the consultants meeting would address, for instance, future recruitment plans. The distinction appears to be that the governance meeting addressed essential patient care and professional matters whereas the consultants meeting was concerned with management of the department more generally.

Timeline of events

The claimant's disability

131. We have previously noted that the claimant received his diagnosis of autism in 2013.

132. In his written submissions the claimant identified further medical conditions that he said he relied upon, but we record that the only disability that is at issue in this case is his condition of autism or ASD. Similarly, despite what appears in the claimant's closing submissions, no part of the claim before us related to discrimination by association or a disability held by anyone other than him.

133. As previously referred to, the claimant first received a diagnosis of autism in 2013, but it is not in dispute that autism is a life-long condition. The late diagnosis does not affect the fact that he has had autism all his life.

134. In his written submissions the claimant referred to what he called the "*features arising from the disability*", "*autism features expressed in claimant*" and in particular the "*features arising from the disability in claimant*". Ms Misra said that this was the first time the claimant had identified such list of "*features arising from the disability*", and that the respondent did not accept that all of the identified features arising from the disability arose from the claimant's disability. That seems to be directed at issues that may arise in the claimant's stayed claims, as there is no claim of discrimination arising from disability in the cases that are now before us. The consequences of the claimant's disability may, however, be relevant to our considerations of indirect discrimination and a failure to make reasonable adjustments.

2013

135. It appears that the first time the question of the claimant's disability arose in the context of his work was in his appraisal by Dr Fisher in summer 2013. This conversation is referenced in a series of emails in July 2013. The claimant wrote to Alison Ball (the respondent's medical HR manager) on 5 July 2013 to say:

> *"On a personal level. I have recently been diagnosed with a disability. I did discuss (the provisional diagnosis) with Dr Fisher during my appraisal. I have also informed Occupational Health.*
>
> *It is unlikely to affect my employment."*

136. Alison Ball followed this up with Dr Fisher on 15 July 2013 saying:

> *"This email from Alan came out of the blue; I am not sure what he means by informing OH, but Blandina Blackburn* [the respondent's occupational health doctor] *is not aware. Are you happy this will not affect his work – and that we have the discussion properly documented?"*

137. Dr Fisher replied on 24 July 2013 as follows:

> *"The disability referred to was discussed at appraisal. I have had a further discussion with Alan this evening and neither of us believe that this will have any effect on his work or that it requires any further action to be taken."*

138. Dr Fisher confirmed in his witness statement that the claimant had said that his disability was autism.

139. We note that at that time neither the claimant nor Dr Fisher considered this to be likely to have any effect on this work. This is not surprising. The nature of

autism is that the claimant has always had it. He had worked for the respondent for many years with neither he nor his colleagues being aware of his disability and without any apparent issues arising.

140. On 10 September 2013 the claimant saw Dr Blackburn of the respondent's occupational health department. She reported (to Alison Ball):

> *"I saw Alan McLeod in the Occupational Health Department today to discuss the recent diagnosis of a disability.*
>
> *He has functioned well in having a disability for all of his young and adult life. In my opinion as I have not been made aware of any issues at work, I do not feel we should anticipate any issues. He is well aware of his limitations should they arise and has been advised to contact us, if help is required.*
>
> *Currently no adjustments are required."*

141. This is consistent with the views of the claimant and Dr Fisher that his disability had had and would have no material effect on his work.

142. We also see in this an early reluctance on the claimant's part to have the nature of his disability identified. He had told Dr Fisher of his diagnosis in the appraisal meeting on 2013 but beyond that, at least at this early stage, he preferred to talk of in in general, non-specific terms, and we see that neither Dr Blackburn nor Dr Fisher had identified to Alison Ball what the claimant's disability was. They (guided, we think, by the claimant) simply said that he had a disability.

143. The view that this would have no effect on the claimant's work seems to have been justified (at least for a time) by nothing of note having then happened until late in 2015.

2015

144. As we have described above, there were usually two meetings of the department's consultants on Friday afternoon. These were the "governance" meeting (concerned largely with medical matters), followed by "departmental" meeting (which addressed departmental business). We understand that minutes of those meetings were taken by individual consultants on a rota basis.

145. On 20 October 2015 the claimant wrote to his colleagues, and Dr Barker, saying:

> *"Dear All*

Please find enclosed the minutes from last week's meeting."

146. The meeting referred to occurred on 16 October 2015 and was attended by Dr Barker and Dr Fisher.

147. On 6 November 2015 Dr Barker replied to all those who had received the email, including the claimant, saying, "*I am disappointed to see this sort of language used in the formal minutes of a meeting.*"

148. We do not have the minutes in question, but we understand them to have recorded the use of some sort of offensive language or swearing by some present at the meeting. We do not understand this to have been specifically directed at the claimant.

149. The claimant replied to Dr Barker on 11 November 2015 saying:

> *"I am extremely disappointed by your comment.*
>
> *The advice "Don't shoot the messenger" … has been in use long enough for you to, perhaps, see the irony of your comment."*

150. He goes on to cite the Respondent's bullying and harassment policy, concluding:

> *"Due to your comment and in-line with my personal responsibility under section 5.5(c) I am now formally bringing this to the attention of all the medical managers at that meeting.*
>
> *A response is awaited."*

151. Section 5.5(c) is a provision for employees "*to report to their line manager any incidents of perceived bullying and harassment*".

152. On 20 November 2015 Dr Fisher replied to the claimant saying:

> *"I am sorry not to have got back to you yet on this matter. I would value understanding exactly what you are referring to in this e-mail. Is it about the conduct of that meeting, the behaviour of all of the regular attendees or those that are visiting the meeting. I think there are some issues to address and whilst this might be reasonable to discuss at the meeting that would probably not result in agreement and it might be better to have a smaller group consider how to improve the areas that are felt to need improvement."*

153. It appears that Dr Fisher and the claimant met to discuss this, as the claimant replies on 25 November 2015:

> *"Thank you for taking the time to discuss this last Friday. As mentioned I do have concerns at the level of aggression and swearing at these meetings. I accept I'm just as guilty of having robust discussions but don't think I veer into aggression.*
>
> *As explained the reason to escalate this was because of the response from Dr Barker. The issue should be the behaviour – not the fact that this was reported! I suspect it may have been helpful if both Dr Barker and yourself had mentioned the inappropriate behaviour at the time.*
>
> *…*
>
> *So, on reflection, I will continue to attend and engage with the meetings. I am also happy to meet to try and discuss ways forward. If I feel the language or treatment of individuals (more often not when they are present) then I will have my displeasure minuted and leave.*
>
> *I am quite happy to leave it like this if you are and see no reason to escalate this further. But we, obviously, need to ensure this remains on record informally.*
>
> *Best wishes and thank you for your support."*

154. The claimant also records in this email that he will no longer be taking minutes and it may be preferable to record the meeting, and raises the prospect that "*it may be appropriate to walk out of a meeting if such behaviour occurs*".

155. Dr Fisher replied:

> *"I think that the fact of having aired views and discussed the matter in the meeting was a useful approach and one which may result in some change of behaviour. I remain happy to meet because it may be that some change of format might also benefit the tone of the meeting. Perhaps we should see how the next one goes then meet after that?*
>
> *Many thanks for summarising your thoughts on this matter and for raising the issue at your last meeting."*

2016

156. No allegations arise out of matters occurring in 2016, or until late 2017.

2017

157. From April 2017 the claimant's job plan was amended so that he started any morning work at either 08:00 or 08:15. We understand this to be because of the claimant's childcare commitments, and that previously his morning work

started at 07:45. For others the start time remained 07:45, and the first piece of work in the morning was the "trauma meeting", reviewing overnight admissions and prioritising work for the day. With these new arrangements the claimant would always be scheduled to arrive at least 15 minutes after that meeting started, although the complexities of the rota established by the job plan meant that the claimant was not expected to attend the trauma meeting every day of the week.

158. By September 2017 a colleague of the claimant's seemed to have noticed a change in his demeanour, writing privately to him under the subject heading "consultant's meeting" to say:

> *"Is everything all right with you? You seem to have taken a bit of a step-change in separating yourself from everyone else. You sat away from the table and seem to me to be a bit troubled by almost everything.*
>
> *You have always had your own ways of doing things but there seems to have been a change to me. When I see that, my first thought is why? Is there other stuff going on for you? Tell me to mind my own business if you wish but I do care about our department and the people that make it up and you are not an exception … happy to offer help if I can do anything."*

159. In his response the claimant expresses his disenchantment with the relevant meetings, saying *"… time to crawl back into my introspective bubble. The meetings are frustrating and a waste of time. Very little is decided and it gives* [named individual] *an opportunity to swear. The sign off of EPR results is a prime example - we've discussed it many times and still no decision."*

160. The bulk of the claimant's complaints arise from November 2017 onward.

161. On 6 November 2017 Dr Fisher wrote to the claimant saying:

> *"I would be grateful to have a catch up with you to explore your views and support to various aspects of the department's efficient running particularly following your recent e-mail exchanges with Tom and on your thoughts on how we get the trauma service running more effectively.*
>
> *Please let me know when is good for you, I can drop into your offices."*

162. Dr Fisher explains his reason for this approach in this way in his witness statement:

> *"In relation to November 2017, Mr Pollard had expressed concern to me about feeling undermined by the tone of some of Mr Macleod's*

emails to him. I consulted with Dr Lindsey Barker (then Medical Director) who was my line manager at the time, during a regular 1-1, and agreed that I would raise it informally with Mr Macleod and also discuss the contents of his email, as he had raised some points about the efficiency of the Orthopaedics and Trauma/Theatres service. I had also received some concerns from other Consultants in the department about a change in Mr Macleod's demeanour and attitude towards them."

163. One of the emails that concerned Dr Fisher may have been one sent by the claimant to Mr Pollard and a range of other colleagues (on 19 October 2017, following Mr Pollard's response to the claimant requesting an agenda for a meeting) saying:

"Mr Pollard,

Let's pick this apart eh?

You requested to do this case today (as I believe it was your patient).

I don't know if you asked if anyone else was able to do this? There are many in the deportment whom could help – I have even been known to do the odd one or two.

But it has got me thinking that we should discuss, going, whether cross-cover works within the deportment – so the agenda hasn't been formalised, please add it!

If it's due to having "dominant, compulsive, control" issues then I can't help you with that one. But I would suggest you take your annual leave. Andrew used to take leave on Governance Friday and the sky didn't fall in. So thot's your choice. As an olive branch I'll chair the meeting tomorrow so you don't need to attend. (But I'll still need the agenda.)

…

As I possess a very high level of emotional intelligence, I've detected that you feel somewhat aggrieved by my email. But I would like you to reflect on the following agenda emails you've sent:

…

Finally to your "so you don't need to worry" comment – as my daughter says "as a strong independent woman" I would like to be afforded the latitude to decide myself what I feel is important and what I should worry about. I don't enjoy Rumsfeld moments. If you "fail to prepare then prepare to fail", So I like to be forewarned and, therefore,

prepared. Saying we do not need to worry about the agenda merely reinforces my view that the meeting has outlived its usefulness.

We rarely make any decisions; often argue and occasionally even profanities are uttered – which, as you know, does upset my delicate constitution. Please add that as another agenda item for me to discuss."

164. Later that day (6 November 2017) the claimant wrote to Mr Pollard saying:

"Hi Tom

Any idea what this is about?

I have so many rants – I'm not sure what he [Dr Fisher] *means?!!!!"*

165. Mr Pollard replied saying:

"Hi Alan

I think some of it is related to the email conversations with all and sundry copied in. Probably best to do these via face to face conversations rather than email. So if they can be minimised it would be better ..."

166. The claimant replied, saying "*Thanks – I'll respectfully decline …*".

167. By the end of the day on 6 November 2017 the claimant replied to Dr Fisher on the question of the trauma service. Dr Fisher replied the next day saying "*I wish to discuss personally with your recent e-mails (and trauma) please, You could give me a call to arrange for me to drop in to your office or you could arrange a time with* [a PA]."

168. On 9 November 2017 the claimant wrote to Dr Fisher saying:

"Dear Dr Fisher,

Can you please advise under which part of section 1.2 of Maintaining Professional Standards CGGL1" this relates to? Has the CEO appointed you as the lead investigator? I do not think it is unreasonable to be aware of any issues rather than go into a meeting blind.

As explained I do not have a leadership role in trauma. And my recent attempt to add it as a regular agenda item to the departmental meeting was not supported. So it would be more appropriate to discuss this with Mr Pollard (as CD) and Mr McAndrew (as trauma director) as the opportunity to discuss this effectively has been circumvented.

Which leads me to the conclusion that this relates to individual patient care. I believe a Datix should be generated and Mr Pollard, as my line manager, should be dealing with this as the lead investigator.

Unless it is a serious incident. I'm actually on call this weekend. Do you need to consider replacing me? I have made you aware of medical issues that mean I may react differently to others. I would have great concerns if there is a serious incident that I am not aware of that may result in my second guessing every decision, potentially compromising patient safety and care. This requires your immediate attention.

Although you may prefer face to face meetings, I prefer emails as it ensures an accurate record and no confusion. As I have a protected characteristic this is a reasonable accommodation to make. I accept there are times relating to urgent issues when you will need to speak to me face-to-face – but I would expect you to seek me. An email requesting an appointment be made would not meet such criterion.

I would also be grateful for less ambiguous emails in the future please. The initial email suggests you wish to discuss departmental and trauma efficiency (both of which I have no managerial control) whereas you appear to wish to discuss something else. This has caused me a great deal of anxiety.

I await an urgent email response."

169. This seems to have crossed with an email from Dr Fisher chasing for a response, after which communication between the two moved to text message, with Dr Fisher concluding:

"You may come to see me tomorrow to discuss as I will not now have access to work e-mail until after my morning ENT list. Lunchtime will be fine for me.

Please do not disturb me again tonight Thanks"

170. In the early morning of 10 November 2017 the claimant sent an email to Dr Barker. The claimant says "*I am sorry to have to bring this to your attention but I have concerns that I may not have been treated fairly.*" He sets out extracts from the various emails and messages, some of which we have cited above. He talks of being side-lined in the meetings, and says:

"I … have much greater concerns regarding Dr Fishers intervention. To send an inflammatory email late at night and then refuse to engage further is completely inappropriate. I feel victimised to tell you the truth.

I raised concerns and suggested issues the department may wish to discuss - but have not received any support from the two line managers above me.

I have found Dr Fishers behaviour intimidating.

This is compounded further by the fact that I have a registered disability and Dr Fisher is one of only three individuals I have shared this with (Dr Blackburn OH included) He is aware that I may view issues or respond to concerns that others may see as unimportant. This can result in me feeling significant anxiety when I do not have a sense of control.

It's now after midnight - I've spent the last four hours worrying about this and composing these emails. This is obviously exacerbated by the fact that I still don't know what the issue is as Dr Fisher refuses to let me know.

I also have concerns regarding, potential, ulterior motives. The initial email notes departmental and trauma efficiency - but this was clearly not the case. I don't feel this is an appropriate way for someone in such a high position of responsibility to behave. The agenda of a meeting should be transparent. And this may even fall short of the high standards the GMC expects of medical managers.

I would be most grateful if you could respond by email.

Please, please, please resist the urge to phone or arrange a meeting.

As noted the Trust should make reasonable accommodation as I have a protected characteristic. And corresponding by email is not unreasonable.

I'm happy for you to discuss this with Dr Blackburn but I do not wish to disclose to you what the issue is.

It's important, however, to be aware that Dr Fisher does know, so the expectations regarding his behaviour is greater."

171. Dr Barker replied around 09:00 that morning, saying:

"Dear Alan, thank you for sharing your worries. This looks to be all on email, so in the first instance, I think it is important to meet with Warren and address any issues face to face. If there are any outstanding concerns after that conversation, I am happy to discuss further."

172. The claimant replied:

"Dear Dr Barker

I do not have confidence to attend such a meeting at this moment in time due to the reasons indicated.

As noted email is a medium I prefer. This is a method regularly used and supported by the Trust. And there is no reason I have been told why this cannot occur via email for the very clear reasons I have explained.

I have asked some specific questions of you in your role as medical director. I would be grateful for a response."

173. Dr Barker says:

"Alan, this cannot continue on email, it is becoming out of proportion. Meeting in person is a reasonable management request and I hope that you will comply with this."

174. On the face of it, and without at this stage considering questions in relation to the claimant's disability, the claimant appears to have sent at least one intemperate email to his manager, Mr Pollard, and then to have reacted very defensively to a request by Dr Fisher for a meeting to discuss matters. His appeal to Dr Barker for intervention has been met by her referring him back to Dr Fisher.

175. The claimant continued this correspondence by writing to Don Fairley, the respondent's "Director of Workforce", or head of HR, at the end of the day on 10 November 2017. He said:

"Dear Mr Fairley,

I would like to have the following "on file".

At present I do not wish to take it further - but reserve the right to do so.

I've had to contact you due to the sensitivities of whom it involves. The only other option would be the CEO.

Unfortunately the email does not read well as it consists of many emails. But I've tried to colour co-ordinate it and use line breaks signifying individual emails.

The normal management chain has not been followed - i.e. my line manager (Mr Pollard) has not spoken to me about any issues (and I have met with him once formally since then).

It has then been elevated to the Care Group Director (Dr Fisher) - whom refuses to declare the concerns raised – these do seem to be different from the reason given in the original email.

I've then made a formal approach to Dr Barker - whom has dismissed this and not followed Trust policy regarding potential Bullying and Harassment.

So I am feeling somewhat victimised by all three tiers of the management structure. This is also beginning to affect my health (I have made contact with Dr Blackburn).

I will comply with the order from Dr Barker to attend the meeting (although I do not feel comfortable doing so).

I do expect this to remain confidential at present but would be grateful if you could confirm receipt and also your thoughts.

There are a number of potential shortcomings relating to employment law including:

1. Not warning the employee of the possible consequences of the disciplinary action - Gurnett v ASOS.com Ltd (employment tribunal)

As I do not know what the issue is then I do not know the potential outcomes.

2. Not setting out the nature of the accusations clearly to the employee - O'Farrill v New Manage Ltd t/a Hooks Gym London Shootfighters (employment tribunal)

Despite very clear requests (and the reason why special disposition may be appropriate under the Equality Act 2010) – this has not been forthcoming.

3. Not furnishing the employee with relevant evidence against them - Archer and another v Solvent Resource Management Ltd (employment tribunal)

Despite very clear requests this has not been forthcoming.

4. Not allowing the employee to be accompanied at a disciplinary hearing - Campbell v Mitie Managed Services Ltd (employment tribunal)

As I do not know whether or not this is a disciplinary meeting then I will not be afforded that right.

Best wishes

Alan

As explained due to the sensitive nature, I do expect this to remain confidential at present."

176. The claimant chased for a response a week later. Mr Fairley responded saying that he had been away but would try to get back to him. He did so a week later, on 23 November 2017, saying:

"Hello Alan,

Apologies I couldn't respond yesterday but Board events and operational matters took over.

