Case Number: 3320629/2021
3300256/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Kelly Ruddock	**v**	(1) Norfolk and Suffolk NHS Foundation Trust; (2) Tracey Holland; (3) Mark Pattison; (4) Diana Keyzor; (5) Janet Turpin; and (6) Amy Eagle

Heard at: Bury St Edmunds **On:** 20 – 28 February 2023
17 May 2023 (no parties in attendance)

Before: Employment Judge M Ord

Members: Ms S Williams and Mr A Hayes

Appearances
For the Claimant: In person
For the Respondent: Mr S Brittenden, Counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The Claimant was the victim of unlawful discrimination on the protected characteristic of disability as follows:

    1.1 The Respondent failed to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010 -

    they applied a PCP that administrative staff carrying out the work which the Claimant did had to work within a Ward based, or predominantly Ward based, setting;

    1.2 that put persons who shared the Claimant's protected characteristics at a substantial disadvantage;

1.3 the Claimant suffered that disadvantage as she was unable to work in a Ward based, or predominantly Ward based, setting; and

1.4 the reasonable adjustments which the Respondent should have made were either to allow the Claimant to carry on with her work as she had done previously working from an office separate from the Ward, or alternatively to allocate her the Band 4 role in Crisis Pathway for which she was interviewed and for which she met the required criteria.

2. The Claimant was unfairly dismissed.

3. The remainder of the Claimant's complaints are not well founded and are dismissed.

4. A Hearing to determine the appropriate Remedy in this case will be fixed in due course.

REASONS

Background

1. The Claimant was employed by the Respondent as a Band 4 Senior Clinical Support Administrator ("Medical Secretary") from 28 July 2017 until 26 September 2021. Her employment ended by way of resignation which the Claimant says was a dismissal under s.95(1)(c) of the Employment Rights Act 1996 ("ERA").

2. The Claimant presented two claims to the Employment Tribunal which were heard together.

3. In respect of the first claim (3320629/2021) the Claimant engaged in Early Conciliation as follows:

3.1 against the First Respondent from 28 August 2021;

3.2 against the Second Respondent from 6 September 2021; and

3.3 against the Third Respondent from 6 September 2021.

4. She received three Early Conciliation Certificates, all issued on 13 September 2021.

5. The Claimant then presented her first claim on 18 September 2021, claiming to have been the victim of discrimination relying on the protected characteristic of disability.

6. In relation to the second claim (3300256/2022) the Claimant engaged in Early Conciliation against the First, Fourth, Fifth and Sixth Respondents from 21 November 2021 and received Early Conciliation Certificates on 1 January 2022 in relation to all of those Respondents.

7. The Claimant then presented her claim form to the Tribunal on 16 January 2022 complaining of unfair dismissal and disability discrimination.

8. All the claims are denied, but the Respondent has accepted that at all material times the Claimant was a disabled person within the meaning of s.6 of the Equality Act 2010 ("EqA") by virtue of:

    8.1 Central Sensitisation (spinal injury following a motor car accident);

    8.2 Systemic Lupus Erythema ("SLE");

    8.3 Fibromyalgia;

    8.4 Post Traumatic Stress Disorder ("PTSD"); and

    8.5 Stress / depression.

9. An Order was made that the claims should be heard together and that at a Case Management Hearing on 15 September 2022 the issues for determination were agreed as set out below.

10. The fundamental issue which underpins this entire dispute relates to an Administration Review which involved, in the Claimant's case, a change to her role which required her to be "Ward based" or "predominantly ward based" and the alleged failure by the Respondents to make reasonable adjustments and / or the failure to offer her alternative employment in Crisis Pathway.

The Issues

11. The agreed issues for determination were as follows:

1. <u>Section 15 Equality Act 2010</u>

    1.1 Unfavourable treatment arising from disability:

        1.1.1 Was the Claimant subjected to unfavourable treatment when she was not offered alternative employment within the Administration Review, namely a Band 4 Crisis Pathway role?

        1.1.2 When Mark Pattison allegedly commented that a transfer to a non-Ward based role was not considered because the Claimant had *"overstated"* her disabilities;

1.1.3 By placing the Claimant into a Ward based role without adjustments;

1.2 Was any such treatment found to have occurred because of something arising in consequence of one or more of the Claimant's disabilities?

1.3 If the Claimant was subject to unfavourable treatment, was it a proportionate means of achieving a legitimate aim? The First Respondent states that its legitimate aim was,

> *"To create an administrative team that could work coherently and flexibly across acute services, whilst maintaining a high level of support, therefore facilitating* [the First Respondent] *fulfilling its primary obligations to service users."*

1.4 It was accepted by the Respondents that the First, Second and Third Respondents (those relevant to this head of claim) had at least constructive knowledge of the Claimant's disabilities from (at the latest) the First Consultation Meeting with the Claimant which took place on or about 1 July 2021.

We note that the Third Respondent accepted in evidence that she knew that the Claimant would be placed at a disadvantage if she was required to work on the Ward.

2. Direct Discrimination – s.13 EqA 2010

2.1 Was the Claimant subject to less favourable treatment because of disability? The Claimant relies on a hypothetical comparator in not materially different circumstances who is not disabled and complains of the treatment set out in relation to the s.15 claim.

3. Failure to make reasonable adjustments - §.20 & 21 EqA 2010

3.1 Did the First Respondent apply the following provisions, criterion or practices or any of them,

3.1.1 the requirement for administrative staff to work within a Ward based setting (the parties disagree as to the frequency of Ward based work); and

3.1.2 a requirement that all staff working on the Ward must undertake a Prevention and Management of Aggression ("PMA") course.

4. If so, did either of those PCPs put disabled people at a substantial disadvantage in comparison with those who are not disabled?

5. Did the First Respondent fail to take such steps as it was reasonable to take to avoid the disadvantage? In particular,

5.1 arrange a meeting to discuss the Claimant's role and her disabilities;

5.2 arrange an Occupational Health Review without delay;

5.3 accede to the Claimant's request to be allocated suitable alternative employment in a Band 4 Crisis Pathway role in circumstances where the First Respondent avers that the Trades Unions had agreed that this was subject to a competitive interview; and

5.4 guaranteeing that the Claimant would never have to work on the Ward.

6. It is conceded that the First, Second and Third Respondents (the relevant Respondents for this head of claim) could reasonably be expected to know that the Claimant had a disability and was likely to be placed at a substantial disadvantage if required to work on the Ward at the material time.

7. Unfair Dismissal

7.1 Did the First Respondent commit a repudiatory breach of contract thereby entitling the Claimant to resign on 26 September 2021?