Turning to your email, I am not usually asked to comment on such matters by individuals and indeed, it would not be the norm. However, your email does suggest some level of personal distress and so I can give a few of my personal thoughts.

From what I can see of the email trail, things do seemed to have escalated rather quickly when I feel that an early discussion would have been beneficial. I understand the reasons why this didn't take place but also wondered whether there is a degree of suspicion and if so, what this is based on?

In terms of the request for an informal meeting, this does seem innocuous to me but then again, maybe I'm missing some of the history. You cite a number of legal cases and I am aware of some of these. Essentially, they relate to the expectations and reasonable actions in formal cases of misconduct or discipline e.g. the right to have any accusations or allegations presented to the employee and a right to defence etc. However, I am not aware from the emails that this is the situation in your case.

I'm not sure if you have had the meeting. If so, then I hope all went well. If not, then I would suggest it would be best to have the meeting and outline your concerns to the CGD."

177. The claimant did eventually meet with Dr Fisher on 12 November 2017. Dr Fisher attempts to summarise the outcome in an email sent that day:

"Dear Alan,

Many thanks for your time just now. I am writing with the summary points agreed:

* *I am to assure the CD* [Mr Pollard] *that it there is no intention to undermine him*

* *As line manager he may approach you to discuss matters, e-mail being best form of communication for you.*

* *You have reflected on content of e-mails*

* *You and I will reflect on our miscommunication in this episode, including me seeing that you would have preferred a more explicit approach, and for you recognising that I did not feel you had answered my request to meet.*

* *That you will explore with Blandina in OH what reasonable adjustments might be appropriate for your condition including whether not attending the consultants meeting might be one of them.*

* *You might explore with your interested colleagues a trauma group development but accepting that you feel this is not your remit to lead.*

* *I will note to Lindsey that we met.*

I hope that represents a reasonable brief summary. Apologies for the delay, I got called to theatre and have been there from just after you left."

178. The claimant responds saying:

"Thank you.

I would prefer for you to note that this issue arose because of being sidelined by the department (whether perceived or actual) You agreed that the issues I raised were reasonable requests for discussion. But appeared to have been discounted without reasonable discussion."

179. Dr Fisher says "*Happy for that to be registered and included.*"

180. In accordance with Dr Fisher's notes, the claimant went again to see Dr Blackburn of the respondent's Occupational Health department. Dr Blackburn produces a letter dated 27 November 2017 addressed to Dr Fisher.

181. She refers to the claimant having a "*neurodisability condition*" which "*often leads to anxiety when faced with change of processes as well as inability to interact very well with social skills that require manoeuvring in a team*".

182. Under the heading "Occupational Health Advice", Dr Blackburn says:

> *"Due to the recent events that he has described to me he did face encounter anxiety, however, this has now been resolved. Nevertheless, he is concerned that should a similar situation occur he may be faced with similar symptoms and if it happens with increasing frequency, then this is likely to produce a health effect on him.*
>
> *Based on the neurodisability characteristics he has I would advise the following:*
>
> 1. *To explain reasons for meetings or processes in an explicit manner rather than assume that he has understood. This is due to his underlying condition, where he needs to understand quite clearly in a logical manner the reason for various actions that are taken either by him or by others, and he needs focusing at any one issue at a time. He has got learned behaviour of trying to manage more than one issue and he has done this very well up to now but this understandably comes at a toll to his own health.*
>
> 2. *A risk assessment of any processes prior to his involvement is prudent as this may lead to anxiety and further health problems and anxiety driven behaviours. However, this may not always be the case, as he has his learned behaviour that may enable him to cope with any mildly difficult situations. However, he should have an assessment in which he can explain his emotions that are leading to symptoms and these would need to be factored in.*
>
> 3. *Again due to his underlying neurodisability condition he would be better suited to communicate in an explicit form by email although he is capable of meetings after the email to explore further the issues raised in the email. I am concerned that if this has not been clarified to him this would lead to unnecessary feelings of anxiety that could progress to other health conditions. Due to his characteristics, he does not communicate verbally as well as he can in an email.*
>
> *In summary, due to his underlying condition it would be useful if you could consider excluding him from consultant meetings that could raise his anxiety, especially meetings that he is not necessarily required to attend. He tells me that he is able to inform and communicate by email if there is a consultation of a particular process. He also needs things quite explicitly stated to him as has been evidenced in the previous events.*
>
> *Currently, other than this, he requires no further adjustments at work."*

183. In summary, the recommended adjustments are:

- To be explicit in giving reasons for meetings or processes.
- To risk assess processes before his involvement.
- To communicate (at least in the first instance) by email.
- To excuse him from attendance at the consultant (or departmental) meetings, with the claimant to participate by email if necessary.

184. On 30 November 2017 the claimant wrote to Mr Pollard, with a copy to Dr Fisher, saying:

> *"Following a discussion with Dr Fisher, and with immediate effect, I will no longer be routinely attending departmental meetings.*
>
> *There may be occasions when I wish to attend in a limited capacity - but will be at my discretion.*
>
> *I will not be discussing the reason for this decision with colleagues and expect this not to be discussed in the meeting in my absence.*
>
> *I will maintain my presence and input via the email system."*

185. In a reply the same day Mr Pollard accepts this on the basis that it referred to the consultants' or departmental meetings only. He says:

> *"Please be assured this will not be discussed in your absence.*
>
> *Regarding the email system, I personally have some reservations (and expect some colleagues would share this view) about how it is employed and how effective a means of communication it is for complex issues e.g departmental ones. Please bear this in mind in terms of expectation - if there is an important issue to discuss then please give me a call. It is important your views are understood and included as a member of the dept."*

186. Mr Pollard goes on to say that the claimant should attend for the start of the trauma meeting at 07:45, rather than the 08:00 or 08:15 that was on his job plan.

187. On 6 December 2017 the claimant wrote to the respondent's chief executive, Steve McManus. He said:

> *"Dear Mr McManus,*

I'm sorry to have to bring this issue to your attention.

Though it may seem a trivial issue, it has had a significant effect on wellbeing and caused unnecessary anxiety and stress.

I've tried to make it easier to understand by breaking it down to a number of emails with a brief explanation attached to each. There will be an additional eight emails, relating to different correspondence and should be read in order to avoid confusion.

I've reviewed the Bullying and Harassment Policy and have concerns that the individuals identified have not followed this. Specifically:

Mr Pollard - Line Manager - Didn't speak to me in person prior to escalating the issue to the care group director.

Dr Fisher - Care Group Director - Although the initial email requesting a meeting appeals to be related to general issues (issues I do not have the main management role over) I had concerns that it was a means to discuss other issues. Despite requests for clarification this was not forthcoming. Ultimately other issues were discussed.

Dr Barker - Medical Director - I approached Dr Barker and expressed concerns. Despite mentioning the policy this was dismissed without further investigation and I was ordered to comply with a meeting with Dr Fisher.

Mr Don Fairley - Director of Workforce - despite his role being noted in the policy also didn't take my concerns seriously and investigate this further.

Although there has not been any disciplinary issues, I suffered a great deal of anxiety and stress over this episode.

I also have concerns that I have been sidelined and felt the need to remove myself from departmental meetings due to others behaviour - which again falls under the same policy!!

I would welcome your opinion and hope you would give this greater consideration than other members of the Trust."

188. Mr McManus replied on 8 December 2017, saying:

"Apologies not to have got back to you yesterday.

I have been out quite a bit so only just now catching up on emails etc.

I will take a look at the information you have sent through to me and come back to you as soon as I can."

189. Mr McManus explained in his witness statement his reluctance to get involved in matters such as this at such an early stage. He says:

"I was mindful that if I stepped in and reviewed the whole matter, it could stop me getting involved at a later date if I was needed as a senior Board member. I was also mindful that any action I take as the Chief Executive would be influencing the process. I wanted to remain as independent as possible; this is my usual practice and I did this with other employees who raised concerns with me, not just with Mr Macleod.

On receipt of his correspondence, as I was unaware of any of the issues, I sought information from Mr Fairley and Dr Barker to understand the background as I was still fairly new to the organisation at that point. My response to Mr Macleod was framed around their advice on the Trust's processes and polices, and I redirected Mr Macleod to these processes.

My recollection is that I did provide Mr Macleod with a response to his emails in the early part of 2018. I believe this response set out my view that I should not get involved at this stage, and referred Mr Macleod to the Trust's formal policies and processes to escalate his concerns."

2018

190. The claimant was off sick for two weeks at the start of 2018.

191. On 22 January 2018 Dr Blackburn wrote to him to say *"I have been asked to arrange a case conference to discuss your health and issues at work. I have asked your Management team, to communicate with you on issues at work, prior to the case conference. My secretary will send a couple of dates in early February.*"

192. The claimant replied say, effectively, that this was the first he knew of any such request and that he was seeking advice from the BMA.

193. On 30 January 2018 Dr Fisher wrote to the claimant saying:

"I had been asked to agree the adjustments that you had requested following your discussions with Dr Blackburn and it was agreed that adjustments such as not attending the consultants meeting and communicating by e-mail by preference would be trialled.

I think there is now a need to review that trial at present using the format of a case conference which you had agreed to if it was required.

The reasons I think this needs consideration are:

* *Concerns have been raised about your absence from the consultants meeting, it being a forum for communication and team working, but without any real explanation having been permitted by you*

* *I am concerned that e-mail communication does not appear to be an effective medium for you at present given the automatic reply that has been sent from your account*

I think the trial has now been running for a period and needs review."

194. The "automatic reply" in question was an "out of office" response the claimant was using. We have not seen that, but understand that it included the words "*non-solicited emails would be routinely deleted*". Further correspondence followed about the OH referral.

195. Having not heard anything from Mr McManus, the claimant chased him for a response on 31 January 2018. He said:

"I'm sorry to have to make contact again, but I've not had any further contact.

I appreciated the recent crisis will have filled your time, but it's now 8 weeks since the first email.

I've raised an issue under the bullying and harassment policy.

I had tried to manage this informally with the individual concerned.

This was formally raised with the MD and Director of Workforce who, as far as I can see, did not investigate this further (despite managerial roles identified as ambassadors in the policy) This is why I escalated the issue to yourself.

Can you please advise who you appointed as the investigating officer, as I have not had any further contact.

I believe I should have also been in receipt of fortnightly updates.

I would welcome your further consideration. I'm sure you must appreciate the additional stress such delays can cause."

196. The claimant chased again for a response on 9 February 2018 and 16 March 2018, in each case simply by forwarding his previous correspondence to Mr McManus.

197. If Mr McManus did send a response to the claimant, neither he nor anyone else at the respondent has been able to provide us with a copy of the response, or explain why such a copy of the response is not available. In those circumstances, while Mr McManus may have intended to send a response, we find that no such response was sent.

198. For the purposes of his appraisal and, ultimately, revalidation of his professional competence, the claimant had to undertake a "multi-source feedback" or MSF exercise. In other professions this might be called 360 degree feedback – that is, comments from those he works with, whether senior or junior, and including patients.

199. While in theory this process is supposed to be anonymous, in practice the feedback may be so specific that the individual in question is readily identifiable.

200. The claimant's MSF (or "e-360 Report for Dr Alan Macleod") is dated 19 February 2018. While in many cases complimentary of the claimant (and in particular with good feedback from patients), other comments were more difficult. Some expressed concerns about his working relationship with colleagues. Mention is made of him being late for the trauma meeting. One commenter says that he does not complete ward rounds, will not see patient relatives (except at particular times), doesn't engage effectively with colleagues and refuses to discuss or make decisions regarding "DNACPR".

201. On 20 February 2018 the claimant wrote to a nurse who he considered to be responsible for the most difficult comments, saying:

> *"Thank you for completing the MSF - you are officially the most negative responder.*
>
> *Can you please, however, stop re-enforcing this myth that I am late to the trauma meeting.*
>
> *My job plan states 8am."*

202. The nurse replied:

> *"Dear Mr Macleod*
>
> *1. I was under the impression that these were anonymous.*

> *2. I have not been informed officially that you have a different start time to anyone else. Therefore, to all intents and purposes it appears to all that you arrive late."*

203. Correspondence continued between the two of them along the same lines, and the nurse in question almost immediately drew HR's attention to her correspondence with the claimant.

204. The OH "case conference" eventually took place on 21 February 2018 with Dr Blackburn, Mr Fisher and a HR manager from the respondent.

205. On 22 February 2018 the claimant wrote to Mr Pollard under the heading "Possible Data Protection Issues", saying "*I would be most grateful with your help with the following.*" He included with that a number of emails from late 2017 and early 2018, broadly relating to what he saw as data protection issues in a research project being undertaken by the department.

206. In reply, Mr Pollard said "*I am not a data protection expert so I suggest you ask the trust data protection office as they will be in a better position to answer your queries*". Subsequent correspondence later that day was to much the same effect, with Mr Pollard concluding "*end of email conversation, and shouldn't you be doing the trauma list*".

207. Pausing there, we note that much had happened of relevance to the claimant's claims in the period 20-22 February 2018. On 20 February 2018 he had received some adverse comments in his MSF. On 21 February 2018 he had the "case conference" with Dr Blackburn and others, and on 22 February 2018 he was attempting to alert Mr Pollard to his data protection concerns.

208. In her later report, Dr Blackburn describes the purpose of the meeting as "*to explore the adjustments*", with Dr Fisher saying that "*concerns had been raised particularly around the adjustments representing a reflection on team working and communication*". We also see in the report that at that stage the claimant preferred to limit the description of his disability to being a "neurodisability" rather than giving the precise diagnosis.

209. Dr Blackburn records the following as "points discussed at this meeting", in a letter dated 26 February 2018:

> *"1. Due to his neurodisability traits, he had requested for difficult meetings and difficult issues to initially entail an e-mail discussion that strictly adheres to points to be raised at any particular meeting. This was mainly to give him time to process the information and plan his response and interactions.*

This does not preclude normal day to day actions, however he has stated if he asks for clarification in e-mail he would expect a response to this, as no response can raise further anxiety and a miss perception of interaction. It appeared at this meeting that there were no issues regarding communication in his day to day work both with colleagues and patients unless there are difficult meetings in which case he has requested specific e-mail discussion prior to face to face meetings.

He is capable of talking to patients and colleagues at social level albeit in a slightly different manner than might be expected from a non-neurodisabled person.

We did discuss that there had been a perceived change in Alan's behaviour over a period of 5-6 months and I informed that the neurodisability manifestations could change with time and also that there were other mental health conditions.

2. *Understandably, he wanted to maintain his privacy and keep his diagnosis confidential and restricted only to people who needed to know. We agreed that in order for the team to understand this, it would be stated that he has a 'health condition' which requires adjustments like non-attendance physically at a consultant team meeting (this is usual for any employee with regards to their confidential clinical diagnosis). These team meetings tend to increase his anxiety and result in a defensive response from him that could be seen as challenging, which then escalates to unhelpful/unprofessional responses from his team members. Equally, what other team members may find as minor issues tend to provoke an anxiety driven response from Alan as well as increase his own anxiety.*

   We did discuss that generally the T&O Department at the RBH is considered to be good and represents a collaborative group but Alan commented that he finds the meetings non-collegiate and anxiety provoking hence the reason for the request not to attend that meeting.

   We also had a discussion around whether declaring the nature of the neurodisability might make interaction with members of the team easier and in particular that the CD may be better able to interact with Alan but Alan has maintained his position of wishing to maintain confidentiality as far as reasonable.

3. *Based on this Dr Fisher agreed that Alan could stay off 'Consultant meetings' but occasionally he may need to attend. It*

was also agreed that his managers would monitor this situation over a 6 month period to see whether it has made a positive impact on Alan's health as well as improved the team working. Many workplace issues that generated the anxiety and behavioural problems were discussed at this meeting.

4. *Alan also requested support in order to reduce his need to monitor his e-mails (he is unable to do this by himself again possibly due to his neurodisability). Both* [HR] *and myself offered to help with the IT issue in order to prevent regular access to e-mail when he is off work, I have contacted IT personnel, who advised that Alan should raise a Help Desk ticket and 'Outlook' personnel would then help him.*

5. *I also raised the issue that he has other mental health conditions for which he is accessing appropriate treatment.*

6. *I agreed to review him for his health in July, if all remained stable, but earlier if there were issues.*

7. *In my opinion it is likely that he would qualify for adjustments to be considered under the Equality Act, but please be aware that this a legal decision rather than a medical decision."*

210. It appears that this meeting was quite difficult, and Dr Fisher later made representations to Dr Blackburn on a number of points, during the course of which he said that he considered that the claimant was "*becoming quite aggressive*" in the meeting. The claimant responded at length to that. In the meantime, Dr Fisher reported the events of the meeting (and subsequently) to Dr Barker in the following terms:

"I have conducted a case conference with Alan Macleod, in conjunction with HR and Occupational Health. There is a letter and some notes generated from that meeting and an agreement on the adjustments that have been put in place at Alan's request. The conference was to review adjustments in response to concerns that had been raised to you and me regarding those adjustments and whether they reflected a wider concern which the senior colleague raising the concerns had expressed.

Information has emerged both during and since that meeting which I think we need to consider and I would appreciate your urgent views on whether further action is needed. The reasons for concern are:

* *Alan brought his 360 degree appraisal to the conference and insisted on reviewing that document. There were a number of*

negative comments made and I noted that the 360 had not been considered at his appraisal several weeks ago nor had the report been reviewed with him before the meeting. I pointed out that the number of negative comments and the spread of scores was unusual. It has also emerged that there may have been an issue with processing of patient feedback forms.

* *I have since learned that Alan has approached a member of nursing staff who had contributed to the 360 and appears to have behaved in an intimidatory and harassing manner to the staff member. The staff member has escalated the matter to HR.*

* *Alan also brought up a GDPR issue with a sheaf of e-mails printed out but it has emerged through enquiries by me into that issue that not only has the issue been completely addressed but that Alan has been observed to be aggressive to staff members associated with the issue; demonstrated poor team working; and the team have had to put in a workaround which he is unaware of in order to enable patients to be given the opportunity to be involved in a research trial.*

* *There has now been concerns raised by two senior respected clinicians in the Trust around behaviour*

* *There has been a clinical issue around consent which you are aware of because you had to involve trust solicitors in the decision making around an amputation when a member of anaesthetic staff had apparently raised the possibility of the need for amputation before the patient was anaesthetised for the procedure.*

* *Additional health concerns were discussed at that conference which had not previously been highlighted to the management team.*

Whilst I support reasonable adjustments to accommodate Alan's health needs I remain concerned that team working and therefore potentially patient safety is compromised by his current behaviour and I am not sure whether any further action needs to be taken. I would appreciate your intervention as I now feel I have reached the end of what I am able to do as Care Group Director. I wonder whether a discussion by key members of the Professional Advisory Panel might be helpful in having wider consideration of next actions whilst recognising the need for confidentiality around Alan's health condition?"