7.2 The Claimant relies upon the implied term of trust and confidence.

7.3 The matters relied on by the Claimant include:

7.3.1 a manager falsifying information that the Claimant had given permission to disseminate an Occupational Health Report;

7.3.2 the Second, Third and Fourth Respondent discussing the investigation into the Claimant's Grievance on several occasions and the Fourth, Fifth and Sixth Respondents discussing that investigation on several occasions. The Claimant says this is contrary to the ACAS Code of Practice Number 1;

7.3.3 the Fifth and Sixth Respondents failing in their duty of care to protect the Claimant from the Second Respondent's threat to remove the Claimant from her Medical Secretary role using the Administrative Review as the vehicle to do so;

7.3.4 the Fourth Respondent misrepresenting the Claimant's Grievance and reporting accusations that the Claimant had not made;

7.3.5 the Fourth Respondent's Grievance Investigation Report recommending that the Claimant be subject to disciplinary action based upon allegations the Claimant had not made;

7.3.6 the First Respondent denying the Claimant access to evidence obtained in the Grievance Investigation;

7.3.7 a delay in producing the outcome of the investigation into the Claimant's Grievance and the provision of different explanations for the delay;

7.3.8 the refusal to provide the Investigation notes;

7.3.9 the delay in producing the Grievance Outcome which the Claimant says was calculated to allow the implementation of the Administrative Review;

7.3.10 the refusal to provide an explanation for the decision;

7.3.11 a failure to provide information about the Claimant's Right to Appeal the decision;

7.3.12 the denial of the Right to Appeal against the Grievance Outcome; and

7.3.13 the failure to offer the Claimant suitable alternative employment in a non-Ward based role.

7.4 Did any or all of the above events occur?

7.5 If they did occur, did they amount to a breach of the implied term of mutual trust and confidence entitling the Claimant to resign?

7.6 Did the Claimant affirm any breach and / or waive it by reason of delay?

7.7 Was there a chance that the Claimant's employment would have terminated in any event (as per Polkey v AE Dayton Services Ltd.)

The Hearing

12. Evidence was heard from the Claimant and the Second, Third, Fourth, Fifth and Sixth Respondents. Reference was made to an extensive Bundle of documents of almost 2,000 pages.

13. Both parties submitted written closing statements to which they added orally.

Findings of Facts

14. Based on the evidence presented to us we have made the following findings of fact.

15. The Claimant began employment with the First Respondent on 28 July 2017 as a Medical Secretary, having previously worked with the First Respondent as an Agency Worker in 2012.

16. The Claimant, along with other Medical Secretaries, worked in offices close to the Consultant or Consultants whose work they were supporting. The unchallenged evidence of the Claimant was that the Medical Secretaries rarely had personal contact with patients or families and most

contact with patients, families and other medical professionals was by telephone.

17. The Claimant has a personal history which includes abuse suffered in childhood. She describes continuing feelings that she cannot defend herself, is considered not worth defending by others and finds it difficult to trust others. She reacts to unexpected touching by, in her words *"freezing"* or *"freaking out"*.

18. Following a motor vehicle accident the Claimant has ongoing back problems and can suffer pain when carrying out certain movements. Her back can spasm leaving her immobile for periods of up to 30 minutes.

19. The Claimant worked at Wedgewood House. The Claimant describes the patients as extremely vulnerable and says many of them are not responsible for their actions due to their mental ill health. All staff wear an alarm as patients can physically attack staff.

20. For those reasons the Claimant avoided, as far as possible, entering the Ward. She felt vulnerable to attack and was concerned for her safety and those of others if she was attacked or unexpectedly touched. If she was attacked the Claimant would be unable to defend herself.

21. The Claimant began work alone and after approximately three months another Medical Secretary ("CB") was recruited to work alongside her.

22. Rather than, as had been initially suggested, working to one Ward each, they shared the work for two Wards (Northgate and Southgate).

23. In May 2018 the Claimant's grandson was diagnosed with Leukaemia. The Claimant took a period of Carer's Leave. The then Office Manager (CR) and a Representative from Human Resources (IC) agreed a flexible working arrangement with the Claimant, allowing her to move her one day off per week as required to support her family.

24. The Claimant agreed to try to avoid Fridays as a day off as this was her work colleague's day off and to keep her Manager informed at all times regarding her non-working day.

25. In early August 2018, the Office Manager changed and AW became the relevant Manager.

26. The Claimant was not present on AW's first day at work as it was the day after a Memorial Service for her brother. The Claimant also suffered an allergic reaction to a wasp sting, consulted her GP and advised CR (erroneously believing that there was a one week hand over between CR and AW) that she could not attend work until the following Tuesday.

27. This information was apparently not passed on to AW, but the Claimant understood that issues arising from this episode were resolved after discussion. AW had considered the Claimant had *"disrespected"* her by virtue of the above events.

28. In February 2019, the Claimant suffered a reaction to some perfume.

29. In April 2019, AW commenced, through Human Resources at the First Respondent, disciplinary action against the Claimant alleging gross misconduct. The charges related to the matters in August 2018 and allegations of bullying a colleague (who later denied ever having accused the Claimant of bullying her).

30. The Claimant presented a Grievance against AW, as stated which was to protect herself and her job.

31. No disciplinary action of any sort proceeded.

32. The Claimant attended a meeting on 30 April 2019 with the Third Respondent and a Human Resources Representative (MH). Although the Claimant believed the meeting was to discuss her Grievance, she says she was required at that meeting to abandon her flexible working agreement and enter a formal agreement with a set day off.

33. In Mr Pattison's email confirming the outcomes of the meeting dated 30 April 2019 at 2.49pm (the heading of the meeting being "Resolution Meeting"), Item 3 sets out this,

> *"There are concerns regarding your Flexible Working Agreement, in that since March 2019* [AW] *has become less supportive of your needs, which is to provide support to your grandson who has Leukaemia. It was agreed at the meeting that you would submit a revised Flexible Working Request which would include,*
>
> *a. an agreed set day each week for you to have as your non-working day; and*
> *b. flexibility to take time off in lieu, Carer's Leave and annual leave at very short notice to support the caring provisions of your grandson."*

34. We find as a fact that the Claimant was, therefore, whilst attending a meeting to discuss the Grievance that she had raised against AW, being required (she says she did not agree, or did not agree freely and we accept that evidence) to alter her agreed Flexible Working Arrangement which was in place to support the needs of her disabled grandson.

35. The Claimant raised a Grievance about this meeting which was investigated along with her Grievance of March 2019. The Investigation began on 12 July 2019, but no outcome was received until 3 December 2020.

36. The Outcome Letter came from the Sixth Respondent. The Grievances were not upheld, although there was an apology for the meeting on 30 April 2019 which it was said left the Claimant *"feeling vulnerable and uncertain"* and three recommendations for future management behaviours including a facilitated discussion between the Claimant, MH and the Third Respondent.

37. The Claimant chose not to Appeal the Grievance Outcome.

38. As part of disclosure for these proceedings, the Claimant found an email from MH to the Head of HR stating,

> *"Given reflection that the approach was probably not what* [the Claimant] *had hoped for"*

and that he,

> *"was happy to apologise to"*

the Claimant.

39. No such apology was ever forthcoming, we have not been taken to any document or meeting at which an apology occurred and the Claimant denied ever receiving such an apology.

40. The Claimant's co-worker (CB) began maternity leave in September 2019. The Respondent did not fund a replacement offering to support the Claimant for either 15 hours per week for six months, or 7.5 hours per week for 12 months. Both the Claimant and CB worked 30 hours per week each. No Agency Staff were recruited resulting in the Claimant having a near doubling of her workload.

41. During the Covid pandemic the Claimant arranged to work from home. Her husband was on the Clinically Extremely Vulnerable ("CEV") list and the Claimant was therefore anxious to avoid contact with others.

42. The Claimant herself was told by her Rheumatologist that she could apply to be added to the CEV list, but the Respondent confirmed to the Claimant that that was not necessary.

43. The Consultants for whom the Claimant worked were supportive of the Claimant's position.

44. Although the Respondent's pleaded case was that the Claimant had requested a permanent work from home arrangement, during the Hearing before us it was accepted that that had never been the case.

45. In early 2021, the then Office Manager (AM) advised the Claimant that some colleagues were agreeing to attend the office one day per week and asked the Claimant to volunteer to do so.

46. AM later required the Claimant to carry out one specific piece of work within the office. The Claimant was not permitted to attend the building out of office hours and therefore agreed to work one Friday morning.

47. The Claimant's unchallenged evidence was that AM told the Consultants, to whom the Claimant worked, that the Claimant was returning to work within the office one day per week. When the Claimant denied this, AM was unavailable so she contacted the Second Respondent. She and the Claimant agreed that a Referral to Occupational Health should be made to obtain advice on whether or not it was appropriate for the Claimant to return to work within the building.

48. On 12 February 2021, the Claimant was sent a finalised copy of the Occupational Health Referral form (she had previously seen the draft) from the Second Respondent.

49. That form, erroneously, indicated that the Claimant had agreed to a copy of the Report being sent to the relevant Manager (the Second Respondent) and the relevant HR Business Partner.

50. We also note that the completed form indicated that the Claimant did not wish to review the Report before such distribution.

51. The Claimant had not given this consent and raised this issue with the Respondent's Information Governance Manager (RG) on 15 February 2021.

52. The Claimant had agreed at all times to the Occupational Health Referral, her complaint only related to the alleged agreement (not given) to the distribution of the Report.

53. The Claimant had a meeting by Teams with RG on 1 March 2021. According to the Claimant, (RG did not give evidence before us) RG was focused on the question of the Referral not the distribution of the Report and that he told the Claimant not to speak to the Second Respondent while his Investigation was ongoing.

54. On 8 March 2021, the Second Respondent attempted to speak to the Claimant who replied that she had been told not to speak to the Second Respondent by Mr Green.

55. The Second Respondent's sworn statement of evidence in paragraphs 26 and 34 continues to conflate the issue of consent to an Occupational Health Report and a consent to its distribution and consent to not having prior sight of it.

56. In fact, the Second Respondent and the Claimant spoke on Teams on 19 March 2020.

57. According to the Second Respondent and her notes made of the discussion, which are in the Bundle before us, the Second Respondent apologised to the Claimant for, *"process confusion"* but referred critically to the Claimant discussing the situation with colleagues saying something the Claimant described as a *"support network"*. The Second Respondent's sworn evidence was that she told the Claimant that they were lucky to be working for the Respondent as (this during the Covid pandemic) the Trust

> *"were not enforcing any return to the workplace if it was unsafe to do so"*

58. The Claimant alleges that the Second Respondent went on to say that it was *"dangerous"* for the Claimant to continue to criticise her as she was leading the Administration Review which would decide who would continue to work at Wedgewood.

59. We do not accept that that allegation was made. The Claimant set out her concerns in writing on 23 April 2021 which set out in detail her complaints regarding this and a subsequent telephone call with the Second Respondent, but no allegation was made regarding a threat to her position.

60. Rather, the Claimant expressed concern that she is

> *"about to be required to apply for my own job in an Administrative Review which is being overseen by* [the Second Respondent]*"*

which the Claimant said,

> *"that adds to the sense of jeopardy as she would make the final decision on whether I have a job in NSFT following the Review".*

61. Thus the Claimant had the concern, but the comment attributed to Ms Holland was not in fact raised by her and we find as a fact was not made.

62. On 1 April 2021, the Second Respondent and the Claimant had a further call when it was agreed that the Claimant would continue to work from home until the Administrative Review was completed. The Second Respondent repeated her apology and acknowledged the Claimant's concerns about the Occupational Health Referral, pointing the Claimant towards RG and the relevant HR Business Partner if she wished further discussion.

63. We note that on 19 March 2021, the Second Respondent had told the Claimant that RG's Investigation had exonerated her. The Claimant had not seen the Outcome of the Investigation.

64. On 23 April 2021, the Claimant contacted the 'Speak Up Guardian' (LK) asking to talk about *"management bullying"*.

65. The Fourth Respondent was appointed as Investigator, the Decision Maker was to be the Sixth Respondent.

66. On 10 June 2021, the Fourth Respondent sent to the Claimant, who was seeing it for the first time, Mr Green's Report which had – for reasons no one has advanced or explained – been sent to the Second Respondent and the HR Business Partner, but not to the Claimant.

67. RG's conclusion was that there had been a data breach but that it was an *"honest error"* because the Claimant's

> *"agreement to return to the office* [for one day in special circumstances] *included her consent to the Assessment".*

68. Thus, we find, continuing to conflate two entirely separate matters – consent to the Referral to Occupational Health, which the Claimant had always given, and consent to the distribution of the Report / not seen the Report first, which she had not given.

69. Nobody has been able to explain why or how the Respondents were continuing in their inability to differentiate the two matters.