211. On 8 March 2018 the claimant wrote to Mr Scheepers, a HR manager within the respondent saying:

> *"I would be most grateful for consideration of a disability pass as a reasonable adjustment.*
>
> *You are aware of the anxiety this has caused when I have struggled to obtain parking, particularly in the afternoons.*
>
> *This is not an annoyance as everyone else feels - I have anxiety due to the responsibility I feel not being able to attend my duties.*
>
> *…*
>
> *Although it is likely that autism (amongst other disabilities) will be a criteria for a Blue Badge in the future - at present this is not the case.*
>
> *So for the reasons noted above I wish to formally request permission to use the disabled bays if necessary as a reasonable adjustment, without the risk of being ticketed.*
>
> *…*
>
> *I am quite happy for you to discuss this with Dr Blackburn.*
>
> *As this does not relate to my medical role, I would be grateful if this does not go to the medical managers."*

212. On 8 March 2018 the claimant also wrote to him:

> *"I seem to have reached an impasse and would welcome your opinion.*
>
> *I raised with Dr Barker in November that I had concerns regarding interactions with Dr Fisher, as I was feeling bullied and harassed. This was not actioned, and instead I was told to attend the meeting, which was resulting in anxiety and stress. (A protected characteristic was disclosed to Dr Barker at this time)*
>
> *I subsequently escalated this to Mr McManus in December (who received the emails noting a protected characteristic)*
>
> *I've also made further contact with the CEO in January and February - apart from an initial recognition of the email in December, I have had no further responses.*
>
> *At no stage do these seem to have been investigated. I believe Trust policies exist to inform and support employees. I did not think these were discretionary?*

This is very disappointing, as, I should have an expectation to be treated fairly and issues investigated when raised. Even if the outcome of an investigation was no concerns, then I should have been informed of this.

Can you confirm whether or not it is normal for formal concerns to be ignored by the Trust?"

213. On 16 March 2018 the claimant wrote to Dr Barker in relation to his complaint of 10 November 2017 saying:

"Can you please confirm that this was satisfactorily investigated?

I never received a response to the points raised."

214. On 20 March 2018 Dr Barker replied saying:

"There was not an intention to set up an investigation.

My action was to request that you met Warren for a conversation and I understand that you have since had a satisfactory case conference with Warren, Blandina and HR."

215. The claimant was not satisfied with this response, and said:

"I have raised formally a number of serious concerns.

If you would kindly reference the last few paragraphs in particular.

The Bullying and Harassment Policy notes that, when possible, it should be concluded informally - but if not possible should be escalated to the next tier of management, I formally did this."

216. On 23 March 2018 the claimant wrote to Mr Scheepers saying:

"I note the fact that a case conference has occurred (and I am unsure how much of the content has been disclosed) has been disclosed to a number of individuals [named]*:*

…

I have been exceedingly clear that my confidentiality is sacrosanct.

Can you please advise whether my confidentiality has been breached?"

217. Mr Scheepers replied almost immediately saying:

"I can assure you that as far as I am aware, the content of the case conference has not been disclosed and I am not aware of any breaches of your confidentiality."

218. By 5 April 2018 the nurse who had provided the feedback that the claimant objected to was in further correspondence with HR, saying:

"I completed a 360 for Alan MacLeod last month. I always thought these were anonymous and I was somewhat surprised to receive an email from him following completion of the 360.

I feel that it was inappropriate of him to contact me. I do appreciate that it would have probably been best not to respond to his initial email but I was so surprised, and annoyed, that he had emailed me.

Below is an email trail from him to me.

I did report this to HR as seen below but I have heard nothing since."

219. On 9 April 2018 Dr Barker replied to the claimant on the question of an investigation, asking whether the claimant wished the investigation to be into the behaviour of Dr Fisher, Mr Pollard and/or his colleagues. The claimant replied:

"Dr Fisher please.

The side-lining is less of an issue - as I've now removed myself from the Consultants' meeting."

220. The claimant continued his correspondence with Mr Scheepers concerning confidentiality on 20 April 2018, saying:

"Can you please clarify, however, whether or not the holding of a case conference is confidential? The fact it was organised and undertaken by OH, suggests it forms part of my medical record. If so, an explanation of why this was discussed will be needed.

I note the "as far as I am aware" comment - can you please investigate what was discussed - as I don't believe you were in attendance, so a more robust investigation is needed."

221. Mr Scheepers replied on 23 April 2018 saying:

"I can confirm that the content of the case conference are confidential. In this particular case OH acted as the facilitator of the meeting, but such meeting could well be facilitated outside of OH and would therefore not necessarily form part of an individual's medical record.

Can you please provide further details with regard to your request for an investigation, in particular who you believe have partaken in these discussions, when this was held and who was present."

222. During March and April 2018 the claimant had been considering and reflecting on the MSF.

223. One result of this reflection was that on 26 April 2018 he entered a report on the respondent's "Datix" system. The Datix system is intended to be used to identify critical areas of concern in relation to patient safety. The respondent says "*a Datix report should be used to report any adverse incident that could produce significant consequences (loss, injury or a near miss) to staff, patients or others, or if the incident demonstrate learning points.*"

224. In this report he gives the name of the person he suspected of giving adverse feedback as being the "person affected, or potentially affected". The report is categorised as being "abuse of staff by other staff". The claimant describes the feedback received as being "*extremely serious allegations*". The report includes his response to and rebuttal of the points raised in the feedback. Under the heading "action taken" he says:

"As noted it is due to the serious nature of these accusations that I am now obliged to report this.

It is unclear whether this individual has an axe to grind and whether this had tarnished the assessment.

But the individual is openly criticising and undermining a colleague."

225. It is not surprising that given the potential importance of matters typically reported under the Datix system that the report was immediately (automatically) cascaded to almost twenty people within the respondent's organisation.

226. It is not at all clear to us what the claimant intended to achieve by this or why he did it. He says "*it is due to serious nature of these accusations that I am now obliged to report this*". The tenor of some of the claimant's evidence was that the nurse in question ought herself to have raised a Datix report about the points she mentioned, and that (to some extent) he was now doing that on her behalf, or at least raising those accusations formally against him so that they could be investigated. Perhaps he was self-reporting accusations against himself lest there was something to them. However, other aspects of the report seem to suggest that he is raising as a concern the fact that the nurse was making malicious allegations against him. He later acknowledged that he ought not to have dealt with matters this way.

227. Although the Datix report went to many people, one individual was formally assigned as "handler". That person took up the Datix report with Dr Fisher, presumably as he was in charge of the department it originated with. On 2 May 2018 Dr Fisher wrote to Dr Barker saying:

> *"Please see the new datix below which suggests to me significant clinical concerns raised through the 360 not to mention the fact that the individual was named in the datix which then gets circulated to a multitude of people further undermining her anonymity."*

228. Dr Barker identifies this as being "inappropriate on David" (presumably Datix) and asks for it to be removed, which it was (or at least it was moved to an inaccessible location). Mel Smith (the respondent's Head of Employee Relations, who Dr Barker had asked for advice) told Dr Barker that:

> *"… to me this entry demonstrates such a lack of judgment in terms of professional responsibilities and boundaries, I'm struggling to see how it can be anything other than a professional misconduct issue."*

229. At the same time as submitting his Datix report the claimant uploaded his formal reflections to the appraisal system. He notified Dr Barker of that, asked her to review it and raised the question of a meeting with her.

230. On 2 May 2018 Dr Barker suggested a meeting together with another colleague, but the claimant replied to say:

> *"I'm sure you will agree it will be less intimidatory and more productive between only two.*
>
> *I'm more than happy to meet with either one of you …*
>
> *The meeting is to discuss the MSF report and, as indicated, I am in the process of undertaking reflective pieces and additional work which I hope you will review.*
>
> *And, as I have already indicated, I dispute the conclusions. I trust you will be approaching this with an open mind …*
>
> *I'm available to meet either today or tomorrow afternoon if you so wish."*

231. In the afternoon of 3 May 2018 the claimant wrote to Mr Scheepers saying he would be recording any meetings he attended "*due to my medical history you are aware of*".

232. Dr Barker and the claimant met that afternoon. It was a long meeting. The transcript shows it taking nearly two hours. After about an hour and a half, the

claimant, in what is clearly an emotional moment, tells Dr Barker that he has been diagnosed with autism.

233. Multiple different allegations arise from things said by Dr Barker at this meeting.

234. Directly after the meeting Dr Barker wrote to the claimant saying:

> *"Thank you for coming to see me this afternoon (3rd May 2018) and our long conversation, which was very productive. I asked you to meet me to discuss concerns over your recent MSF and some of your actions after receiving it. I will not document our whole conversation, but the conclusions that I think we agreed.*
>
> *1. The feedback from your patients was universally excellent*
>
> *2. You have identified some initial changes that you will make in response to the feedback*
>
> *a. You will deliberately guard against making off the cuff remarks that may be perceived as offensive*
>
> *b. You recognise that there are some colleagues with whom you do not get on, and you will restrict your interactions to them to a purely professional level*
>
> *c. You will/have explained to your team, the constraints on your timing of the post-take ward round, and have arranged teaching in the first 15mins and a finish time that does not delay the theatre list*
>
> *d. Following our conversation, you will review the report to find any other changes (however small) that you might make, including those around working effectively with colleagues*
>
> *3. I agreed to investigate the 3 concerns expressed, which made you worry about your insight into your patient care (relating to not completing regular ward rounds, communication with relatives and the use of DNACPR).*
>
> *4. You recognised your error of judgement in posting your MSF on datix and you will write me a letter to that effect.*
>
> *By the end of our conversation, I was more reassured that you are engaging in this process. I also offered to speak to your clinical lead on your behalf and explore whether coaching might be helpful.*

Please cold you confirm that this is your agreed recollection of our discussion."

235. Later that night the claimant replied in the following terms:

"Thank you for the summary, with which I concur.

Thank you also for helping me identify changes I have already started following the MSF.

And identifying other considerations.

As discussed I had not appreciated that a Datix report was not the appropriate route to request an investigation into potential patient safety issues due to others raising concerns of ones professional behaviour. And I apologise for doing so.

I had undertaken a reflective piece following the MSF. There were concerns raised that would constitute professional neglect on my behalf. For some of the reasons discussed today, my perception may be different to others and I had concerns that my insight may be affected. I had examined Datix reports and also requested [named individual] *review my reflective piece. I had contacted two individuals via email to explore their concerns (again as part of my reflection) - but when advised this was not appropriate, no further contact was made.*

I was not aware of another route to explore this to ensure patient care is not compromised.

Although I have not had formal training with Datix, I was under the impression this was to raise potential patient safety issues and also risks to staff (another element of the feedback). I had copied and pasted the section from the reflective piece - as this explored the concerns raised. I had only put the chief nurse as the investigator as I felt they would be in the best position to explore this. I was shocked when you stated this was a publicly available document. I have submitted Datix in the past to explore difficult interactions and have found the feedback beneficial. No one has previously advised that such use would constitute professional misconduct, so I am extremely happy that you have explained this. Although such potential serious consequences of using the Datix system is likely to result in complete abstention in the future.

I had no intention of "harassing" other members of staff and apologise if this is someones perception – the two emails sent in February was a request to ask the individual to stop suggesting I was late (as I found

others repeating this and it was, potentially, undermining). I have not made any further attempts to discuss this further (either via email or in person) since then. And did not explore any of the criticisms that were levied. I note a formal investigation of harassment has been initiated, as it should be when concerns are raised and would welcome clarification of what behaviour has constituted harassment once this is complete.

I am mindful that you noted my health may be impacting upon my work interactions. My GP suggested a period of sick leave in January due to work related stress secondary to some managerial behaviour at RBH. As I was content that there are no patient related risks, I did not wish to do this.

I was, somewhat, surprised by my labile behaviour this evening. I will explore this further with my GP as insight is not always possible if one's health is compromised."

236. There are some specific points that the claimant now complains of concerning the meeting. In particular, there are comments that the claimant says Dr Barker made that he describes as being either inappropriate or discriminatory. Those are "*Make Joe Bloggs a cup of coffee in the morning – things that just make you part of the team*", "*do that in person one to one; face to face, rather than email*", "*and just watch out not winding people up*", and "*many doctors are on the spectrum*".

237. Dr Barker's first statement contained either denials of these comments or statements that she did not recall them.

238. Dr Barker was unaware that the claimant was recording their conversation. She had also not heard the recording until the start of the tribunal hearing. Having heard the recording, she prepared a supplemental witness statement which we allowed into evidence as set out above. In this she says:

"Having now had the opportunity to listen to the recording that Mr Macleod made of our meeting on 3 May 2018, without alerting me to this or seeking my consent, and reviewed it alongside the transcripts he has provided, while there are occasional mistypes, I recognise that I did make some of the alleged comments. My previous statement was written to the best of my knowledge and recollection in light of the information available to me at the time, and I did not recognise or recollect the comments attributed to me."

239. She goes on to accept that she made the comments alleged, but explains (as she sees it), the context around them. We will address that in detail when discussing the particular allegations that arise.

240. On the same afternoon that the claimant was meeting with Dr Barker Mel Smith wrote to the nurse who the claimant had mentioned in his Datix report saying:

> *"You raised concerns a few weeks ago through your management line regarding some interactions that you had had with a colleague.*
>
> *We would like to take these concerns forward but need to understand from you whether you would prefer to take the issue forward as a grievance explaining what you would like as an outcome, or if they are effectively a complaint.*
>
> *The route of how we take forward the concerns will depend on what you would prefer."*

241. In response, the nurse said:

> *"Having taken advice, it appears the best way forward would be as a grievance.*
>
> *As an outcome I would like an apology and for the person to start working as an effective member of the team. He has become very isolated, and it appears to be by his own design."*

242. The claimant was off sick from 10 May 2018 to 4 November 2018.

243. No specific individual allegations arise during this period of sickness, and we will not deal with events in that period in any detail. There were, however, ongoing processes largely related to the adverse MSF that the claimant had received and the consequences of that.

244. The nurse in question had a first stage grievance meeting on 23 May 2018. At the same time the "revalidation committee" commenced an "*investigation into clinical concerns raised about* [the claimant]". This was to be under the "Maintaining High Professional Standards" or "MHPS" process. The terms of reference were under three headings, derived from the MSF. Dr Waldmann was to be the "case manager". It was the respondent's case that this investigation arose from a request made by the claimant during the 3 May 2018 meeting – effectively that the claimant had himself requested these matters be investigated under the MHPS process.

245. On 19 June 2018 the claimant saw Dr Blackburn. She reported to Mr Pollard on 20 June 2018 that the claimant had recently returned to his private practice and was fit to return to his work for the respondent (subject to certain conditions, and on a limited basis) from 16 July 2018.

246. Dr Blackburn had suggested that the claimant should be open with Mr Pollard about his diagnosis, and he did that on 20 June 2018.

247. The claimant commenced ACAS early conciliation in respect of his first claim on 20 June 2018.

248. Although Dr Waldmann had prepared a letter on 11 July 2018 notifying the claimant of the MHPS process, this was not provided to the claimant until September 2018, when there was talk of him returning to work. Similarly, it seems that the grievance process concerning the nurse mentioned in the Datix report was put on hold pending his return to work.

249. The claimant submitted his first employment tribunal claim on 6 September 2018.

250. A return to work meeting for the claimant was convened on 7 September 2018. This set out arrangements for a phased return to work.

251. On 8 September 2018 the claimant wrote to Dr Waldmann saying that while he had wanted the concerns raised to be investigated he had not expected this to be by way of a MHPS investigation. Dr Waldmann replied on 16 September 2018 to say, amongst other things, that "*MHPS is our only route to investigate concerns about a doctor's capability*".

252. On 25 September 2018 the claimant was invited to a meeting to respond to the grievance that had been raised against him (with the meeting to take place on 18 October 2018). On the same day he was invited to an interview under the MHPS process (to take place on 28 September 2018). This interview eventually took place on 25 October 2018. The claimant had assistance from the MDU in responding to the MHPS process.

253. On 2 November 2018 the claimant sent to Ms Emerson-Dam 13 grievances and one informal concern, saying "*there will be a number of other formal grievances that will be raised in the near future. These relate to the MHPS and bullying / harassment investigation against myself. These have not been included at this stage to ensure that these processes progress without any further delay.*" Three further grievances followed later in November 2018.

254. The claimant returned to work for the respondent on 8 November 2018.

255. In November 2018 the grievance investigation prompted following the claimant's Datix report concluded. The resulting report says:

> "*We have decided to uphold the grievance … and will be recommending that given that every employee is responsible for their own conduct, consideration is given to the use of the Trust's disciplinary policy (and / or MHPS) with reference to the allegations of*

harassment and inappropriate professional conduct [by the claimant, in relation to] *the apparent evidence of his behaviour in many instances and a number of workplace colleagues.*"

256. Around the end of November the investigator's report (as part of the MHPS process) was produced. Having considered the investigation report, on 20 December 2018 Dr Waldmann wrote to the claimant saying:

> *"It is clear from the investigation that there is evidence to support all of the allegations i.e. that you are reluctant to be involved in DNACPR conversations; that you do not carry out sufficient ward rounds on your post-operative patients; and that there are times when you are not readily available to see patients or their families when asked. It is considered that all of these activities form part of the usual duties of a consultant and the question therefore is whether we can support you to make them possible.*
>
> *There are two possible courses of action. The first is to proceed to a formal hearing under the Trust's disciplinary policy as it is clear to me that the allegations relate to your conduct. The second is to have a meeting to discuss what might be needed to enable you to carry out your duties in a satisfactory way; possibly by some adjustments to your job plan but also by other means as suggested in the report. I intend to pursue the latter in the first instance in order to explore whether or not the issues can be resolved informally. If not, I will need to consider further if formal disciplinary action is appropriate. I attach a copy of the Investigation Report. Please see the suggestions for remedial action."*

257. The claimant immediately replied saying:

> *"I confirm receipt of the documents.*
>
> *I dispute the finding of the report.*
>
> *I will consult with the MDU.*
>
> *Can you confirm if the only way to dispute this is for the case to follow the formal route? If this is the case, the please proceed with the process immediately.*
>
> *This process have taken an inordinate amount of time, so I do not wish any further delays.*
>
> *As part of the next step, the employer needs to ensure all relevant evidence to be used in capability hearing. Can this please be released without delay."*

258. Broadly speaking this was consistent with the claimant's general view that he had done nothing wrong in respect of the matters to be addressed by the MHPS process, and if the only way of establishing this was via disciplinary proceedings then that was what he wanted. This leads to the somewhat unusual situation that the employer wanted matters to be resolved informally without the need for disciplinary proceedings but the employee was pressing for the employer to undertake those disciplinary proceedings.

259. On 20 December 2018 the claimant raised a grievance about the MHPS investigation. This brought the number of outstanding grievances to 17 or 18.