70. The Claimant set out her response to the Fourth Respondent on 11 June 2021, emphasising her concerns over the error in the focus of the Investigation, the fact that the person about whom the complaint was made was given the outcome when the Claimant as the complainant was not and that the person about whom the complaint was made reported the Outcome to the Claimant as complainant. Further that RG had not investigated the actual complaint of non-consent to the distribution of the Report.

71. The Claimant also said that this gave the Second Respondent

> *"the opportunity to threaten my position in the Trust".*

72. The Administrative Review Consultation process began on 7 June 2021 and on that day the Claimant and all impacted employees were given a Consultation Pack.

73. The Claimant's role "Senior Ward Administrator" was to be

> "predominantly Ward based"

with a need to

> "assist and support the Ward Manager with any administrative tasks the Ward Administrator is unable to complete themselves"

and would have

> "supervisory responsibilities for the Ward Administrator"

74. The Claimant requested a one to one meeting on 8 June 2021. She was offered a meeting on 1 July 2021.

75. The letter of 7 June 2021 forwarding the Consultation Pack encouraged staff to,

> "book [their] one to one appointment as soon as possible"

and that the Consultation would end on 7 July 2021.

76. It was agreed that the Occupational Health Referral should be made to determine if the Claimant could work on the Wards. This was agreed with the relevant HR Business Partner, however, by 15 July 2021 (after the end of the Consultation Period) the referral had still not been made.

77. On 1 July 2021, the Claimant's one to one was held with the Third Respondent, Service Director. The HR Business Partner and AM were present.

78. The Claimant set out her concerns over *"Ward working".* She had a spinal injury from a car accident and the physical issues would prevent her from any potential approach in the Ward. She said she could not pass a PMA course. She confirmed that prior to this she *"rarely went on the Ward"*.

79. The Claimant also identified her mental health issues which affected her ability to work on the Ward (trauma based from childhood), including if patients seek to touch staff inappropriately (a known problem) as well as not feeling safe on the Ward and struggling to work in small spaces. The office on the Ward was, in her view, small.

80. The Claimant again referred to dealing with her grandson undergoing chemotherapy, her brother's death and that

> *"she has strong feelings around not being able to work in the Ward as she feels she has very little resilience".*

81. Because the Claimant's role was, according to the Consultation document, to be "predominantly Ward based" the Claimant's first preference as expressed during the meeting and in writing was for a new role in the structure, "Senior Crisis Pathway Administrator" placing her current role as second preference (bearing in mind that the current role was predominantly Ward based).

82. Not withstanding the importance of the Occupational Health Referral which was designed to determine the suitability of a Ward based role for the Claimant, the Referral was not made by the Respondent until 16 July 2021.

83. The Office Manager (Diane) stated at this time that there had been no approval for this Referral previously from the Claimant.

84. We fail to understand that. The Claimant had agreed with the HR Business Partner that the Referral should take place and the consent would have been confirmed if an appropriate Referral Form had been sent to the Claimant. The delay is not explained by a lack of consent from the Claimant and given the purpose of the Occupational Health Report (to see what adjustments could be made to enable the claimant to carry out her work as a medical secretary) , it is in the circumstances inexplicable.

85. On 16 July 2021, the Claimant was interviewed for the role of Senior Carers Pathway Administrator.

86. The Respondent has a Redeployment Policy. The Respondent agreed that this Policy applies in the circumstances of the Administrative Review. It was agreed between the First Respondent and staff Representatives on 6 March 2018, it states this,

> "1. Staff who require redeployment whether for reasons of redundancy or ill health should make every effort to secure alternative employment;
>
> 2. Employees will be given prior consideration for any vacancies where they meet the essential criteria for the role;
>
> 3. …
>
> 4. Should there be more than one suitable redeployment candidate to consider for vacant roles then a competitive selection process will need to be undertaken."

87. The Claimant was interviewed for the position. A scoring system was applied and the "appointable level" for the post was 22 points. The Claimant scored 23 points. The Respondent accepted before us that the Claimant met the essential criteria for the post.

88. The Claimant was the only candidate seeking redeployment. As a fact, she required redeployment because the role she had previously undertaken was changing to a Ward based role. She was not, however, appointed to the role, another candidate – not requiring redeployment and seeking the role as promotion – was appointed.

89. According to the Respondent there was an Agreement with the Trades Unions that any "new posts" in the Administrative Review would require

competitive interview, but we have seen no such agreement in writing nor was this, as far as we have seen, explained to staff. Further, we have seen nothing which indicates that any such agreement would override the terms of the Redeployment Policy.

90. We find as a fact that the Respondent failed to follow its Redeployment Policy, that the Policy applied to the Claimant's position who was requiring redeployment because of ill health (her disabilities making Ward based work something she could not consider) and that under the Policy she should have been appointed to that role as she was, as the Respondent accepted, the only redeployment candidate being considered for that new role.

91. The Respondent says that there was an agreement reached with the Trades Unions that any new posts created in the Administrative Review would be subject to competitive interview, but the Respondent has not produced any evidence to support that contention. Further, it is clear that any such "Agreement" would fail to take account of the needs of those with protected characteristics under the Equality Act 2010, in particular disabled persons.

92. Had such an Agreement been in place, then the duty to make reasonable adjustments to it would apply.

93. On 19 July 2021, the Third Respondent conducted the Outcome Meeting with the Claimant. The Claimant was told that she had been allocated her second preference, Band 4 Senior Administrator Northgate Ward.

94. The Claimant confirmed she could not accept this role because it was Ward based although in evidence before us it was suggested on behalf of the respondent that the role would be unchanged, including the location of the claimant's work. We find as a fact that this was not, if it were the case, communicated to the claimant for if it had been she would, we find, have remained in post. Indeed a later advertisement for the post described it as "ward based" so we do not accept the respondent's position in evidence that it was the intention for the post to remain as it was. The Claimant raise the question of the Carers Pathway role being suitable alternative employment and the delay in the Occupational Health Referral which she said should have been part of the decision making process.

95. The Claimant also felt that what she told the Third Respondent in the one to one meeting had not been taken seriously.

96. The Second Respondent replied on 22 July 2021. He said the following,

    96.1 That the Crisis Pathway post was a new post that *"should"* be open to competition; as it was a new post it *"needed"* to be a competitive process and that this had been approved by the Trust Partnership

Meeting with staff (made up of Trade Unions) on two separate occasions who were *"fully on board with the process"*;

96.2 That there was a delay in sending the Occupational Health Referral for which the Second Respondent apologised and that the Sixth Respondent and Human Resources would *"take the learning from this"*; and

96.3 As at during the one to one meeting the Claimant had *"candidly informed"* the Second Respondent that she did *"go on the Wards"* and within her Expression of Interest she indicated that she had been going on the Wards *"over the last four years"*.