260. On 21 December 2018 the claimant's MDU representative wrote to Dr Waldmann saying:

> *"Thank you for sending the Case Report. We are disappointed by its contents. We appear to be markedly at odds about the process and this is obfuscating a possible issue that needs to be resolved. I would like to be able to support Mr Macleod to reflect on the trust's concerns and for us to find common ground and agree a way forward. However you must understand in May the trust had vague concerns based on opinions that these terms of reference might be true. In December the trust have now again asserted vague concerns and opinions. The investigation adds nothing. There is no single incident identified that I can discuss with Mr Macleod. No date, time or patient. That means we cannot consider the actual context, what words Mr Macleod may have actually used, what factors he considered or the actual impact on the patient and so neither can you.*
>
> *We have not seen the appendices, but you will have done. If the investigator did not push witnesses for instances, why was he talking to them? If there are no instances there is no case. If there are instances why were they not put to Mr Macleod and he be offered an opportunity to respond? I have made this basic point before. Why did the trust accept this investigation report without factual evidence?*
>
> *You have suggested the matter could go to a hearing. I suspect you could force the issue but this would be profoundly unfair. It is not the role of a hearing to correct errors in an investigation, or to begin the fact finding process. Can I ask what else the trust feel a hearing would achieve? We have been asking for an informal resolution throughout, Mr Macleod did not need to be threatened with a hearing to bring us to a discussion.*
>
> *I know this situation can deteriorate rapidly and that is not good for any party. It remains my preference to find common ground and resolve the situation, informally. The wording of your letter suggests to me you are*

being advised in this process. I would like to suggest that whoever has been advising you also attends the meeting in person."

261. The correspondence continued.

262. By the turn of the year, the claimant was back at work (on reduced duties at first) but:

a. The nurse's grievance had been upheld, with a recommendation that consideration be given to disciplinary action against the claimant.

b. The MHPS process was still underway. The case manager was proposing informal resolution but the claimant wanted to establish that he had done nothing wrong by means of (if necessary) formal disciplinary proceedings.

c. The claimant had outstanding grievances in relation to between 15-20 matters.

d. The claimant's first employment tribunal claim was underway.

2019

263. Our description of events in 2019 will be brief. The claimant's allegations in relation to the events of 2019 focus on specific matters that can be dealt with under the individual allegations.

264. Around 11 January 2019 the claimant was notified that he was under investigation relating to "*an allegation of bullying and intimidating behaviour*". This was the start of the process that had been recommended in the outcome of the nurse's grievance.

265. In January-March 2019 there seems to have been some sort of dispute between the claimant and Mr Pollard about his private work in comparison with his work for the respondent.

266. On 12 March 2019 the claimant's BMA representative wrote to Suzanne Emerson-Dam asking for an update on the disciplinary investigation against him. The representative chased for a response on 22 March 2019 and was told that the investigation was expected to take another four weeks.

267. In the meantime, there had been no further progress on the MHPS investigation. Dr Waldmann puts it this way in his witness statement:

"From January to April 2019, there was an impasse given Mr Macleod's stance, and I believe most of this time was spent taking advice on how to proceed. It was plainly somewhat unusual to have a consultant

insisting on being taken to a formal disciplinary hearing where the Trust wanted to support and remediate outside of a formal disciplinary and MHPS emphasises the need to resolve matter informally where this is possible."

268. Whatever the rights and wrongs of the claimant's position on this, we accept that having an employee insist on going through the formal process when some sort of informal resolution had been offered would have been unexpected and unusual, and was liable to lead to some confusion and delay in the process.

269. On 10 April 2019 Dr Waldmann sent the claimant a letter including the following:

"As you are aware, on the basis of the evidence set out in the investigation report the investigator concluded that the allegations set out in the Terms of reference are substantiated. Having reviewed the report in my position as Case Manager, I am satisfied that some further action is required in order to address this.

One option available to us is that we proceed down a formal route as set out in MHPS. As I indicated in my letter of 20 December 2018 that is likely to involve proceedings under the disciplinary process, in order to consider your conduct. Alternatively, I might determine that these are matters of capability to be dealt with through the capability process in MHPS. For the avoidance of doubt, they are two very different processes.

However, in view of the nature of the concerns raised and the position that you have set out in your evidence to the investigation, I have indicated that I would be content to proceed with an informal resolution in order to avoid the need for formal processes. That would involve you recognising the expectations of the Trust in terms of how work is to be delivered and engaging with us, with support, in order to ensure that you are able to meet those expectations. I am content to discuss with you whether that might require adjustment to your job plan, further training and/or any other support.

At this stage there would be no requirement for you to sign up to or accept anything. I am simply proposing that we have a discussion in person, so that we can all understand how we might be able to agree an effective way forward that enables us to resolve these issues without the need for further formal processes."

270. The claimant replied pointing out the respondent's previous delays and asking for "*a significantly extended period to reflect upon the options*". This was granted to 10 May 2019.

271. Around the same time the claimant was discussing his job plan with Mr Pollard. This resulted in a series of emails from 10-11 April 2019 concerning the start date of the Job Plan, with the claimant contending it should be eight weeks from the final submission and Mr Pollard saying it should apply from 1 April "*as your job plan is continuing from last year*". Mr Pollard was concerned that this would leave a gap in the job plan from the end of the previous year. The claimant's response was that there would be no gap as the system automatically extended the previous job plan to avoid gaps.

272. The correspondence continued, with Mr Pollard insisting that it should start from 1 April in line with others. The claimant accuses Mr Pollard of "*curt comments*". Mr Pollard replies saying "*Curt because I have limited time to do emails and don't want to devote the majority of this to your queries, as explained before, when I already gave you my decision.*"

273. The claimant contacted ACAS concerning early conciliation for a second time on 15 April 2019.

274. On 16 April 2019 the claimant wrote to Dr Barker saying:

> *"Dear Dr Barker,*
>
> *Please review the email trail below.*
>
> *I have mentioned to you before that the CD seems to include both yourself and the CGD in routine emails between a subordinate and a CD.*
>
> *I have also raised concerns that this may not always be appropriate.*
>
> *The CD mentioned that you had advised him to do this.*
>
> *I did request clarification of the "rules".*
>
> *The response, however, is fairly nebulous.*
>
> *The CD was suggesting that this was different to the routine discussions he would have.*
>
> *Can you please clarify this?*
>
> *Best Wishes*
>
> *Alan"*

275. The claimant included a number of emails to this email – essentially the claimant challenging Mr Pollard in relation to a comment he (Mr Pollard) made about escalating matters raised by the claimant to the clinical group director and medical director.

276. As far as we are aware there was no response from Dr Barker to that email.

277. Mr Pollard says "*the concerns about Mr Macleod's late attendance and non-participation … lead to a vote of no confidence in Mr Macleod's ability to undertake trauma work being passed during a Consultant's meeting on 17 May 2019*".

278. We have not seen any formal record of that vote, but it is agreed that it took place and was passed on that date. The fact that the vote took place and was passed is not said by the claimant to be an act of disability discrimination. It appears that an investigation into matters surrounding the vote of no confidence took place with a report being produced in September 2019, but nothing in these cases depends on that.

279. The claimant's second and third employment tribunal claims were lodged on 25 & 26 July 2019 respectively.

280. The disciplinary investigation that arose from the nurse's complaints concluded in July 2019, recording that "*AM's behaviour and actions would constitute all elements of bullying, cyber bullying and harassment*" and noting that "*AM's lack of engagement in this investigation has demonstrated a lack of professionalism and not supported the principles of a full investigation process*". We understand that this is not in itself a decision that the claimant should be disciplined, but instead is the first step towards convening a formal disciplinary hearing.

281. In relation to the claimant's grievances, Ms Emerson-Dam records in her witness statement that in August 2019 the claimant was offered a schedule of grievance meetings (with an independent chair) from November through to December 2019. On 1 October 2019 the claimant withdrew his grievances saying that he no longer had faith in the grievance process.

282. In 28 October 2019 the new medical director, Dr Janet Lippett, wrote to the claimant proposing a meeting in what seemed to be an effort to resolve the multiple outstanding issues: the MHPS process, the vote of no confidence and matters arising from it and the question of disciplinary proceedings arising from the nurse's complaint. The claimant agreed to the meeting, and it took place on 7 November 2019.

283. This meeting appears to have been productive, with Ms Emerson-Dam saying that "*the outcome of the November 2019 meeting was that all the outstanding*

disciplinary matters were concluded informally based on the commitments made by all in the meeting and the [agreed] *action plan. It was agreed that if existing matters could not be resolved informally, it would revert to the formal process. To date, these matters remain concluded, albeit new matters have arisen since.*"

284. On 29 December 2019 the claimant submitted his fourth employment tribunal claim.

285. We will end our account of events there.

C. THE LAW

Introduction

286. Unless otherwise stated, all statutory references that follow are to the Equality Act 2010.

Proving discrimination

287. Section 136:

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

288. However, we note from Hewage v Grampian Health Board [2012] UKSC 37 (para 32) that: "*it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*"

Direct disability discrimination

Generally

289. Section 13(1):

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

The comparator

290. Section 23:

> *"(1) On a comparison of cases for the purposes of section 13 … or 19 there must be no material differences between the circumstances relating to each case.*
>
> *(2) The circumstances relating to a case include a person's abilities if … on a comparison for the purposes of section 13, the protected characteristic is disability."*

291. The effect of this is explained at para 3.29 of the EHRC Code of Practice:

> *"The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)."*

292. The question of a comparator for direct discrimination claims was a source of considerable difficulty for the claimant, and, as recorded above, the tribunal intervened on a number of occasions to remind the claimant of the requirements outlined by para 3.29.

293. The first description we have of the appropriate comparator is in the list of issues, where this is said:

> *"As confirmed by the Claimant at the PH on 7 July 2020, the Claimant relies on a hypothetical comparator, being a neuro-typical doctor who had complaints raised against them and did not undergo a MHPS investigation, and employees with disabilities who have had health needs supported (for example, employees in a wheelchair would not expect disparaging comments)."*

294. This is not how the claimant put it in his closing submissions, but there are obvious difficulties with both comparators. A comparator having complaints raised against them is only relevant (if at all) to the small part of the claimant's claims that relate to complaints made against him. While it was an early theme of his evidence that someone who was disabled in a different way would have been treated better than he was (and that, in general, autism or ASD was misunderstood and not respected by the respondent so much as other disabilities were or would have been) the evidence on that was scant and does not address the question of whether the claimant was directly discriminated against by reason of his disability.

295. The respondent's view was that the appropriate comparator was someone who shared the communication difficulties the claimant had, but who was not autistic. The claimant objected to that on the basis that someone who had the same communication difficulties as him would, by definition, also be autistic. As he puts it in his written closing submissions: "*The comparator appears too similar to be suitable. Essentially, the same, apart from one has a medical diagnosis.*"

296. The claimant goes on to say in his written closing submissions: "*an appropriate comparator would be: male, aged around 50, heterosexual, white, non-denomination, consultant trauma and orthopaedic surgeon*".

297. We do not accept this. It is not what is suggested in para 3.29 of the EHRC Code of Practice, but more than that it does not meet the requirements of section 23 that "*there must be no material differences between the circumstances relating to each case*" and "*the circumstances relating to a case include a person's abilities if … on a comparison for the purposes of section 13, the protected characteristic is disability*". If the claimant's point is that he was discriminated against because of the effect of or symptoms of his disability, then that would be a claim of discrimination arising from a disability under s15 of the Equality Act 2010, but there is no such claim in this case.

298. We accept that someone with the claimant's communication difficulties would be highly likely to be autistic, but for the purposes of discrimination law we are required to construct a hypothetical and artificial comparator who has the same communication difficulties as the claimant but is not autistic.

299. The claimant's approach to matters of direct disability discrimination was fundamentally flawed. That is evident in a number of areas. For instance, allegation 1 is described as being a matter of direct discrimination but the comparator is "neuro-typical employees", rather than neuro-typical employees with the same communication difficulties as the claimant. Allegations 2 and 7 are a "*failure to adhere to (or support) reasonable adjustments*" as being (at least in part) direct disability discrimination, but the claimant has not given us anything from which we could conclude that someone who was not disabled but had the same communication difficulties would have had their reasonable adjustments continued. If the person was not disabled then there would be no legal obligation to make reasonable adjustments in the first place.

300. Whoever or whatever the comparator is for the claimant's direct disability discrimination claim, it is clear that they are a hypothetical comparator, as the claimant has never identified an actual comparator. However, he has also not identified anyone or circumstances from whom we could construct a hypothetical comparator. He has made no attempt to give us material from which we could construct a meaningful comparator.

301. Except in respect of one element of his claim, which we will come on to, the apparent failure by the claimant to appreciate the nature of a direct disability discrimination claim (and the relevant comparator) means that he has not given us the evidence that would be necessary for such a claim to succeed.

Indirect disability discrimination

302. Section 19:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it.*
>
> *(c) It puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

303. Section 23(1) applies to section 19 as much as it applies to section 13, but section 23(2) only applies in section 13 cases.

304. We also note from 4.16 of the EHRC Code of Practice that: *"It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment.*"

305. We will thus have to consider (i) whether the PCP alleged exists, (ii) whether it was applied to or would be applied to others, (iii) whether it puts people with autism at a particular disadvantage, (iv) whether it put the claimant at a that disadvantage and (v) if so, whether it was a proportionate means of pursing a legitimate aim. In practice (i) and (ii) can be considered together, and (iii) and (iv) may often be considered together.

Reasonable adjustments

306. The duty to make reasonable adjustments includes a duty (section 20(3)):

"… where a provision, criterion or practice of [the employer] *puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

Time limits

307. Section 123 of the Equality Act 2010 says:

> *"(1) Subject to section 140B, proceedings … may not be brought after the end of:*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal things just and equitable …*
>
> *(3) For the purposes of this section:*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period …"*

308. Section 140B says:

> *"(2) In this section:*
>
> *(a) Day A is the day on which the complainant … complies with the requirement … to contact ACAS … in relation to the matter in respect of which the proceedings are brought, and*
>
> *(b) Day B is the day on which the complainant … receives … the* [early conciliation] *certificate …*
>
> *(3) In working out when the time limit set by section 123(1)(a) … expires the period beginning with the day after Day A and ending with Day B is not to be counted.*
>
> *(4) If the time limit set by section 123(1)(a) … would … expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period."*

309. The circumstances of this case raise a number of questions in relation to time limits. The first is what the legal position is where a discrimination claim is out of time but the claimant gives no explanation of why that is and does not ask

for an extension of time. The claimant's written submissions do not deal with time issues at all, despite there clearly being time issues in the case.

310. The respondent relies on Robertson v Bexley [2003] IRLR 434 and Thompson v Ark Schools [2019] ICR 292 to the effect that extensions of time are the exception rather than the rule, and therefore, presumably, need to be sought and justified by a claimant.

311. The question of an extension of time on "just and equitable" grounds is a wide discretion, typically to be exercised according to the balance of prejudice that each party would suffer if time was or was not to be extended. To the extent that there is a burden on a claimant to show that time should be extended, it has been described as a burden of "persuasion", rather than a burden of proof or evidence (see Abertawe Bro Morgannwg University LHB v Morgan UKEAT/0320/15). However, we note HHJ Peter Clark's statement in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278 that "*if* [a] *claimant advances no case to support an extension of time, plainly, he is not entitled to one*".

312. The second is what the position is with regards to amendments and time limits. A large number of the allegations were added by amendment two or more years after the claims were originally submitted. Later in these reasons those are called the "type 4" claims.

313. Although floated at an earlier stage of proceedings, the application to amend was formally made in October 2021 and is addressed in a case management order of Employment Judge Gumbiti-Zimuto dated 17 November 2021.

314. Galilee v Commissioner of Police for the Metropolis [2018] ICR 634 makes it clear that there is no "relation back". For limitation purposes a successful application to amend does not lead to the amendment being treated as having been submitted at the time the original claim form was presented to the tribunal.

315. Even if there is no extension of time in respect of any individual claim of discrimination, there remains a clear point set out in the list of issues as to whether any acts of discrimination are capable of forming "continuing acts" when taken together with acts that are within time.

Knowledge of the disability

Direct discrimination

316. Section 23 makes it clear that a direct disability discrimination claim depends on the actions of the alleged discriminator being "because of" the protected characteristic of disability, as opposed to being "because of" the

consequences of or matters arising from the disability. The claimant and any comparator have the same abilities and skills, but the claimant is disabled and his comparator is not.

317. It seems to us that it must follow for there to be direct discrimination that the alleged discriminator must know, or at least suspect, that the claimant is a disabled person. They need not know the exact details of the disability, the particular diagnosis or have reached their own conclusion that the claimant precisely meets the statutory definition of disability, but their actions must arise "because of" the protected characteristic of disability.

Indirect discrimination

318. The statutory definition of indirect discrimination does not appear to rely on any knowledge or suspicion on the part of the alleged discriminator that an employee is a disabled person.

Reasonable adjustments

319. The position in relation to reasonable adjustments is explicitly addressed at para 20(1)(b) of Schedule 8:

> *"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to ..."*

D. DISCUSSION AND CONCLUSIONS

Time limits – types of claim

320. In cases with such a wide range of allegations there are always likely to be issues around whether a complaint has been brought in time. We have explained above how we came to ask the respondent to put in writing what its position on time limits was. That document is attached as appendix 2. From that document it is clear that even without getting into the question of time limits in relation to later amendments, there are time issues with the original claims.

321. In the absence of any opposition to it from the claimant, we accept that the respondent's document on time limits is accurate.

322. The claimant's extensive closing submissions do not address this at all, and we have never been given any reason by the claimant why claims that are not within time were not brought within the relevant time limit.

323. Appendix 2 places claims into three categories: (1) those in the first claim, (2) those in the second claim, (3) those in the third claim and (4) those added by amendment. As previously stated, the fourth claim does not seem to make a difference to this.

324. The first claim was the subject of early conciliation from 20 June 2018 (Day A) to 3 August 2018 (Day B). It was submitted on 6 September 2018. The relevant early conciliation extension of time is that given by s140B(3), and the earliest date that could be within time for the claim is 25 April 2018. For time limit purposes we will call these "type 1" claims.

325. The second claim was the subject of early conciliation from 2 June 2019 (Day A) to 1 July 2019 (Day B) and the claim was submitted on 25 July 2019. The extension under s140B(4) applies and the earliest date that could be within time for the claim is 3 March 2019. For time limit purposes we will call this a "type 2" claim.

326. The third claim was the subject of early conciliation from 15 April 2019 (Day A) to 15 May 2019 (Day B) and was submitted on 26 July 2019. The extension under s140B(3) applies and the earliest date that could be within time for this claim is 27 March 2019. For time limit purposes we will call this a "type 3" claim.

327. The claims added by amendment were not subject to early conciliation. They were added on 17 November 2021 by virtue of an amendment application made on 4 October 2021. We will call these "type 4" claims.

328. In theory any decision on amendment ought to take into account time limits, and ought to itself address any necessary extension of time (this is "*essential*" (Selkent v Moore [1996] IRLR 661), but not "*mandatory*" (Galilee)). In practice this is often not done, not least because of complications around whether allegations may be part of a "continuing act".

329. Employment Judge Gumbiti-Zimuto's order simply records that the respondent did not oppose the application to amend the claim and "*The amendment that I allow in this case is to give permission to the claimant to rely on all the matters set out in the list of issues and the table of allegations as though they were set out in the claim forms.*" The formal order that follows from that is:

> *"The claimant has permission to amend the claim so as to include all claims as set out in the in the "List of issues to be read in conjunction with table of allegations" produced at the preliminary hearing on 17 November 2021."*

330. The judge goes on to say that the issues to be decided in the case are set out in the list of issues. That is the list of issues attached to these reasons. That refers to time issues in relation to the four existing claims, but does not say anything about time issues in relation to amendments.

331. The respondent's position is that time remains an issue on the claims added by amendment, and that the decision to allow the amendment is not to be treated as a decision that it was just and equitable to extend time in respect of the allegations that have been added. The claimant's submissions do not mention anything about that.

332. The full terms of any concession by the respondent on the application to amend are not set out. Given that the respondent was clearly resisting the original claims on a time basis it would be surprising if they had conceded that time should be extended for the amendments, where were far more obviously out of time. Given that many of the amendments related to (while being separate from) matters already in the claim form in respect of which time was an issue we would also find it surprising the judge had intended his permission to amend as being a decision to find it just and equitable to extend time in respect of the amendments, while leaving the position in relation to the original claims open.

333. Given that, we conclude that the decision to allow the amendments should not be interpreted as a decision that it was just and equitable to extend time for them. That remains a matter for us at this final hearing.

334. There appear to be a small number of claims where the complaint post-dates submission of the relevant claim form but has not been the subject of an application to amend. These appear as part of allegations 2 and 4 only.

The position generally

335. We have mentioned earlier the arguments the claimant put as to the comparator for his direct discrimination claim. We have also set out there why we consider the claimant's approach to direct disability discrimination to have been fundamentally flawed.

336. We have also referred to discussions we had with the claimant during the course of the hearing about this, and also referred to the claimant's position that we should await his closing submissions, which he would use to draw together the strands of his case and explain to us how these points were matters of direct discrimination.

337. Unfortunately despite the obvious effort that the claimant had put into his written submissions, and despite citations of law by him in those submissions, we find that they have largely proceeded without reference to any orthodox

principles in relation to the forms of discrimination at issue in this case: direct discrimination, indirect discrimination and a failure to make reasonable adjustments.

338. For direct discrimination, the claimant has given us no relevant comparator, nor any evidence from which we could construct that comparator.

339. For indirect discrimination, in general the claimant seems to have misunderstood or simply not addressed the requirement to establish a provision, criterion or practice. That is, to show not just that something happened to him but that this stemmed from a provision, criterion or practice that the respondent either did or would have applied to others. Any question, for instance, of indirect discrimination by the application of a PCP of "*delaying progressing grievances*" cannot be established without some reference to how someone else's grievances either were or would have been handled.

340. The requirement to establish a PCP also applies to some extent in relation to a claim of failure to make reasonable adjustments. The list of issues defines these largely by referring back to the PCPs relied upon for the indirect discrimination claim, with the same problems that arise in relation to those PCPs.

341. Finally, as we have mentioned, although raised at various points during the hearing the claimant has not addressed any of the problems in respect of time limits on his claim.

The allegations

342. In what follows the relevant allegations have been copied across from the table of allegations in the list of issues, occasionally with minor formatting corrections.

Allegation 1

1	22nd February 2018	Failure to engage with the Claimant's clinical concerns	Mr T. Pollard	The Claimant had concerns regarding potential patient data protection issues that he discussed with the ICO who recommended he try and clarify the matter locally. Multiple emails were sent to the care group director (Dr W	*Feelings of being side-lined* Impression that my concerns and opinions were being dismissed purely because of the individuals' perception of my behaviour and actions. *Undermining the Claimant's position* *Impression that no one*	Direct discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather

				Fisher)	*in the Trust took the Claimant's concerns seriously*	than secondary to disability

343. These are type 4 claims.

344. It is clear that this is a reference to his exchange of emails with Mr Pollard on 22 February 2018 in which the claimant asks Mr Pollard for help with what he (the claimant) saw as a data protection issue, and Mr Pollard refers him on to an (unknown) data protection officer.

345. This is said to be direct disability discrimination – but the claimant has done nothing to show that there was direct disability discrimination. We have no indication of how Mr Pollard replied to anyone else who raised that kind of concern. There is nothing from which we can construct the relevant comparator or say how that they would or may have been treated any differently. This allegation cannot succeed in those circumstances.

Allegation 2

2	30th November 2017 3rd May 2018 November 2019 (No exact date of report recorded)	Failure to adhere to reasonable adjustments	Mr T Pollard (clinical director); Dr W Fisher (Care Group Director); Dr L Barker (Medical Director); Mr W Scheepers (Medical staffing)	Clinical managers not respecting the decision for the Claimant not to attend departmental management meetings. Ignoring emails despite agreeing that emails would be an appropriate form of communication. Suggesting to disregard email communication Agreement to not attend Consultant's meeting Including Mr T	Agreed reasonable adjustments not followed by management team	Direct discrimination Refusal to follow reasonable adjustments

				Pollard (clinical director); Dr W Fisher (Care Group Director); Dr L Barker (Medical Director); Mr W Scheepers (Medical staffing)		

346. These are type 1 claims, with the exception of any allegation in November 2019 which post-dates the claim form but does not seem to have been the subject of any formal application to amend the claim.

347. As far as 30 November 2017 is concerned, the significance of this date seems to be that it is when, based on the occupational health report, the claimant declared his intention no longer to attend the departmental meeting. However, while the adjustment was identified then there is nothing to suggest that what is alleged in allegation 2 occurred – that the adjustment was not honoured. Mr Pollard replied agreeing to the adjustment. Whatever happened, there was no failure to adhere to reasonable adjustments (by way of direct discrimination or reasonable adjustments) on 30 November 2017.

348. It is not clear what the claimant is complaining of in relation to the 3 May 2018 meeting. Perhaps it is just the "get off email" comment referred to at allegation 7. Allegation 7 addresses this in the context of direct discrimination, and paras 13(a) & (b) of the list of issues make it clear that this is not intended as a distinct allegation of a failure to make reasonable adjustments.

349. As for November 2019, we are not sure what this is supposed to refer to. The respondent interprets it as being in relation to the meeting noted in an email of 15 November 2019, in which there is talk of "*attendance at consultant meeting to discuss AM's adjustments*". The claimant response to the email recording this proposal with a simple "*thank you*". We do not see any direct discrimination or refusal to make reasonable adjustments here. The talk is of him attending the meeting to discuss his reasonable adjustments, not attending the meeting on any routine basis. We do not consider this to amount to disability discrimination.

Allegation 4

4	21st February 2018	The Respondent undermining the Claimant's	Mr T Pollard; Dr W Fisher; Dr L Barker	Suggesting these are simple behavioural issues that can be modified		Direct discrimination

	3rd May 2018 1st April 2019	disability		easily – rather than recognising certain behaviours are a feature of the disability and cannot be easily modified. Constant criticism of "poor teamwork" (Mr T Pollard; Dr W Fisher; Dr L Barker) Dr L Barker's MD Comments: **"Make Joe Bloggs a cup of tea in the morning or something. Things that just make you part of the team."** "I would say, that there are a lot of doctors who are on the spectrum." "You could start at Myers Briggs where you rank people as introverted and move into Asperger's. And a lot of doctors fit in that edge."	Not accepting that differences in working is part of the disability and does not represent poor teamwork or risks to patients. Impression the MD did not recognise the disability.	

350. These are type 1 claims, with the exception of any allegation in April 2019 which post-dates the claim form but does not seem to have been the subject of any formal application to amend the claim.

351. The first of these arises on 21 February 2018, which must be in relation to the OH case conference. This must therefore be something that Dr Fisher did, and it seems to us that it can only be read as being the same as allegation 19. We will address it under allegation 19.

352. Similarly, the complaint in relation to 3 May 2018 seems identical to those in allegations 8 and 9, and will be dealt with under those headings.

353. The reference to 1 April 2019 seems to relate to an account that Dr Barker gave of the 3 May 2018 discussion during the course of a grievance investigation. We do not see any basis on which that account of the meeting could be said to amount to disability discrimination in its own right.

Allegation 5

5	10th November 2017 18-20th March 2018 9th April 2018 17th April 2018	The MD Dr L Barker ignoring requests for support	Dr L Barker	The Claimant raised concerns that he felt bullied and harassed by the CGD Dr W Fisher	Not recognising the stress and anxiety is a feature of ASD. Impression certain individuals in the Trust failed to take the disability seriously	Resulting in stress, anxiety and deterioration of depression

354. These are type 1 claims and are all out of time.

355. The list of allegations does not specify what form of disability discrimination this is alleged to be, but earlier in the list of issues it is clear that this is intended as a claim of direct disability discrimination.

356. The first of these is said to have occurred on 10 November 2017, which must be meant as a reference to Dr Barker referring him back to Dr Fisher when he appealed to her to intervene.

357. We have described above how that came about. The particular difficulty for the claimant is that there is nothing whatsoever to suggest that Dr Barker's response (or failure to respond) amounted to direct disability discrimination. In common with the other direct disability discrimination claims there is nothing to suggest that Dr Barker would have behaved any differently with a comparator who had the same communication difficulties but did not have autism. At the time Dr Barker would have known that the claimant considered himself to have a disability, but as he referenced in his own email to her she did not know what that disability was. There is nothing to suggest that Dr Barker behaviour was a matter of direct disability discrimination.

358. We think the reference to 18-20 March 2018 is to the sequence of emails from 16-20 March 2018 in which the claimant chases for a response to his original complaint. As with the earlier complaint, there is nothing to suggest that Dr Barker's treatment of the claimant in respect of this was a matter of direct disability discrimination or that she would have treated anyone with the same communications difficulties (but who was not autistic) any differently.

359. 9 April 2018 is when Dr Barker did reply to the claimant, asking him which elements he wanted to be investigated. We do not see how this can be categorised as ignoring requests for support, when she specifically asks the claimant what it is that he wants to be investigated and, as with the earlier points, do not see any aspect of direct disability discrimination in this.

360. 17 April 2018 is the claimant's response to that, identifying the matter that needs to be investigated as being a matter in relation to Dr Fisher. There is no evidence that suggests that any failure here was a matter of direct disability discrimination, or that anyone else would have been treated differently.

Allegation 6

6	16th October 2015 11th November 2015	Managers ignoring concerns raised about swearing at departmental meetings	Dr L Barker Dr W Fisher	This had been brought to the attention of the CGD Dr W Fisher and MD Dr L Barker by the Claimant and not actioned (Both were present at the meeting when the swearing occurred and failed to tackle this at the time or afterwards when a formal complaint was	Autism individuals often have sensitivities to noise, smell etc. One of my issues is stress relating to swearing. This has had secondary consequences of being criticised of withdrawing from the department and loosing support from colleagues.	Indirect discrimination – by failing to act upon (what most organisations would find unacceptable) this resulted in stress and anxiety and ultimately in the need for me to remove myself from the meetings on health grounds

				raised)		Comparator: Neuro-typical individuals

361. These are type 4 claims.

362. The list of issues describes it as an allegation of both direct and indirect discrimination, with (in respect of the indirect discrimination claim) a PCP of "*managers ignoring concerns raised about swearing at departmental meetings*". Thus the indirect discrimination claim is not about the swearing as such, but is about the managers' response to the claimant complaining about swearing.

363. While both Dr Fisher and Dr Barker were present at the meeting on 16 October 2015 the claimant did not raise concerns about swearing at the meeting. His concerns about swearing were raised later in his email of 11 November 2015, in response to Dr Barker's email. He refers to section 5.5(c) and says "*a response is awaited*".

364. We have set out in the timeline what occurred in response to this. Dr Fisher replied and met with the claimant. The claimant later says "*I am quite happy to leave it like this if you are and see no reason to escalate this further*".

365. What is clear from this is that the claimant's concerns about swearing at the meeting were not ignored. Dr Fisher took steps to follow up with the claimant and the claimant eventually took the view that nothing more needed to be done. Whatever this amounts to, it does not show a PCP of "*ignoring concerns raised about swearing in meetings*". This allegation must fail because the PCP is not established. We also do not find any direct discrimination in this allegation.

Allegation 7

7	3rd May 2018 March 2019 (face to face - no date	The MD Dr L Barker failing to support the agreed reasonable adjustments	Dr L Barker	The MD Dr L Barker disregarded the reasonable adjustments by saying "I would just get off email"	Impression the MD did not recognise the disability. The senior managers failed to support the reasonable adjustments – thereby undermining the issues	Direct discrimination

	record ed)					

366. These are type 2 claims and would all be out of time depending on the exact date of the March 2019 meeting.

367. From the transcript of the 3 May 2018 meeting it is clear (and accepted by Dr Barker) that she said "*… I would say just get off email*". Immediately prior to that she had said "*… emails are a cause of a lot of problems*", and immediate after she said "*And you're not the first person I've had that conversation with either.*"

368. The allegation here is an unusual one. As with allegation 15 it is said that a failure to support or follow reasonable adjustments is an act of direct discrimination, not a failure to make reasonable adjustments.

369. For this to succeed, we would have to find that Dr Barker failed to support reasonable adjustments because of the claimant's disability, but would have supported reasonable adjustments if the claimant had the same communication difficulties but did not have autism. There is no evidence to suggest that this was or would be the case.

370. In respect of the allegation in relation to a March 2019 face-to-face meeting, we have not been able to identify what that meeting was nor what there was about it that might have amounted to direct disability discrimination.

Allegation 8

8	3rd May 2018	The MD Dr L Barker making inappropriate comments and expecting behaviour that may be incompatible	Dr L Barker	"Make Joe Bloggs a cup of coffee in the morning – things that just make you part of the team" "do that in person one to one; face-to-face, rather than email" "and just watch out not - people up"	Impression the MD did not recognise the disability. Suggesting issue is within myself and can be rectified by simple behavioural changes rather than accepting the behaviour and perceptions are a part of the disability	Direct discrimination

371. This is a type 1 claim and is within time. It has many similarities with allegation 9, and we will deal with them together.

Allegation 9

9	3rd May 2018	The MD Dr L Barker making discriminatory comments during a meeting	Dr L Barker	"Many doctors are on the spectrum"	Impression the MD did not recognise the disability. There is no evidence to support this. Only one in 10 individuals with autism are in employment. The total rate of disabilities in doctors is 6%. This statement demonstrates a lack of understanding of the term ASD – everyone will have some features of ASD individuals – but only those who have significant day-to-day issues are classed as disabled.	Direct / Indirect discrimination Comparator: other employees with disabilities who have had health needs supported & do not face disparaging remarks

372. This is a type 1 claim and is within time.

373. It is said to be direct or indirect discrimination. The PCP is said to be making discriminatory comments. We do not see how that can possibly be a valid PCP for the purposes of an indirect discrimination claim, so will treat this as an allegation of direct disability discrimination.

374. The exchange that we are concerned with is recorded in this way in the claimant's transcript of the meeting:

> *"AM I have autism*
>
> *LB You don't have to tell me if you don't want to.*
>
> *AM No, it's just to try to explain why I struggle.*
>
> *LB Do you want a tissue.*

> *[While] you are composing yourself, I would say, that there are a lot of doctors who are on the spectrum.*
>
> *You could start at Myers Briggs where you rank people as introverted and move to Asperger's.*
>
> *And a lot of doctors fit in that edge.*
>
> *So, it's not incompatible with …"*

375. Dr Barker also says:

> *"… if you do that one-to-one, face-to-face rather than email.*
>
> *Because it's so easy to mis-interpret email.*
>
> *And just watch the, the not winding people up.*
>
> *Because you get people's responses, do you?*
>
> *You can see if you're winding someone up – can you?"*

376. The claimant replies "*often not, unfortunately*".

377. The "Joe Bloggs" comment appears a few pages later in the transcript, where Dr Barker says:

> *"Make Joe Bloggs a cup of tea in the morning or something.*
>
> *Things that just make you part of the team."*

378. All of these exchanges come after the claimant has told Dr Barker that he has been diagnosed with autism.

379. Dr Barker describes her statement that "*many doctors are on the spectrum*" as following immediately after the claimant had told her of his diagnosis. She says that the claimant "*was becoming upset at the end of our discussion*". She says it was made "*in the context of trying to comfort Mr Macleod and in particular, reassuring him that a diagnosis of autism was not incompatible with a role as a doctor/Consultant*". We accept that context, and accept that the statement was not meant to be hurtful.

380. We are, however, bound to say that this was clearly a remark that was prompted by, and can only have been prompted by, the claimant's disability. It specifically references his disability. The respondent accepts that in their closing submissions: "*the comment about doctors being on the spectrum is a direct reference to ASD and followed the Claimant's disclosure to Dr Barker that he was autistic*". Dr Barker would not have said this to the hypothetical

comparator who had the claimant's communication difficulties but was not autistic. That is inherent in the comment itself. The comparator would not have been "*on the spectrum*" and the comment would not have been made.

381. The other remarks follow later, but within a few minutes of this exchange. As previously, we accept that they were intended by way of encouragement and perhaps coaching to the claimant. They were not intended as harmful. However, we do not accept Dr Barker's comments that they were not related to or caused by her recent knowledge that the claimant had autism.

382. As we have described before, the claimant's disclosure of his diagnosis had come late in the meeting. To the extent that Dr Barker was intending generally to coach and encourage a colleague who was having relationship difficulties at work, she had already had around 90 minutes or more to do that. These exchanges only came after the claimant's disclosure of his diagnosis, and additions such as "*you can see if you're winding someone up – can you?*" suggest to us that Dr Barker had the claimant's diagnosis in mind. If this was simply a question of communication difficulties or relationship difficulties there would have been no need for that question.

383. We therefore find that each of these comments made by Dr Barker were because of the claimant's disability, and she would not have made those comments to someone who had similar communication difficulties but did not have autism.

384. What remains is whether these comments amounted to less favourable treatment.

385. The claimant sets out in the table of allegations why he regarded this as being less favourable treatment:

> "*There is no evidence to support this. Only one in 10 individuals with autism are in employment. The total rate of disabilities in doctors is 6%. This statement demonstrates a lack of understanding of the term ASD – everyone will have some features of ASD individuals – but only those who have significant day-to-day issues are classed as disabled.*"

and

> *"Suggesting issue is within myself and can be rectified by simple behavioural changes rather than accepting the behaviour and perceptions are a part of the disability."*

386. The respondent says:

> "*the phrase is not derogatory and even if Dr Barker was wrong in her perception or interpretation of the statistics around autistic doctors in*

the workforce this is not less favourable treatment at all. It was a comment made, perhaps slightly clumsily, in a show of support to the Claimant who had said he was a loner with no friends at work and was describing feeling side-lined and outside the team."

387. As regards the other matters, they say:

> *"the Claimant has presented his case to the tribunal as though there were no possible modifications, he could make to his behaviour to assist in communication or teamwork. There is no medical evidence to support this contention and it must be reasonable for an employer to explore ways in which to support the Claimant in teamworking that including exploring what he is capable of doing or not doing. The OH advice and medical advice refers to coping strategies and learned behaviours, and the tribunal is aware that the Claimant has significant personal responsibilities quite apart from the demanding job he held. To suggest that no behavioural change whatsoever was possible and to explore this was discriminatory flies in the face of reason. To equate this exploration to diminishing his condition is also unreasonable."*

388. We find that this was less favourable treatment, and amounted to direct disability discrimination.

389. Dr Barker was reacting with good intentions during the course of an emotional meeting. However, in doing so she subjected the claimant to less favourable treatment.