97. The Second Respondent said that when placing people within a role they took into consideration Expressions of Interests, skill set and one to one conversations. It was said that the Occupational Health Referral had at that point been made and until it was received *"please continue with your current post"*.

98. The comment regarding *"going on the Ward over the last four years"* is, we find, an implicit suggestion that the Claimant's statement that she could not work on the Ward was an exaggeration or false.

99. The Claimant characterises this as the Second Respondent accusing the Claimant of overstating her inability to work in a Ward based environment. We agree and find as a fact that the Second Respondent did not accept, notwithstanding the Claimant's history, disabilities and comments that the Claimant could not work in a Ward based environment.

100. The Occupational Health Report was received on 29 July 2021. In particular this said that,

> *"…* [the Claimant] *has described a number of reasons why it is likely she would be unable to, or would suffer a significant exacerbation of her symptoms with a short time of being required to work on a Ward or in a Ward based environment…* [and if] *… the purpose of the Occupational Health Report was to propose adjustments… when an individual has quite clearly stated that they would be unable to do so, there is very little that Occupational Health would be able to do to suggest adjustments"*

And

> *"…* [the Claimant] *rationale for not wanting to work on the Ward… is valid based on the conditions she has and the symptoms she describes as experiencing."*

101. The Claimant had chosen not to Appeal the decision not to appoint the Claimant to the Crisis Pathway role as, in her words, by the time she was told of the outcome the other candidate had been appointed. We accept

that evidence and that was the reason why she did not pursue that point further.

102. On 29 July 2021, the Claimant sought an update from the Fourth Respondent regarding the Investigation into her Grievance and formally rejected the Senior Administrator role stating that she

> *"cannot and will not accept the position… as you have offered it".*

She said she was

> *"unable to work in the Wards"*

and that the Respondents had

> *"chosen to disregard my health and welfare, and that of my colleagues on the Wards."*

103. The Claimant referred to being physically ill that day and that she would take sick leave for the following day due to stress headaches.

104. The progress of the Fourth Respondent's Investigation into the Claimant's Grievance was as follows:

104.1	27 May 2021 – Fourth Respondent receives the Claimant's Grievance and was appointed Manager;
104.2	2 June 2021 – Fourth Respondent asked Sixth Respondent to confirm the next steps (to interview the Claimant) and arranged to interview the Claimant on 10 June 2021;
104.3	10 June 2021 – the Claimant was interviewed via Teams;
104.4	11 June 2021 – the Claimant sent the Fourth Respondent the list of specific allegations as requested;
104.5	17 June 2021 – arranged to interview the Second Respondent on 30 June 2021;
104.6	21 June 2021 – arranged to interview RG on 28 June 2021;
104.7	28 June 2021 – interview RG;
104.8	30 June 2021 – interview Second Respondent;
104.9	6 July 2021 – sent "initial thoughts" to Sixth Respondent;
104.10	30 July 2021 – concluded Investigations and finalised "first draft" Report.

105. At this stage the Fourth Respondent was told by the Fifth Respondent not to submit her Report as the Claimant might be raising another Grievance.

106. Matters proceeded as follows:

106.1 17 August 2021 – the Fourth Respondent sought an update from the Fifth Respondent who told the Fourth Respondent to send the Report to the Sixth Respondent *"when she returned from holiday"*;

106.2 31 August 2021 – first draft of Report sent to Sixth Respondent;

106.3 2 September 2021 – after verbal feedback from Sixth Respondent final Report sent to her.

107. The Claimant had asked for updates on 29 July, 13 September and 14 September.

108. On 29 July 2021, the Fourth Respondent told the Claimant that she hoped to send the Report to the Manager and Human Resources by the end of the following day.

109. On 13 September 2021, the Claimant prompted the Fourth Respondent as six weeks had passed and she was unaware of any progress.

110. On 14 September 2021, the Claimant was told by the Fourth Respondent that she had been

> *"asked to hold on to the Report which was completed at the end of July"*

as the Claimant had

> *"raised another complaint"*

and that there was

> *"some discussion I believe as to whether it was appropriate to combine the two complaints into one investigation"*

111. The Fourth Respondent went on to say that,

> *"the Grievance has been completed within sufficient timescales according to Trust Policies"*

112. We have not seen any relevant timescale set out in any Policy.

113. By this stage the Claimant had not seen any Report, nor had she met the relevant Manager, the Sixth Respondent. She asked the Fourth Respondent (copied to the Fifth Respondent) why / who had required that the Report be delayed and questioned whether this amounted to further bullying.

114. Ultimately, the Report was produced and the Claimant is highly critical of the Investigation Report.

115. In her evidence she pointed to the following issues:

115.1 That the Report shows (3.1.1) that the Fourth Respondent had been told clearly about the two part consent for the Occupational Health Report;

115.2 At 3.1.5, the Fourth Respondent discusses the Occupational Health Referral with the Second Respondent but does not query the two stage consent and accepts the Second Respondent's explanation of having a *"honestly held belief"* of consent, despite at 3.1.6 discussing the change of Occupational Health Referral form with the Second Respondent claiming still to use the old form because the new form *"isn't really good enough"*, but in fact the Second Respondent had used the new form in relation to the Claimant;

115.3 The Claimant was unaware of any change in the Occupational Health Referral process prior to receipt of the Investigation Report, sent to her without the Appendices on 15 October 2021;

115.4 In item 3.1.11, that the Second Respondent claimed they had misunderstood the role of the ICO, despite the fact that RG had stated that the Claimant was *"right that the Information Commissioner said it was a data breach and it was wrong"*;

115.5 That in a section headed "Response" under paragraph 3.1.18, the Second Respondent concludes that,

> *"the Trust can request an Occupational Health Consultation if they have concerns about the health and performance of a member of staff: although consent for this is preferred it is not a requirement"*

and

> *"Occupational Health are ultimately responsible for gaining the consent of the employee for both a Consultation and for distribution of the Report"*

when the Claimant had never refused to attend an Occupational Health appointment;

115.6 That RG believed he was being asked to investigate a potential data breach due to lack of permission from the Claimant for the Occupational Health Referral, without any questioning as to how he had reached that conclusion based on the information which the Claimant consistently gave to him;

115.7 In paragraph 3.1.26, RG is reported as denying that the Claimant had raised any issues of bullying with him. The Claimant had not made any accusations of bullying at that point and never made any accusations of bullying to RG;