390. Her attempt at comforting the claimant by saying many doctors were "*on the spectrum*" was seen by the claimant as demonstrating a lack of understanding of his condition. We accept that Dr Barker's comments could reasonably be taken that way and were taken that way by the claimant. Some individuals who are not autistic may have characteristics associated with autism, but that is a long way from saying that they are autistic or have the very serious difficulties that can come with that condition. To seek to minimise the nature of the claimant's condition in this way was well-meant, but was also less favourable treatment.

391. As for her suggestions concerning making cups of tea or meeting face-to-face, there may be a place in some conversations for discussing coping strategies, but the claimant is correct to say that Dr Barker's comments come across as if his disability can be overcome with simple steps, some of which (such as the face-to-face meetings) may have been very difficult for the claimant to undertake. There seems in these comments to be no acknowledgement that the claimant's behaviour stems from a life-long disability. It cannot be a matter of simple behavioural changes. Dr Barker's comments can be taken (as the claimant did) to suggest that the claimant's

difficulties can be overcome with a change of behaviour. That is less favourable treatment when those difficulties stem from a disability.

Allegation 10

10	6th December 2017 31st January 2018 9th February 2018 16th March 2018 29th June 2018	The CEO Mr S McManus not assisting the Claimant when he requested support	Mr S McManus	The Claimant sent emails noting his disability and concerns of behaviours of others; initial response acknowledging email but no further help or advice was received. Emails sent on five separate occasions.	*Feelings of isolation, lack of support, anxiety, stress and depression.* *Feelings of being side-lined* *Impression that no one in the Trust took the Claimant's concerns seriously* The CEO ultimately has responsibility for the health and safety of the employees. I have been informed by the employers freedom to speak up guardian that the CEO is usually obliged to meet individuals who raise such concerns. It is unclear why my pleas were ignored	Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent may have been influenced by others and decided not to undertake appropriate decisions and actions.

392. This is a type 4 claim.

393. It is the claimant's case that Mr McManus's lack of action in response to his emails (other than acknowledging them) was a matter of direct disability discrimination.

394. We have found that Mr McManus did not respond to the claimant, but we are at a loss as to how the claimant concluded that this was a matter of direct disability discrimination, or on what basis he wishes us to draw that conclusion.

395. In his closing submissions, the claimant says "*The CEO noted that he would have intervened with other issues covered by the Equality, Act 2010.*" but we do not see how that assists the claimant. The relevant comparison for the

purposes of direct disability discrimination is not with, for instance, how Mr McManus would have responded to a complaint of sex discrimination.

396. Mr McManus has said that until these claims were brought he was completely unaware that the claimant was autistic, and we see nothing in the claimant's correspondence with him that could have lead him to think that the claimant did have autism. In those circumstances we do not see how this allegation could succeed.

397. In making this finding we have treated the issues from 6 December 2017 – 16 March 2018 all as one piece, since they all relate to the same original complaint. The claimant says nothing in his closing submissions about 29 June 2018 and the respondent notes that "*the Claimant accepted there was no allegation about an email or contact on 29 June 2018 and did not pursue that aspect of this allegation in the end.*"

Allegation 11

11	10th November 2017	The Director of Workforce Planning (Mr D Fairley) failed to act upon the Claimant's email raising concerns about feeling bullied and harassed.	Mr D Fairley	The Claimant's concerns were met with cynicism – "wondered whether there is a degree of suspicion"	This is a trait regularly seen in individuals with autism, then his statement is pejorative and indicates a failure to consider the disability but rather apportion the issue to the Claimant	Indirect discrimination

398. This is a type 1 claim and is out of time.

399. The claim is framed as indirect discrimination. The PCP is "*failing to act upon concerns raised about feelings of bullying*". In his written submissions the claimant says that Mr Fairley "*should have considered the claimant's disability and health could be relevant to the concerns raised*" and "*should have engaged with the claimant and explored the concerns*".

400. There is nothing to suggest that such a PCP (if it exists) would have been applied to others. It would be surprising if there was a general PCP within the respondent of failing to act upon concerns raised about feelings of bullying.

401. The email to Mr Fairley says that he does not want it taken any further (at least at that point) but is simply asking for Mr Fairley's thoughts, which Mr Fairley later supplies. He cannot be criticised for doing what the claimant asked him (at the time) to do.

402. We do not see any such PCP as alleged by the claimant. There is nothing in Mr Fairley's response to suggest that he has failed to act on concerns raised about feelings of bullying. He seems to have done exactly what the claimant asked him to do. There is nothing to say what would have been done in any other case, nor anything from which we could conclude that the PCP alleged by the claimant existed.

403. This claim must be dismissed as the claimant has not established the necessary PCP.

Allegation 12

12	8th March 2018 23rd March 2018 20th April 2018	The Head of Medical Staffing (Mr W Scheepers) failed to investigate the Claimant's concerns of feeling bulled and harassed	Mr W Scheepers	The Claimant emailed on four separate occasions but no response was received or action undertaken Normal process is to report to line managers. When this is not possible the personnel department should action this.	*Feelings of isolation, lack of support, anxiety, stress and depression.* *Feelings of being persecuted and victimised* *Failure to follow the reasonable adjustments* *Feelings of being side-lined* *Undermining the Claimant's position* *Impression that no one in the Trust took the Claimant's concerns seriously*	Indirect discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies

404. This is a type 1 claim and is out of time.

405. It is said to be both direct and indirect discrimination. No PCP is given for indirect discrimination.

406. The 8 March 2018 email concluded by asking "*Can you confirm whether or not it is normal for formal concerns to be ignored by the Trust?*". As far as we are aware there was no response by the respondent to this. But the allegation is that the HR officer in question "*failed to investigate the claimant's concerns*". Asking whether it is normal for concerns to be ignored is not the same as asking for those concerns to be investigated, so we do not see that the claimant has made out the detriment alleged. Still less do we see any indication that this amounted to either indirect or direct discrimination.

407. On 23 March 2018 the claimant asked "*can you please advise whether my confidentiality has been breached?*" Mr Scheepers replied that so far as he was aware it had not been. We do not consider that any other response was required, that this amounted to a failure to investigate the claimant's concerns or that it was in any way a matter of direct or indirect discrimination.

408. The 20 April 2018 email is the claimant's follow up to the 23 March 2018 email. This time he does ask for an investigation of some kind. Mr Scheeper's response to ask him to provide further details regarding his request for an investigation. We do not regard this as ignoring the request for an investigation nor as being in any way an act of indirect or direct disability discrimination.

Allegation 13

13	23rd March 2018 20th - 24th April 2018	The Head of Medical Staffing Mr W Scheepers failed to investigate a potential data protection breach of the Claimant's personal data	Mr W Scheepers	The Claimant emailed on two separate occasions but no response was received or action undertaken Raised concerns that my personal data had been shared without my permission breaking data protection law	Potential distribution of confidential personal data	Data protection Law Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies

409. This is a type 4 claim.

410. It is in essence a repeat of the last two elements of allegation 12, and fails for the same reasons.

Allegation 14

14	8th March 2018 29th March 2018 29th June 2018	The Head of Medical Staffing Dr W Scheepers failed to consider a request for reasonable adjustments	Mr W Scheepers	A formal request relating to parking was made to the Head of Medical Staffing three times and no response received or action undertaken. The Claimant experiences anxiety when he has struggled to obtain a parking space and has anxiety due to the responsibility he feels not being able to attend his duties on time (particularly as Medical staffing confirmed that lack of parking is not a valid reason not to attend work". Even if this was not felt to be a reasonable adjustment, the formal process should have occurred.	Impression employer did not take disability seriously	Direct discrimination – failure to consider a request for a reasonable adjustment

411. This is a type 1 claim. Anything in relation to June 2018 is within time.

412. It is said to be both direct disability discrimination and a failure to make a reasonable adjustment. It is not clear what PCP is alleged in respect of the question of a failure to make reasonable adjustments.

413. The claimant says that on each date he made a request for changes in parking arrangements. Specially on 8 March 2018 the claimant made a request for a car parking permit – specifically to be allowed to part in the disabled parking spaces if no other spaces were available. On 29 June 2018 he wrote to Mr Scheepers saying "*Can you please forward the reasonable adjustment assessment regarding parking in the disabled bays.*". We have not been able to identify any request on 29 March 2018 but since we have identified the first and last we will proceed on that basis. It does not appear to be suggested by the claimant that any request on 29 March was significantly out of line with the other requests. It may be the claimant intended to refer to an email of 20 April 2018, which is simply him forwarding his email of 8 March 2018 to Mr Scheepers.

414. It seems clear that this request was never responded to by Mr Scheepers, although by 7 September 2018 Ms Emerson-Dam had said that "*the trust is unable to provide you with a designated car parking space*".

415. We do not see how this can be an act of direct disability discrimination. There is nothing to suggest that Mr Scheepers failed to consider the request because of the claimant's disability.

416. There are formidable problems with the claim that this amounted to a failure to make reasonable adjustments. In the first place, the allegation itself is framed as a failure to consider a request for reasonable adjustments, and failing to consider a request for reasonable adjustments will not itself amount to a failure to make a reasonable adjustment. Even if it is reframed as the lack of permission to park in a disabled space being itself a failure to make a reasonable adjustment we have no idea of the PCP the claimant alleges that the respondent was obliged to adjust, nor what substantial disadvantage the claimant was put at as a result of that PCP. That is despite the fact that the claimant in his closing submissions works through the relevant elements of the EHRC Code of Practice and identifies the need for a PCP. Possibly the PCP alleged is that for a disabled parking space a person needs to qualify under the "blue badge" scheme, but if that is the PCP there is no evidence to suggest that that PCP exists or was applied. We are not aware of any response from Mr Scheepers saying that the claimant cannot park in the disabled parking spaces because he does not qualify for a blue badge.

417. In his written submissions, the claimant says:

"- The Claimant had been struggling to attend work on time.

- The Claimant was criticised for this by colleagues and medical managers.

- The difficulty was secondary to a number of reasons:

o Childcare of disabled children – disability by association.

o Work-related stress and anxiety and subsequent effects on sleeping and time-keeping.

These would represent features arising from the disability.

o Additional stress of worrying about being late and fear of criticism and victimisation.

- The employer was aware that the issues was resulting in a substantial disadvantage."

418. As we have noted elsewhere, the question of discrimination by association is not part of the claimant's claim.

419. So far as questions of "*work-related stress and anxiety*" and "*additional stress of worrying*" we understand the claimant to be saying that these are secondary to and arise from his disability. However, fundamentally on this point the claimant has failed to supply the necessary parts that would go to make up a claim of a failure to make reasonable adjustments. We do not know (and are not in a position to construct) the PCP he alleges, nor do we have evidence on the substantial disadvantage (if any) he was put to. This allegation must fail.

Allegation 15

15	8th March 2018 23rd March 2018 20th April 2018	The Head of Medical Staffing Dr W Scheepers failed to follow reasonable adjustments regarding emails	Mr W Scheepers	Despite the individual being present at the meeting when the reasonable adjustments were confirmed **Mr W Scheepers failed to follow reasonable adjustments regarding email communication as agreed**	Impression employer did not recognise disability	Direct discrimination

				during the OH meeting January 2018		

420. This is a type 2 claim and is out of time.

421. Somewhat unusually, this is a claim that failing to follow reasonable adjustments is an act of direct disability discrimination.

422. This creates the somewhat difficult concept that because of the claimant's disability, Mr Scheepers did not follow the agreed reasonable adjustments – whereas he would have followed agreed reasonable adjustments in relation to an individual who had the same communication difficulties as the claimant but was not autistic.

423. Not only is that counterintuitive, as with much of the claimant's case on direct disability discrimination it is completely unsupported by any evidence. There is no evidence as to how Mr Scheepers treated others who were not disabled, nor anything from which we could conclude that he would have treated a non-disabled person any better.

424. If it is said that a failure to reply to the emails is direct discrimination, the emails of 8 March 2018 and 20 April 2018 are the original parking email which was subsequently re-sent to Mr Scheepers on 20 April 2018. We see no evidence to suggest that a failure to reply to these was an act of direct disability discrimination.

425. The 23 March 2018 email concerned confidentiality, and Mr Scheepers did reply to that.

426. In his closing submissions the claimant identified additional emails that he said Mr Scheepers did not reply to (but seemingly not including the email of 23 March 2018). We have confined ourselves to the emails that seem to be in issue in the schedule of allegations.

Allegation 16

16	21st February 2018	The Respondent was openly critical of some characteristics and features of the Claimant's disability	Dr W Fisher	The CGD Dr W Fisher noted that "I felt and expressed to him that he was becoming quite aggressive" during a meeting.	Challenging behaviour is a feature of ASD and so the comment by the CGD is unfortunate and perhaps suggests a lack of understanding or acceptance of the disability. These actions could be	Indirect discrimination

				The Occupational Health doctor had explained that "challenging" behaviour may occur during the meeting at the onset.	considered as potentially dismissing the disability and conflating the issues to a choice of behaviour. The Occupational Health doctor had explained this during the meeting.	

427. This is a type 1 claim and is out of time.

428. This is said to be indirect discrimination, with the relevant PCP being "*being openly critical of some characteristics and features of the claimant's disability*".

429. We are bound to say at this point that such a PCP cannot be a proper PCP for the purposes of an indirect discrimination claim as it is particular to the claimant's situation and cannot be (nor is it said to be) applied to others. The respondent has not subjected the claimant to the indirect discrimination alleged.

Allegation 17

17	10th November - 1st December 2017 3rd May 2018	Is it discriminatory to locate the problem exclusively within the individual Dr L Barker Dr W Fisher Mr T Pollard	Dr L Barker Dr W Fisher Mr T Pollard	Not considering that the environment may be resulting in the behaviours. So failing to make adjustments are causing the issues at work. Suggesting the behaviours are purely a reflection on the claimant, rather than considering that it may be a	Impression employer did not recognise disability	Direct discrimination Comparator: other employees with disabilities who have had health needs supported (for example, employees in a wheelchair would not expect disparaging comments)

				feature of the disability. " It brings your judgement into question." "there are a lot of doctors who are on the spectrum." Challenging behaviour is a feature of ASD - "I felt and expressed to him that he was becoming quite aggressive" Claimant's start time for a meeting "indicated a lack of teamwork". "wondered whether there is a degree of suspicion" - suspicion is a trait regularly seen in individuals with autism. This statement is pejorative and indicates a failure to consider the disability but rather apportion the issue to the Claimant		

430. This is a type 4 claim.

431. The first element of this allegation is from 10 November – 1 December 2017, which covers the period from his original complaint to Dr Barker through to the outcome of the occupational health report which recommended adjustments.

432. In his written submissions the claimant refers only to the second element which is said to have occurred on 3 May 2018. The respondent says the allegation "*is incapable of being determined it is so opaque*". It is certainly very difficult to understand what is meant by it, and the claimant's written submissions do not assist, at least not with the first element.

433. Ultimately this first element of the allegation is bound to fail because it is an allegation of direct discrimination which, like other aspects of the direct discrimination claim, has no comparator nor any evidential material from which we could construct a comparator. Whatever the behaviour complained of here, or the detriment, there is nothing to suggest that someone with the same communication difficulties but without being autistic would be treated any differently by the respondent.

434. The claimant's written submissions suggest that the compliant in relation to 3 May 2018 relates to Dr Barker's comments, which are dealt with at allegations 8 and 9.

Allegation 18

18	21st February 2018	Being criticised for failing to perform impossible actions	Dr W Fisher	The CGD Dr W Fisher was openly critical suggesting the Claimant should have discussed an assessment during his appraisal, This was impossible as the appraisal meeting had occurred before the feedback period even started.		Indirect discrimination Indirect discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent deemed the problem to be with the claimant and decided not to undertake

						appropriate decisions as mandated in the policies

435. This is a type 4 claim.

436. It is said to be a matter of direct and indirect discrimination. In the case of indirect discrimination the PCP alleged is "*being criticised for failing to perform impossible actions*".

437. Despite the full discussion of this in the claimant's written submissions we do not understand what this allegation amounts to. 21 February 2018 is the date of the "case conference" with Dr Blackburn which Dr Fisher also attended, but we do not see any allegation concerning something that Dr Fisher did during that meeting. The closest we can find that that is the claimant criticising a subsequent email sent by Dr Fisher on 6 March 2018.

438. The relevant email is from Dr Fisher to Dr Barker, where Dr Fisher says:

> *"Alan brought his 360 degree appraisal to the conference and insisted on reviewing that document. There were a number of negative comments made and I noted that the 360 had not been considered at his appraisal several weeks ago nor had the report been reviewed with him before the meeting."*

439. The claimant's objection to that is that the feedback post-dated his appraisal meeting, so could not possibly have been discussed during the appraisal.

440. Whatever the rights and wrongs of that we do not see any basis on which it could be considered either direct or indirect discrimination. So far as indirect discrimination is concerned, there is nothing to suggest that the respondent had a PCP of "*being criticised for failing to perform impossible actions*" or that (if it was applied to the claimant) it was or would be applied to others. Similarly, there is nothing to suggest that any of this is a matter of direct discrimination, or that Dr Fisher would not have acted in the same way with a non-autistic employee who had similar communication difficulties to the claimant.

Allegation 19

19	21st February 2018	Conflating an agreed contractual variation as evidence of	Dr W Fisher	The CGD Dr W Fisher reported the Claimant's start time for a meeting	This was an agreed contract variation.	Direct discrimination

		poor behaviour		"indicated a lack of teamwork". This was despite the CGD being part of the process of an agreed contract variation	Using this as a "behavioural problem" is undermining	Comparator: Neuro-typical individuals The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies

441. This is a type 4 claim, and also appears as part of allegation 4.

442. This seems to relate to the conflict between the trauma meeting starting at 07:45 and the claimant's job plan saying he started at 08:00.

443. Again this seems to relate to the occupational health "case conference" on 21 February 2018, but we are not at all clear about what it was that Dr Fisher did that was wrong during that meeting. As far as we can tell, the claimant does not address allegation 19 in his written submissions (and this was not one of the points that may have been missed through the section relating to Mr Pollard being missing).

444. There is nothing in Dr Blackburn's follow up letter suggesting that the trauma meeting start time was discussed at the case conference.

445. It is apparent that at various points there were tensions around whether the claimant started work at 08:00 or 07:45, but the variation to 08:00 has always been described as necessary for his children, not in consequence of his disability. Beyond that, again we find nothing to suggest that anyone who had the same communication difficulties but was not autistic would have been treated differently in relation to their start time.