115.8 In paragraphs 3.1.30 / 31, the Second Respondent refers to a discussion on 1 April 2021 which the Claimant says in fact took place in early February 2021, regarding potential return to work. The Claimant had explained throughout that her husband was on the extremely vulnerable list, she could be placed on it but was told that there was no need for her to be on that list as she could work from home and notwithstanding this, was pressurised to return to work at least some of the time with, in the Investigation Report, the Second Respondent specifically stating that

> *"Everybody bar* [the Claimant] *agreed to a hybrid role, so they would spend a time in the office proportionate to the number of hours they worked"*

and that,

> *"*[the Claimant] *didn't want to do this…"*

115.9 There is implicit criticism in paragraphs 3.1.32 to 3.1.34, that in a timeline the Claimant had not given as much detail about a conversation as she subsequently gave in interview, which the Claimant says is unreasonable;

115.10 In the Summary and Conclusions, it is alleged that

> *"*[the Claimant] *does not appear willing or able to accept apologies"*

whereas the Claimant said that there was a pattern in her Grievance against AW in 2018, her Grievance against MP and MH in 2018 and in her Grievance against HD in 2020, that she sought, and only sought, apologies;

115.11 In 4.1.5 of the Summary and Conclusions it is said that there was

> *"…some evidence that* [the Claimant's] *own behaviours and attitude do not align with Trust values or could constitute bullying or harassment as defined in the Trust's Dignity and Respect Policy. This is particularly evident in a propensity to threaten legal actions against individuals or the Trust with no legal basis for those threats".*

The Claimant denies ever threatening a Grievance, disciplinary action or legal action against anyone. She had taken action to contact appropriate authorities in order to be clear of her understanding of her situation and informed others that she had checked her information to show what she said was accurate. All she had ever asked for, she states, was an apology – an

acknowledgement of wrongdoing – and to be allowed to get on with her work, preferably from home whilst her husband was shielding;

115.12 In the Recommendations / Lessons Learned, the first item which the Fourth Respondent reports, is that

> *"To accuse someone of fraud without any basis of truth could be seen as misconduct, to spread misinformation to other colleagues is a breach of the Dignity and Respect Policy and, being outside the behaviours expected of staff does not align with Trust values; to persist with this by being asked to stop could be in breach of the Disciplinary Policy. Therefore some consideration should be give to whether / what action should be taken regarding* [the Claimant's] *accusations of fraud"*

and in Recommendation 3,

> *"To consider how to support the Claimant* "in her understanding that the continued threats of Grievance, disciplinary or legal action *without any basis* could be seen as bullying or vexatious behaviour" [emphasis in the original]"

115.13 There are no recommendations coming from the points which the Claimant raised as her Grievance, rather advice given to Managers and others subject to misinformation accusations or gossip should be reviewed and what support is offered to Managers who have a Grievance raised against them should be considered.

116. The Claimant was, on 9 September 2021, the subject of an Attendance Support Meeting with the Third Respondent and thereafter a further Attendance Support Discussion Meeting with AM on 10 September 2021. The Claimant was chasing an update of the Investigation Report on 13 and 14 September 2021 and again between 17 and 21 September 2021 whereafter the Claimant was invited on 21 September 2021 to attend a formal Resolution Feedback Meeting in relation to the Grievance which was not to be held until 18 October 2021.

117. The Claimant was seeking other work given the situation as regards her employment within the First Respondent. She was offered a six months temporary position on 22 September 2021 with a request for an immediate start. She spoke to AM that day confirming the intention to resign immediately. Because payroll had already been calculated up to 25 September 2021, the Claimant suggested that her unused but untaken holiday could be used to cover the intervening few days.

118. On 27 September 2021, she received an email from AG suggesting that the Claimant was seeking to receive payment from both the First

Respondent and the new employer at the same time, which was not the case.

119. The Claimant was offered a Resignation Meeting which she declined.

120. On 10 October 2021, the First Respondent advertised what was, in effect, the Claimant's previous role stating that the role *"is Ward based"*.

121. The Claimant's employment ended on 26 September 2021. Subsequently she was forwarded the Grievance Investigation Report on 15 October 2021, without the Appendices. A Grievance Outcome Meeting was held on 18 October 2021. The Claimant was told that she had not received the Appendices because it was considered that it may be detrimental to her mental health.

122. The Outcome Meeting was held over Teams and as part of that meeting the Sixth Respondent claimed that she could not change the Report the Fourth Respondent had written, and said that it was

> *"Not in* [her] *gift to change the Report".*

Notwithstanding the fact that email correspondence exists to show the Fourth Respondent had made changes as requested by the Sixth Respondent.

123. The Respondent's position regarding the suitability of the Senior Administrators role varied between witnesses. Whilst the Respondent's documents, as received by the Claimant during the course of the process and as was apparent from the discussions held with the Claimant, the role was either Ward based or *"predominantly"* Ward based. When it was advertised in October after the Claimant's departure it was described as *"Ward based"*.

124. During the course of his evidence Mr Pattison, the Second Respondent, said that the Claimant's desk would be *"outside of the Ward"* and that documents saying that the role was *"predominantly Ward based"* and that it would be *"located on the Ward"* was described by him as *"part of the Consultation process"*. When he was asked why the Claimant had not simply been told that she could continue to work as she had been, his reply was *"I thought we had"*. The Tribunal finds as a fact that she was not, because if she had been told, none of these issues would have arisen and indeed, the Second Respondent himself said that he was *"struggling to evidence"* where the Claimant was told.

125. Mr Pattison (contrary to the suggestion that there was an agreement with the Trades Unions) said he did not know who had made the decision that the role was to be subject to a competitive interview process.

126. Accordingly, the Claimant was left in the position by 22 September 2021 where:

126.1 Her role, on the basis of everything she had been told, had changed to a Ward based, or *"predominantly"* Ward based, role which she could not fulfil because of her disabilities as confirmed by the Occupational Health Report of 29 July 2021;

126.2 The Respondent did not suggest adjustments to the role to accommodate the Claimant's disabilities, nor had they advised the Claimant that she could carry on as she had previously been working which would have been a perfectly easy and reasonable adjustment, indeed one which the Respondent said in evidence before us they could and would have accommodated (but did not communicate to the Claimant);

126.3 The Claimant had met the essential criteria for the role in Crisis Pathway but was not appointed to it, contrary to the Re-Deployment Policy due to an undocumented and unevidenced agreement apparently made between the First Respondent and the relevant Trades Unions;

126.4 The Claimant had submitted a Grievance in May 2021 which had been investigated and which had not been concluded. When the Claimant chased conclusion of the Grievance she was told that the Fifth Respondent had told the Fourth Respondent to *"hold on"* to the Report in case, or in the belief that, a further complaint was to follow;

126.5 The Claimant had raised a Grievance, the outcome of which suggested that she should be subjected to disciplinary action and alleged she had raised untrue allegations (which she had in fact not raised) with the Grievance failing to differentiate between consent to an Occupational Health Report and consent to a distribution of it;

126.6 Received an invitation to the Grievance Outcome Meeting (letter dated 21 September 2021) which, notwithstanding the delays already suffered, would not be held until 18 October 2021;

126.7 Had been offered a position (essentially her old role but Ward based or predominantly Ward based) which she could not do because of the insistence by the Respondent that the Claimant would have to work, or predominantly work, on the Ward; and

126.8 She had been required to give up an agreed flexible non-working day each week at a meeting which was planned to discuss a Grievance she herself had raised.