Allegation 20

20	10th November - 1st December 2017	Inflexible management structures Interpreting policies in a	Multiple employers representatives – including:	Individuals in authority have difficulty accepting behaviours of ASD individuals and ASD employees may	Rules are very important to individuals with ASD. Policies are there to clearly identify the rules and responsibilities of	direct discrimination Indirect discrimination

	5th May 2018	piece-meal fashion.	Dr L Barker Dr W Fisher Mr T Pollard Mr W Scheepers	find the management structure particularly disabling Maintaining Professional Standards (CG611) Trust Bullying and Harassment Policy (CG048) Capability Policy - CG225 Individuals selectively picking what parts of a policy the wish to follow - e.g. failing to notify National organisations; failure to follow normal practices in commencing an investigation; failure to offer normal processes of support (failing to identify a designated board member)	staff Failure of others to follow the policies (particularly when divergence to the policy is identified) cam result in stress and anxiety.	Comparator: other employees with disabilities who have had health needs supported

446. This is a type 4 claim.

447. The first element of this concerns the period 10 November – 1 December 2017, as previously discussed under allegation 17. This is alleged as both direct and indirect discrimination. For indirect discrimination the PCP alleged is "*inflexible management structures; interpreting policies in a piece-meal fashion*".

448. This allegation had a number of difficulties. It is difficult to see what the claimant intends in saying that there are "inflexible management structures", and it is very difficult to see how this could be both direct and indirect discrimination. In his written submissions the claimant describes this as

"*relating to managers supporting one another to the detriment of the claimant*".

449. We are at a loss as to what this allegation really amounts to.

450. So far as direct discrimination is concerned, whatever it is, it must fail because there is no evidence as to how anyone who was not disabled but had the same communication difficulties as the claimant would have been treated.

451. For indirect discrimination, the claimant simply has not established that this PCP exists. If it is to be understood as supporting each other specifically against the claimant, it cannot be a PCP as it was not (and would not be) applied to anyone else. If it is to be understood more broadly there is no evidence that any PCP of this nature would be applied to anyone else. The position is the same with the question of "interpreting policies in a piece-meal fashion" – there is nothing to suggest this existed as a PCP that either was or would be applied to anyone else.

452. We have not been able to identify anything taking place on 5 May 2018 that may form the basis of this allegation.

Allegation 21

21	10 – 11th April 2019 13th September 2019	Failure of the individual to engage with normal requests from a subordinate	CD Mr T Pollard	CD is placing me under a level of scrutiny that I feel intolerable (and constitutes harassment) Discussing my individual job plan inappropriately with others Refusal to undertake a job plan review; despite, unilaterally, the employer changing this which has resulted in some detriment. And then criticising because of this. Refusal to	Bullying and harassment Sidelining Reflecting underlying disability	Direct discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability

				answer direct questions relating to clinical concerns Refusing to follow agreed reasonable adjustments. Refusing to engage unless I attend departmental meetings.		

453. This is a type 4 claim.

454. We have described the 10-11 April 2019 correspondence earlier in our decision. The elements of "explanation of allegation" do not seem to apply to the 10-11 April correspondence and we see no basis on which this can be considered to be direct disability discrimination.

455. On 13 September 2019 the claimant sent an email to Mr Pollard (in reply to an email from Mr Pollard):

> *"… I contest the conclusions in this email.*
>
> *I also feel it is inappropriate for a lot of the content to be shared (particularly my employment situation) But this is not the forum to expand upon this."*

456. We don't understand what the "*normal request from a subordinate*" is in relation to this, nor the "*failure to engage*" (Mr Pollard replied on 18 September 2019) nor how any of it can be said to be direct disability discrimination.

Allegation 22

22	16th March 2018 7th November	Failure to progress formal disciplinary investigations against myself	MD Dr L Barker Ms S Emerson-Dam Deputy director workforce planning, CD Mr T	Requested formal processes are completed (either abandoned or progression of the formal process). This has been	Stress and anxiety. Resulting in additional issues and, ultimately, a "vote of no confidence" from colleagues (May 2019)	Direct discrimination and victimisation Comparator: - This would include neuro-typical doctors

	2018 19th November 2018 21st November 2018 20th December 2018 11th March 2019 22nd March 2019		Pollard Case Managers (Dr C Waldmann; Matron L Buttery; Sr. A Rogers)	declined	Occupational Health have expressed concerns. Resulting in deterioration of mental health and additional medications being prescribed by a psychiatrist to alleviate this	who had complaints raised against them and did not undergo a MHPS investigation Indirect disability discrimination Comparator: Neuro-typical individuals (Respondents failure to consider claimants disability on conduct of investigation) Also ACAS guidance (unnecessary delays relating to disciplinary processes)

457. This is the only type 3 claim and is out of time.

458. These allegations are of direct and indirect discrimination. No PCP is identified for any indirect discrimination claim. Although victimisation is mentioned it has never been suggested that this is meant in the technical sense, nor has any relevant "protected act" been identified by the claimant.

459. The 16 March 2018 email was his email to Dr Barker in respect of his original complaint of 10 November 2017, asking "*can you please confirm that this was satisfactorily investigated*".

460. The particular detriment alleged here is a failure to progress formal disciplinary investigations against the claimant, but his email of 16 March 2018 is not about a disciplinary investigation against him. If it is in relation to the broader concept of "formal processes" it could be taken as a request to

progress some kind of grievance or formal complaint. Dr Barker's response is to the effect that she had understood all this either had been or was to be informally resolved, which seems reasonable in the circumstances. We do not consider this to be a matter of direct disability discrimination, and there is no evidence than any relevant comparator would have been treated differently.

461. The claimant references three dates during November 2018 when there was an alleged failure to progress formal disciplinary investigations against him.

462. It is not obvious to us, nor is it apparent from the claimant's written submissions, what it was that was or was not done on 7, 19 and 21 November 2018 that amounted to a failure to progress the disciplinary investigations. Given that, those allegations must be dismissed.

463. Similarly it is difficult to understand what the allegation date of 20 December 2018 is intended to refer to. That was the date that Dr Waldmann sent through the investigation report along with his proposal for a "*meeting to discuss what might be needed to enable you to carry out your duties in a satisfactory way*", but as recorded earlier, no allegations of discrimination were put by the claimant to Dr Waldmann. It is certainly true that this is not progressing formal disciplinary action but we cannot see how this suggestion of stopping short of formal disciplinary action could amount to "less favourable treatment", nor do we consider there is any basis on which it could be considered to be either direct or indirect disability discrimination.

464. Perhaps this is intended to refer to the claimant's email in reply, where he said "*please proceed with the process immediately*". If so, we note that the reason given in response to the that by Dr Waldmann was that it was then so close to Christmas that nothing could happen until the new year. This seems to us to be a sensible response and we see no direct or indirect discrimination in that.

465. We have not been able to identify any failure to progress the disciplinary investigation that occurred on 11 March 2019.

466. We think the 22 March 2019 reference is intended to be in relation to Ms Emerson-Dam's response to the claimant's BMA representative saying that the investigation was expected to take another four weeks, but notifying the claimant of progress in that manner cannot of itself be said to be failing to progress the disciplinary investigation, nor do we see how such a response could amount to direct or indirect disability discrimination.

Allegation 24

24	Jan – June 2019	Failure to respond to emails	Dr L Barker MD	Routine ignoring of emails	Failure to follow reasonable adjustments	Direct discrimination

467. This is a type 2 claim and is at least partly within time.

468. In his submissions the claimant identifies a number of unanswered emails he sent to Dr Barker in this period. These seem to start with the email of 16 April 2019 and continue with emails on 14 May 2019, 28 May 2019 (perhaps two on that date, one of which may have been answered), 5 & 20 June 2019.

469. In its response, the respondent says that these points were never put to Dr Barker by the claimant and that she never knew which emails he was referring to.

470. We accept that that is correct – Dr Barker was never asked by the claimant about these emails and any failure to reply.

471. This allegation is of direct discrimination: that is, that Dr Barker "routinely ignored" the claimant's emails and would not have done so if he had been an individual with the same communication difficulties but who was not autistic.

472. As with previous elements of the claimant's direct discrimination claim, this claim is bound to fail in the absence of any indication that Dr Barker behaved any differently to him than she did to anyone else, and in the absence of any suggested that her behaviour on this point was to do with his disability.

Allegation 26

26	November 2017 – Present	Delays in progressing grievances	Ms S Emerson-Dam	Slow progression of investigations. On grievance was raised in November 2017.		Indirect discrimination

473. This is a type 4 claim.

474. It is an indirect discrimination claim with the PCP alleged being "*delaying progressing grievances*".

475. We do not understand what the claimant meant in referring to a grievance in November 2017. This seems to be addressed in p891 of the claimant's submissions but even then we are not clear what particular matter he is thinking of. There were, arguably, two complaints made in November 2017 – one to Mr Fairley (which the claimant said he wanted to go no further, so it cannot be this that he was thinking of) and one to Dr Barker which she

referred back to Dr Fisher. If it is the Dr Barker complaint he was thinking of we cannot see what that has to do with Ms Emerson-Dam.

476. The more substantial problem with this claim is that it depends on the claimant establishing that the respondent has a PCP of delaying progressing grievances. That is, not just that his grievances were delayed – that alone is not enough for an indirect discrimination claim, but that the respondent either did or would have delayed grievances from other people. That is the essence of a PCP. It either was or would have been applied to other people.

477. As with many other of the indirect discrimination claims, this suffers from the fundamental problem that the claimant has given us no evidence of how anyone else either was or would be treated in respect of their grievance. We know that the nurse's grievance was dealt with over a period of several months, with any delay there being attributable at least partly to the claimant being off sick. However, this is far from the 12-24 months that the claimant talks of in relation to his grievances. In the summary in relation to this allegation, the claimant speaks of why he felt he eventually had to abandon the grievance process, but there is nothing in that to suggest how grievances from others either had been or would be treated. This allegation cannot succeed as the claimant has not established the PCP necessary for the indirect discrimination claim.

478. In his written submissions the claimant talks of a "*practice of expecting an employee to attend for an in-person interview*". This is the first time that such a PCP has been identified and, in the absence of any application by the claimant to amend his claim (which would be likely to be refused at this stage of the proceedings) we cannot consider it.

E. CONCLUSION

479. The comments of Dr Barker during the 3 May 2018 meeting amounted to direct disability discrimination. None of the other allegations made by the claimant are acts of disability discrimination.

480. The events of the 3 May 2018 meeting were subject to early conciliation from 20 June to 3 August 2018, with the claim following on 6 September 2018. Under s140B(3) the period of early conciliation does not count towards the standard three month time limit. As such, what would have been the expiry of the standard time limit on 2 August 2018 is extended by the just over six weeks taken up by early conciliation, and a claim brought on 6 September 2018 is comfortably within time.

481. In her oral closing submissions Ms Misra said that the 3 May 2018 incident was (just) out of time. We think that must be based on the idea of the one month extension of time permitted by s140B(4), but if so, it omits the decision

in Luton Borough Council v Haque [2018] ICR 1388 that the extensions provided by s140B(3) and (4) are to be applied sequentially, not alternatively.

482. Since those are the only acts of disability discrimination, and they are brought within the necessary time limit, no further questions of time limits arise. However, we record that if we had found other matters to be acts of disability discrimination we would have considered ourselves bound to apply HHJ Clark's statement in Rathakrishnan that "*if* [a] *claimant advances no case to support an extension of time, plainly he is not entitled to one*" and we would not have extended time on a just and equitable basis.

F. NEXT STEPS

483. At the end of this hearing the tribunal listed 2-3 November 2023 as a provisional remedy hearing and a case management hearing for the stayed claims. A separate order will be issued in respect of preparation for those hearings.

Employment Judge Anstis
28 July 2023

Sent to the parties on: 2 August 2023

For the Tribunals Office

APPENDIX 1

LIST OF ISSUES

INTRODUCTION

By way of ET1s lodged on 6 September 2018 ('Claim 1'), 25 July 2019 ('Claim 2'), 26 July 2019 ('Claim 3') and 29 December 2019 ('Claim 4'), the Claimant brings claims of:

a. Direct disability discrimination contrary to section 13 of the Equality Act 2010 (EA 2010);

b. Indirect disability discrimination contrary to section 19 of the EA 2010;

c. Failure to make reasonable adjustments contrary to section 21 of the EA 2010; and

By way of ET3s and Grounds of Resistance lodged on 30 October 2018, 16 September 2019 and 25 February 2020, the Respondent resists these claims.

JURISDICTION – TIME LIMITS

Claim 1 - 3332631/2018

1. In respect of those of the Claimant's claims under Claim 1, the Claimant appears to be relying on events that took place in October 2017. Having contacted ACAS in June 2018, the Respondent submits that the notification was made out of time, and such the Respondent asserts that those claims under Claim 1 lodged on 6 September 2018 are out of time.

    a. Do any or all of those acts / omissions form part of a course of conduct by the Respondent extending over a period of time such as to render them in time?

    b. If not, then is it just and equitable to extend time in respect of those allegations?

Claims 2 and 3 - 3320811/2019 & 3320812/2019

2. In respect of those of the Claimant's claims under Claims 2 and 3 that arose prior to 26 April 2019, subject to any extension afforded by the Early Conciliation period, the Respondent asserts that those claims are out of time.

    a. Do any or all of those acts / omissions form part of a course of conduct by the Respondent extending over a period of time such as to render them in time?

    b. If not, then is it just and equitable to extend time in respect of those allegations?

3. In relation to the allegations of failure to make reasonable adjustments, the Tribunal will need to identify the date on which the Respondent decided not to make the adjustment.

Claim 4 - 3328251/2019

4. In respect of those of the Claimant's claims under Claim 4 that arose prior to 28 September 2019, subject to any extension afforded by the Early Conciliation period, the Respondent asserts that those claims are out of time.

    a. Do any or all of those acts / omissions form part of a course of conduct by the Respondent extending over a period of time such as to render them in time?

    b. If not, then is it just and equitable to extend time in respect of those allegations?

DISABILITY

The Claimant relies on the condition of autism for the purposes of his disability discrimination claims. The Respondent accepts that the Claimant is disabled in accordance with the section 6 EA 2010 definition and that they had knowledge of the Claimant's disability at the relevant time.

DIRECT DISABILITY DISCRIMINATION – s. 13 EA 2010

5. Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent treated him less favourably because of his disability than it treated or would treat others contrary to the Equality Act 2010, s.13 by the allegations below as detailed in the annexed Table of Allegations

    a. Allegation 1

    b. Allegation 2

    c. Allegation 4

d. Allegation 5

e. Allegation 6

f. Allegation 7

g. Allegation 8

h. Allegation 9

i. Allegation 10

j. Allegation 12

k. Allegation 13

l. Allegation 14

m. Allegation 15

n. Allegation 17

o. Allegation 18

p. Allegation 19

q. Allegation 20

r. Allegation 21

s. Allegation 22

t. Allegation 24

6. What comparators are relied on by the Claimant?

   As confirmed by the Claimant at the PH on 7 July 2020, the Claimant relies on a hypothetical comparator, being a neuro-typical doctor who had complaints raised against them and did not undergo an MHPS investigation**,** and employees with disabilities who have had health needs supported (for example, employees in a wheelchair would not expect disparaging comments).

7. Did the Respondent act in the way alleged because of the Claimant's disability?

8. If the burden of proof has shifted to the Respondent, has the Respondent shown that there was no contravention of Equality Act 2010, s13?

INDIRECT DISABILITY DISCRIMINATION – s.19 EA 2010

9. The Claimant is relying on the following allegations in the annexed Table of Allegations for the purposes of this claim:

    a. Allegation 6

    b. Allegation 9

    c. Allegation 11

    d. Allegation 12

    e. Allegation 16

    f. Allegation 18

    g. Allegation 20

    h. Allegation 26

10. Did the Respondent apply to the Claimant the following provisions, criteria or practices ('PCPs')?

    a. Managers ignoring concerns raised about swearing at departmental meetings (Allegation 6)

    b. Making discriminatory comments; (re: Allegation 9)

    c. Failing to act upon concerns raised about feelings of bullying; (re: Allegation 11)

    d. Being openly critical of some characteristics and features of the Claimant's disability (re: Allegation 16).

    e. Being criticised for failing to perform impossible actions (Allegation 18)

    f. Inflexible management structures; Interpreting policies in a piece-meal fashion. (Allegation 20)

    g. Delaying progressing grievances (Allegation 26)

The Respondent disputes that these can amount to PCPs which were applied to the Claimant and/or others:

11. Has the Claimant shown that:

    a. The Respondent applied, or would apply, those PCPs to persons who do not have the Claimant's disability;`

    b. Those PCPs put, or would put, persons with the same disability as the Claimant at a particular disadvantage when compared to persons who do not share that disability; and

    c. The PCPs put, or would put the Claimant at that disadvantage?

12. In respect of the above PCPs which the Claimant has shown put him and persons with his disability at a particular disadvantage, can the Respondent show it to be a proportionate means of achieving the legitimate aims of:

    a. Ensuring effective and harmonious team-working, in accordance with GMC Good Medical Practice and Trust values, within the department;

    b. Managing concerns raised by employees efficiently and in accordance with the Trust's disciplinary and/or grievance policies as applicable; and

    c. Seeking to accommodate the Claimant by considering reasonable adjustments to formal processes.

FAILURE TO MAKE REASONABLE ADJUSTMENTS – s.21 EA 2010

13. Did the Respondent fail to make reasonable adjustments? The Claimant relies on the following allegations in the annexed Table of Allegations:

    a. Requiring the Claimant to attend department meetings (Allegation 2)

    b. Failing to respond to email communications (Allegation 2)

    c. Failure to appropriately consider a request for a parking space as a reasonable adjustment (Allegation 14)

    d. Head of Medical Staffing Dr W Scheepers failing to follow agreement regarding email communication (Allegation 15)

e. Failure to respond to emails (Allegation 24)

14. Did the Respondent apply the PCP(s)/physical feature(s)/lack of an auxiliary aid detailed in paragraph 10 and/or 13 above?,

15. If so, did that place the Claimant at a substantial disadvantage in relation to persons who are not disabled for the purposes of s20(3) to s20(5)?

16. If so, did the Respondent know or could the Respondent reasonably be expected to know that the Claimant was likely to be placed at the disadvantage in question for the purposes of Schedule 8, para 20(1)(b) of the Equality Act 2010?