127. Against that background the Claimant had been seeking alternative work. She could not afford to simply wait to be dismissed by the Respondent.

128. The Claimant tendered her verbal resignation with immediate effect on 22 September 2021. Because payroll had been made up to 25 September 2021, the Claimant suggested that the Respondent could use her untaken holiday to cover the period 23, 24 and 25 September 2021 to be met with

an allegation that she was seeking to work for a new employer and still be paid by the Respondent which was palpably not the case as the Claimant had tendered her resignation with immediate effect on 22 September 2021.

129. Although there were subsequent events, they post date the Claimant's resignation if they are not relevant to the issues we have to determine and it is against that factual background that the Claimant brings her complaints.

The Law

130. Under s.20(3) of the Equality Act 2010 ("EqA"), where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

131. Under s.15 EqA 2010, a person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of the disability and it cannot be shown that the treatment is a proportionate means of achieving a legitimate aim.

132. Under s.94 of the Employment Rights Act 1996 ("ERA"), each employee has a right not to be unfairly dismissed by their employer.

133. Under s.95(1)(c) ERA 1996, an employee is dismissed if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

134. Under s.98(1) ERA 1996, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason, or if more than one the principal reason, for the dismissal and that it has either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee had.

135. The Tribunal has been referred to a number of Authorities by the Respondent which we summarise as follows:

135.1 Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 6664, where a failure to consult with the Claimant about reasonable adjustments was not of itself a failure to make reasonable adjustments, the question being whether or not a Respondent has complied with their obligations to make the adjustments. Entirely fortuitous and unconsidered compliance is enough.

135.2 Ryder v Leeds City Council UKEAT/0243/11, the carrying out of an assessment as to what reasonable adjustments might be made in respect

of a disabled employee was not of itself capable of amounting to a reasonable adjustment.

135.3 The EHRC Code on Employment which points to relevant factors in assessing the reasonableness of any particular adjustment, in particular:

a. how effective the change would be in avoiding the disadvantage the disabled worker would otherwise experience;
b. the practicability of the step proposed;
c. its cost;
d. the size and resources of the organisation; and
e. the availability of financial support.

135.4 Archibald v Fife Council [2004] ICR 954, where the duty can extend to offering an employee an existing vacancy in a role they are physically able to do without competitive interview so long as this step is a reasonable thing for the employer to do in all the circumstances.

135.5 But that such an adjustment is not reasonable where it is tantamount to appointing an employee to a role for which they do not meet the essential requirements (Wade v Sheffield Hallam University UKEAT/0194/12.

135.6 Hilaire v Luton Borough Council [2022] UKEAT166, where offering an employee an existing vacancy was objectively a step which could have alleviated a disabled person's disadvantage, the surrounding circumstances must be considered by the Tribunal including the impact on those who would have taken part in a process of selection. The making of an adjustment is not a vehicle for giving an advantage over and above removing the particular disadvantage.

135.7 The mere fact of unreasonable treatment does not meet an inference of unlawful discrimination - Zafar v Glasgow City Council [1998] ICR120.

135.8 Chief Constable of Kent v Bowler UKEAT/0214/16, where procedural failings in dealing with grievances and an internal appeal did not entitle an Employment Tribunal to infer direct race discrimination and victimisation. Merely because an explanation for certain treatment is inadequate, unreasonable of unjustified does not by itself mean the treatment is discriminatory.

135.9 R (on the Application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS & Ors. [2010] IRLR 136, where the question of whether a person has been treated less favourably because of a protected characteristic requires a Tribunal to ask, "what was the alleged discriminator's reason for the treatment in question?"

135.10 The EHRC Employment Code confirms that the consequence of disability (para 5.9) include anything which is the result, effect or outcome of a disabled persons disability. We note that the Respondent accepts that the Claimant's inability to work on a Ward arises in consequence of at least one of her disabilities.

135.11 Dunn v Secretary of State for Justice [2019] IRLR 298, states that the Tribunal must determine what caused the relevant treatment, or what was the reason for it. The focus is on the reason in the mind of the Respondent and it is insufficient for a Claimant to argue (Robinson v Department for Work and Pensions [2020] EWCA Civ. 859), that *"But for"* the disability they would not have been put in a situation that led to unfavourable treatment. The focus needs to be on the reasons for the treatment itself.

135.12 Malik v BCCI [1997] IRLR 462, established the implied term of trust and confidence and stated that neither party to an employment contract must without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

135.13 Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19, where the Employment Appeal Tribunal confirmed that a Claimant must have resigned at least partly in response to the breach. The conduct amounting to a repudiatory breach of contract does not have to be the only reason, or even the main reason, for resignation so long as it materially contributed to or influenced the decision to resign.

135.14 Leeds Dental Team Limited v Rose [2014] ICR 94, where – the function of the Tribunal is to look objectively at the employer's conduct as a whole. The question is not whether the employee has subjectively lost confidence in the employer but whether objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence that an employee is entitled to have in their employer.

135.15 Conduct not known about at the time of the resignation cannot amount to a fundamental breach of contract, nor the conduct subsequent to the resignation convert that resignation into constructive dismissal – Forester v Charcon Products Ltd. [1974] IRLR 308, and Gaelic Oil Co. Ltd. v Hamilton [1977] IRLR 27.

135.16 Hadji v St Luke's Plymouth UKEAT0095/12/BA, set out the *"essential principles"* on the Law of Affirmation stating,

"i. the employee must make up [their] mind whether or not to resign soon after the conduct of which they complain and if they do not they may be regarded as having been elected to affirm the contract or as having lost their right to treat themselves as dismissed;

ii. immediate delay of itself, unaccompanied by express or implied affirmation of the contract is not enough to constitute affirmation, but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay;

iii. if the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Tribunal may conclude that there has been affirmation; and

iv. there is no fixed time limit within which the employee must make up their mind, the issue of affirmation is one which subject to those principles the Tribunal must decide on the facts. Affirmation cases are fact sensitive."