17. If so, did the Respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage (or to provide any relevant auxiliary aid). The steps which the Claimant alleges should have been taken are as follows:

    [Claimant to confirm]

18. Would the adjustments relied on by the Claimant have overcome the alleged disadvantage?

REMEDY

19. Is the Claimant entitled to an award for injury to feelings and, if so, at what level?

TABLE OF ALLEGATIONS

No.	Date of allegation	**Allegation summary** (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
1.	22nd February 2018	Failure to engage with the Claimant's clinical concerns	Mr T. Pollard	The Claimant had concerns regarding potential patient data protection issues that he discussed with the ICO who recommended he try and clarify the matter locally. Multiple emails were sent to the care group director (Dr W Fisher)	*Feelings of being side-lined* Impression that my concerns and opinions were being dismissed purely because of the individuals' perception of my behaviour and actions. *Undermining the Claimant's position* *Impression that no one in the Trust took the Claimant's concerns seriously*	Direct discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability
2.	30th November 2017 3rd May 2018 November 2019	Failure to adhere to reasonable adjustments	Mr T Pollard (clinical director); Dr W Fisher (Care Group Director); Dr L Barker (Medical Director); Mr W Scheepers (Medical staffing)	Clinical managers not respecting the decision for the Claimant not to attend departmental management meetings. Ignoring emails despite agreeing that emails would be an appropriate form of	Agreed reasonable adjustments not followed by management team	Direct discrimination Refusal to follow reasonable adjustments

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
	(No exact date of report recorded)			communication. Suggesting to disregard email communication Agreement to not attend Consultant's meeting Including Mr T Pollard (clinical director); Dr W Fisher (Care Group Director); Dr L Barker (Medical Director); Mr W Scheepers (Medical staffing)		
3.	**Allegation 3 Struck Out by EJ Gumbiti-Zimuto at June 2021 Preliminary Hearing**					
4.	21st February 2018 3rd May	The Respondent undermining the Claimant's disability	Mr T Pollard; Dr W Fisher; Dr L Barker	Suggesting these are simple behavioural issues that can be modified easily – rather than recognising certain behaviours are a feature of the disability and		Direct discrimination

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
	2018 1st April 2019			cannot be easily modified. Constant criticism of "poor teamwork" (Mr T Pollard; Dr W Fisher; Dr L Barker) Dr L Barker's MD Comments: **"Make Joe Bloggs a cup of tea in the morning or something. Things that just make you part of the team."** "I would say, that there are a lot of doctors who are on the spectrum." "You could start at Myers Briggs where you rank people as introverted and	Not accepting that differences in working is part of the disability and does not represent poor teamwork or risks to patients. Impression the MD did not recognise the disability.	

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
				move into Asperger's. And a lot of doctors fit in that edge."		
5.	10th November 2017 18-20th March 2018 9th April 2018 17th April 2018	The MD Dr L Barker ignoring requests for support	Dr L Barker	The Claimant raised concerns that he felt bullied and harassed by the CGD Dr W Fisher	Not recognising the stress and anxiety is a feature of ASD. Impression certain individuals in the Trust failed to take the disability seriously	Resulting in stress, anxiety and deterioration of depression
6.	16th October	Managers ignoring concerns raised about	Dr L Barker Dr W Fisher	This had been brought to the attention of the CGD	Autism individuals often have sensitivities to noise, smell etc.	Indirect discrimination – by failing to act upon (what

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
	2015 11th November 2015	swearing at departmental meetings		Dr W Fisher and MD Dr L Barker by the Claimant and not actioned (Both were present at the meeting when the swearing occurred and failed to tackle this at the time or afterwards when a formal complaint was raised)	One of my issues is stress relating to swearing. This has had secondary consequences of being criticised of withdrawing from the department and loosing support from colleagues.	most organisations would find unacceptable) this resulted in stress and anxiety and ultimately in the need for me to remove myself from the meetings on health grounds Comparator: Neuro-typical individuals
7.	3rd May 2018 March 2019 (face to face - no date recorded)	The MD Dr L Barker failing to support the agreed reasonable adjustments	Dr L Barker	The MD Dr L Barker disregarded the reasonable adjustments by saying "I would just get off email"	Impression the MD did not recognise the disability. The senior managers failed to support the reasonable adjustments – thereby undermining the issues	Direct discrimination

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
8.	3rd May 2018	The MD Dr L Barker making inappropriate comments and expecting behaviour that may be incompatible	Dr L Barker	"Make Joe Bloggs a cup of coffee in the morning – things that just make you part of the team" "do that in person one to one; face-to-face, rather than email" "and just watch out not - people up"	Impression the MD did not recognise the disability. Suggesting issue is within myself and can be rectified by simple behavioural changes rather than accepting the behaviour and perceptions are a part of the disability	Direct discrimination
9.	3rd May 2018	The MD Dr L Barker making discriminatory comments during a meeting	Dr L Barker	"Many doctors are on the spectrum"	Impression the MD did not recognise the disability. There is no evidence to support this. Only one in 10 individuals with autism are in employment. The total rate of disabilities in doctors is 6%. This statement demonstrates a lack of understanding of the term ASD –	Direct / Indirect discrimination Comparator: other employees with disabilities who have had health needs supported & do not face disparaging remarks

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
					everyone will have some features of ASD individuals – but only those who have significant day-to-day issues are classed as disabled.	
10.	6th December 2017 31st January 2018 9th February 2018 16th March 2018	The CEO Mr S McManus not assisting the Claimant when he requested support	Mr S McManus	The Claimant sent emails noting his disability and concerns of behaviours of others; initial response acknowledging email but no further help or advice was received. Emails sent on five separate occasions.	*Feelings of isolation, lack of support, anxiety, stress and depression.* *Feelings of being side-lined* *Impression that no one in the Trust took the Claimant's concerns seriously* The CEO ultimately has responsibility for the health and safety of the employees. I have been informed by the employers freedom to speak up guardian that the CEO is usually obliged to meet individuals who raise such concerns. It is unclear why my	Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent may have been influenced by others and decided not to undertake appropriate decisions and actions.

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
	29th June 2018				pleas were ignored	
11.	10th November 2017	The Director of Workforce Planning (Mr D Fairley) failed to act upon the Claimant's email raising concerns about feeling bullied and harassed.	Mr D Fairley	The Claimant's concerns were met with cynicism – "wondered whether there is a degree of suspicion"	This is a trait regularly seen in individuals with autism, then his statement is pejorative and indicates a failure to consider the disability but rather apportion the issue to the Claimant	Indirect discrimination
12.	8th March 2018 23rd March 2018 20th April 2018	The Head of Medical Staffing (Mr W Scheepers) failed to investigate the Claimant's concerns of feeling bulled and harassed	Mr W Scheepers	The Claimant emailed on four separate occasions but no response was received or action undertaken Normal process is to report to line managers. When this is not possible the personnel department should action this.	*Feelings of isolation, lack of support, anxiety, stress and depression.* *Feelings of being persecuted and victimised* *Failure to follow the reasonable adjustments* *Feelings of being side-lined* *Undermining the Claimant's position* *Impression that no one in the Trust took the Claimant's concerns seriously*	Indirect discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability Direct discrimination Comparator: Neuro-typical individuals

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
						The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies
13.	23rd March 2018 20th - 24th April 2018	The Head of Medical Staffing Mr W Scheepers failed to investigate a potential data protection breach of the Claimant's personal data	Mr W Scheepers	The Claimant emailed on two separate occasions but no response was received or action undertaken Raised concerns that my personal data had been shared without my permission breaking data protection law	Potential distribution of confidential personal data	Data protection Law Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
14.	8th March 2018 29th March 2018 29th June 2018	The Head of Medical Staffing Dr W Scheepers failed to consider a request for reasonable adjustments	Mr W Scheepers	A formal request relating to parking was made to the Head of Medical Staffing three times and no response received or action undertaken. The Claimant experiences anxiety when he has struggled to obtain a parking space and has anxiety due to the responsibility he feels not being able to attend his duties on time (particularly as Medical staffing confirmed that lack of parking is not a valid reason not to attend work".	Impression employer did not take disability seriously	Direct discrimination – failure to consider a request for a reasonable adjustment

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
				Even if this was not felt to be a reasonable adjustment, the formal process should have occurred.		
15.	8th March 2018 23rd March 2018 20th April 2018	The Head of Medical Staffing Dr W Scheepers failed to follow reasonable adjustments regarding emails	Mr W Scheepers	Despite the individual being present at the meeting when the reasonable adjustments were confirmed **Mr W Scheepers failed to follow reasonable adjustments regarding email communication as agreed during the OH meeting January 2018**	Impression employer did not recognise disability	Direct discrimination
16.	21st February 2018	The Respondent was openly critical of some characteristics and features of the Claimant's	Dr W Fisher	The CGD Dr W Fisher noted that "I felt and expressed to him that he was becoming quite	Challenging behaviour is a feature of ASD and so the comment by the CGD is unfortunate and perhaps suggests a lack of understanding or acceptance	Indirect discrimination

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
		disability		aggressive" during a meeting. The Occupational Health doctor had explained that "challenging" behaviour may occur during the meeting at the onset.	of the disability. These actions could be considered as potentially dismissing the disability and conflating the issues to a choice of behaviour. The Occupational Health doctor had explained this during the meeting.	
17.	10th November - 1st December 2017 3rd May 2018	Is it discriminatory to locate the problem exclusively within the individual Dr L Barker Dr W Fisher Mr T Pollard	Dr L Barker Dr W Fisher Mr T Pollard	Not considering that the environment may be resulting in the behaviours. So failing to make adjustments are causing the issues at work. Suggesting the behaviours are purely a reflection on the claimant, rather than	Impression employer did not recognise disability	Direct discrimination Comparator: other employees with disabilities who have had health needs supported (for example, employees in a wheelchair would not expect disparaging comments)

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
				considering that it may be a feature of the disability. " It brings your judgement into question." "there are a lot of doctors who are on the spectrum." Challenging behaviour is a feature of ASD - "I felt and expressed to him that he was becoming quite aggressive" Claimant's start time for a meeting "indicated a lack of teamwork". "wondered whether there is a degree of suspicion" - suspicion is a trait regularly seen in individuals with		

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
				autism. This statement is pejorative and indicates a failure to consider the disability but rather apportion the issue to the Claimant		
18.	21st February 2018	Being criticised for failing to perform impossible actions	Dr W Fisher	The CGD Dr W Fisher was openly critical suggesting the Claimant should have discussed an assessment during his appraisal, This was impossible as the appraisal meeting had occurred before the feedback period even started.		Indirect discrimination Indirect discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability Direct discrimination Comparator: Neuro-typical individuals

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
						The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies
19.	21st February 2018	Conflating an agreed contractual variation as evidence of poor behaviour	Dr W Fisher	The CGD Dr W Fisher reported the Claimant's start time for a meeting "indicated a lack of teamwork". This was despite the CGD being part of the process of an agreed contract variation	This was an agreed contract variation. Using this as a "behavioural problem" is undermining	Direct discrimination Comparator: Neuro-typical individuals The agent of the respondent deemed the problem to be with the claimant and decided not to undertake appropriate decisions as mandated in the policies
20.	10th	Inflexible management	Multiple employers	Individuals in authority have	Rules are very important to individuals	direct discrimination

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
	November - 1st December 2017 5th May 2018	structures Interpreting policies in a piece-meal fashion.	representatives – including: Dr L Barker Dr W Fisher Mr T Pollard Mr W Scheepers	difficulty accepting behaviours of ASD individuals and ASD employees may find the management structure particularly disabling Maintaining Professional Standards (CG611) Trust Bullying and Harassment Policy (CG048) Capability Policy - CG225 Individuals selectively picking what parts of a policy the wish to follow - e.g. failing to notify National organisations; failure to	with ASD. Policies are there to clearly identify the rules and responsibilities of staff Failure of others to follow the policies (particularly when divergence to the policy is identified) cam result in stress and anxiety.	Indirect discrimination Comparator: other employees with disabilities who have had health needs supported

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
				follow normal practices in commencing an investigation; failure to offer normal processes of support (failing to identify a designated board member)		
21.	10 - 11th April 2019 13th September 2019	Failure of the individual to engage with normal requests from a subordinate	CD Mr T Pollard	CD is placing me under a level of scrutiny that I feel intolerable (and constitutes harassment) Discussing my individual job plan inappropriately with others Refusal to undertake a job plan review; despite, unilaterally, the employer changing this which has resulted in some detriment. And then criticising because of this. Refusal to answer direct questions relating to clinical concerns	Bullying and harassment Sidelining Reflecting underlying disability	Direct discrimination Comparator: Neuro-typical employees Prejudice that perceived "behaviour" is "wrong" rather than secondary to disability

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
				Refusing to follow agreed reasonable adjustments. Refusing to engage unless I attend departmental meetings.		
22.	16th March 2018 7th November 2018 19th November 2018 21st November 2018	Failure to progress formal disciplinary investigations against myself	MD Dr L Barker Ms S Emerson-Dam Deputy director workforce planning, CD Mr T Pollard Case Managers (Dr C Waldmann; Matron L Buttery; Sr. A Rogers)	Requested formal processes are completed (either abandoned or progression of the formal process). This has been declined	Stress and anxiety. Resulting in additional issues and, ultimately, a "vote of no confidence" from colleagues (May 2019) Occupational Health have expressed concerns. Resulting in deterioration of mental health and additional medications being prescribed by a psychiatrist to alleviate this	Direct discrimination and victimisation Comparator: - This would include neuro-typical doctors who had complaints raised against them and did not undergo a MHPS investigation Indirect disability discrimination Comparator: Neuro-typical individuals (Respondents failure to consider claimants disability on conduct of

No.	Date of allegation	Allegation summary (as set out in the ET1 and clarification of claims)	Individual(s) involved	Explanation of allegation	The detriment allegedly suffered by the Claimant	Particular type of discrimination alleged and relevant section of Equality Act 2010
	20th December 2018 11th March 2019 22nd March 2019					investigation) Also ACAS guidance (unnecessary delays relating to disciplinary processes)
23.	**Allegation 23 not allowed as amendment by Order of EJ Gumbiti-Zimuto dated 20 September 2021**					
24.	Jan – June 2019	Failure to respond to emails	Dr L Barker MD	Routine ignoring of emails	Failure to follow reasonable adjustments	**Direct discrimination**
25.	**Allegation 25 struck out by Order of EJ Gumbiti-Zimuto dated 20 September 2021**					
26.	November 2017 – Present	Delays in progressing grievances	Ms S Emerson-Dam	Slow progression of investigations. On grievance was raised in November 2017.		Indirect discrimination

APPENDIX 2

THE RESPONDENT'S POSITION ON TIME LIMITS

Allegation Number	**Date of Allegation**	**ACAS ECC Dates**	**Claim pleaded**	**Relevant Date of presentation**
1	22 February 2018	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
2	30 November 2017 3 May 2018 November 2019	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
3	**Allegation struck out by EJ Gumbiti-Zimuto at June 2021 PH**			
4	21 February 2018 3 May 2018 1 April 2019	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
5	10 November 2017 18-20 March 2018 9 April 2018 17 April 2018	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
6	16 October 2015 11 November 2015	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
7	3 May 2018 March 2019	2 June 2019 - 1 July 2019	Claim 2	25 July 2019
8	3 May 2018	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
9	3 May 2018	20 June 2018 - 3 August 2018	Claim 1	6 September 2018

10	6 December 2017 31 January 2018 9 February 2018 16 March 2018 29 June 2018	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
11	10 November 2017	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
12	8 March 2018 23 March 2018 20 April 2018	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
13	23 March 2018 20 - 24 April 2018	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
14	8 March 2018 29 March 2018 29 June 2018	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
15	8 March 2018 23 March 2018 20 April 2018	2 June 2019 - 1 July 2019	Claim 2	25 July 2019
16	21 February 2018	20 June 2018 - 3 August 2018	Claim 1	6 September 2018
17	10 November - 1 December 2017 3 May 2018	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
18	21 February 2018	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
19	21 February 2018	N/A	Not pleaded in ET1 Claim Forms	Amendment granted on 17

			Added by virtue of amendment application made on 4 October 2021	November 2021
20	10 November - 1 December 2017 5 May 2018	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
21	10 - 11 April 2019 13 September 2019	N/A	Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021
22	16 March 2018 7 November 2018 19 November 2018 21 November 2018 20 December 2018 11 March 2019 22 March 2019	15 April 2019 - 15 May 2019	Claim 3	26 July 2019
23	**Allegation not allowed by EJ Gumbiti-Zimuto Order dated 20 September 2021**			
24	January to June 2019	2 June 2019 - 1 July 2019	Claim 2	25 July 2019
25	**Allegation struck out by Order of EJ Gumbiti-Zimuto dated 20 September 2021**			
26	November 2017 – Present (date of amendment?)		Not pleaded in ET1 Claim Forms Added by virtue of amendment application made on 4 October 2021	Amendment granted on 17 November 2021

APPENDIX 3

ADJUSTMENTS v1

This document records the measures to be adopted by the tribunal. It may later vary depending on developments during the hearing. This is the first version, applicable from 31 January 2022.

1. THE TRIBUNAL ENVIRONMENT

No necessary changes have yet been identified to the tribunal environment (including the waiting room). Mr Macleod will raise any issues in relation to the environment as they arise, and the tribunal panel will raise any issues with Mr Macleod in the even that he appears uncomfortable.

2. THE MODE OF THE HEARING

The hearing is to be in person. If Covid-19 requires any non-legal member of the tribunal panel to self-isolate (and if they remain fit enough to participate in the hearing) it may be that the hearing can proceed on a hybrid basis, but if any other person essential to the hearing is required to self-isolate the hearing will not continue for the period of their self-isolation.

3. RECORDING

From 1 February 2022 onward the claimant may record the hearing, subject to the following conditions:

a. The recording must be provided to the respondent and the tribunal by 20:00 on the evening of the day it relates to. (*Note: on 7 & 8 November 2022 this requirement was varied to the respondent providing a copy to the tribunal, as the claimant had no internet connection at home.*)

b. The recording must not be used, copied or disclosed by the claimant or respondent for any purpose other than the conduct of the tribunal proceedings. The recording or any transcript of the recording must not be made available or played by the claimant or respondent to anyone other than (i) the claimant, (ii) those conducting the litigation on behalf of the respondent (and any of the respondent's staff who instruct those conducting the litigation) and (iii) the tribunal.

c. All copies of the recording must be deleted by the claimant and the respondent no later than seven days after the day they relate to.

4. WRITTEN SUBMISSIONS

At any point (except when giving evidence) the claimant may opt to address a point arising during the hearing by written submissions rather than orally. Any such written

submission must be sent by email to readingtribunals@justice.gov.uk and to an email address nominated by the respondent.

5. BREAKS

Scheduled breaks: the tribunal will aim to break for ten minutes, on the hour.

Ad hoc breaks: at any point the claimant (or anyone else) may ask for a break. This includes an early end to the tribunal day.

6. ADVANCE NOTICE OF QUESTIONS

By 18:00 on the day before any day when the claimant is expected to give evidence, the respondent must provide to the claimant and the tribunal, in writing, an outline of the areas it expects to question the claimant on the following day. This must include giving the page numbers of any documents in the tribunal bundle that are likely to be under particular scrutiny during that day, as well as an indication (by reference to the claimant's chronology) of what time periods the cross-examination is intended to cover.

ADJUSTMENTS v2 (after 24 June 2022)

7. LISTING ARRANGEMENTS

With effect from the end of the hearing on 24 June 2022, all previous adjustments apply but with the following addition: subject to individual exceptions agreed by the claimant, hearings in this case shall be for a maximum of two days at a time, with a three week gap between hearings.

ADJUSTMENTS v3 (from 7 November 2022)

8. CASE MANAGEMENT

Where possible, matters of case management would be dealt with after the claimant had completed his cross-examination of a witness.