Conclusions

136. Applying the facts found to the relevant Law, we have reached the following conclusions and we set these out directly by reference to the List of Issues in this case.

137. The Respondent had accepted that at all material times the Claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010 by virtue of five conditions:

137.1 Central Sensitisation (spinal injury following a motor car accident);

137.2 Systemic Lupus Erythematosus (SLE);

137.3 Fibromyalgia;

137.4 Post Traumatic Stress Disorder (PTSD); and

137.5 Stress / Depression.

Section 15 Equality Act 2010 – Discrimination Arising from Disability

138. The Claimant alleges that she was subject to unfavourable treatment arising from disability when:

138.1 She was not offered alternative employment within the Administration Review, namely a Band 4 Crisis Pathway role;

138.2 When Mark Pattison, the Third Respondent, allegedly, commented that a transfer to a non-Ward based role was not considered because the Claimant had *"over stated"* her disabilities; and

138.3 When the Claimant was placed into a Ward based role without adjustments.

139. The Respondent has accepted that they had knowledge of the Claimant's disabilities at all material times.

140. The Claimant was not offered the Crisis Pathway role. She was subject to a competitive interview (contrary to the Respondent's own Re-Deployment Policy because she was the only person requiring re-deployment due to redundancy or for medical reasons) and that we find could amount to unfavourable treatment.

141. The Reason for the treatment, however, was not because of any disability but because the Respondent had apparently made an agreement with the

relevant Trades Unions that in the Administrative Review any *"new posts"* (and it is not disputed that the Band 4 Crisis Pathway role was a new post) would be subject to competitive interview.

142. This was contrary to the Respondent's own Re-Deployment Policy and was not something which we have seen evidence of during the course of this Hearing, but the agreement (whether actually reached or not) which those responsible believed meant that a competitive interview process had to take place, was the reason why the Claimant was not offered the role. She was not offered the role without interview, nor was she offered the role after interview even though she met the essential criteria, because another person who had applied for the role (not subject to re-deployment and as a promotion) scored more highly in the interview process.

143. That was not because of anything arising in consequence of the Claimant's disability. The reason was because the Respondent had, we are told, reached an agreement with the Trades Unions that any new post would be filled by competitive interview.

144. Accordingly, this claim does not succeed.

145. The second alleged example of unfavourable treatment arising from disability was when Mr Pattison allegedly commented to the Claimant that a transfer to a non-Ward based role was not considered because the Claimant had *"over stated"* her disabilities.

146. It was not put to Mr Pattison that he had made this allegation directly and the closest the Claimant comes to pursuing this particular complaint is by reference to a comment by Mr Pattison that,

> *"…but Kelly you have worked on the Ward for years".*

147. The fact is that the Claimant did occasionally – albeit with careful planning and assistance – go onto the Ward from time to time. It was very rare for her to do so and the misstatement by Mr Pattison was that he over stated the extent to which the Claimant worked on or visited the Ward, rather than a suggestion that he over stated the Claimant's disabilities.

148. In his witness statement (on which he was not challenged) Mr Pattison said that he was advised by Human Resources that it would not have been reasonable to *"slot in"* the Claimant to the role because it was a new role and because one of the other candidates had scored more highly than the Claimant, that other candidate had been offered the role. That was the reason for the treatment and it did not relate to the Claimant's disabilities.

149. The letter dated 22 July 2021 (recording the points in the meeting of 19 July 2021) do not suggest that the comment was made in any way, but recounts that the Claimant had admitted that she had been on the Wards (without any comment as to the frequency of it).

150. There is no evidence that Mr Pattison directly stated that the Claimant had *"over stated"* her disabilities and this particular complaint fails.

151. The third allegation under s.15 EqA 2010 is that the Claimant was placed into a Ward based role without adjustments.

152. The Claimant was offered the role. She was offered it when she was unsuccessful in her application for the Crisis Pathway Role.

153. We have found as a fact that the Claimant was not told (if indeed it was the case) that the role could continue to be undertaken by her in the way she had previously undertaken it. Although the Claimant did not carry out at any time the role as redefined in the Administrative Review (i.e. as a Ward based or predominantly Ward based role) that was what she was offered.

154. The Respondents were aware that the Claimant had substantial disabilities and that these prevented her from carrying out a Ward based or predominantly Ward based role. The Occupational Health Report of 29 July 2021 confirmed that the Claimant was likely to be,

> *"…unable to, or would suffer a significant exacerbation of her symptoms within a short time of being required to work on a Ward or in a Ward based environment".*

155. Accordingly, when the Claimant was told that not only was she unsuccessful in her application for the Crisis Pathway role, but further that she was being offered her *"second choice"* which was the Ward based role without any reference to adjustments to be made, she was subject to unfavourable treatment.

156. The Respondents knew the Claimant could not carry out this role.

157. There is a conflict in the Respondent's evidence around this because they seek to rely on the stated legitimate aim of,

> *"…creating an Administrative Team that could work coherently and flexibly across acute services, whilst maintaining a high level of support, therefore facilitating* (the First Respondent) *fulfilling its primary obligations to service users"*.

158. However, during the course of the evidence before us, the Respondent (whilst accepting that it could not evidence the Claimant ever being told this) said that the Claimant could have been allowed (at one stage going so far as to say, would have been allowed – although this was not communicated to her) to carry on with her role as she had always done it. Accordingly, there was no requirement for the Claimant's work to be Ward

based, or predominantly Ward based, for the Respondent to meet its stated legitimate aim.

159. Accordingly, we conclude that the Claimant was subject to unfavourable treatment because of something arising from her disability (her inability to work on the Ward or in a predominantly Ward based role) when she was given that role without adjustments.

Direct Discrimination

160. The Claimant says that she was subject to direct discrimination, i.e. that she was subject to less favourable treatment because of her disability. She refers to the same three matters as was raised under the Section 15 claim.

161. For the same reasons as we have stated above, the first two complaints (not being offered the Band 4 Crisis Pathway role and Mr Pattison allegedly commenting that she had *"over stated"* her disabilities) fail.

162. The reason for the Claimant not being offered the Band 4 Crisis Pathway role was because she had come second in an interview process to another candidate and the Respondent had apparently reached an agreement that new posts would be subject to competitive interview. Mr Pattison had not suggested that the Claimant had *"over stated"* her disabilities.

163. We do not conclude that the Claimant was offered or placed in the Ward based role without adjustments because of her disability.

164. The hypothetical comparator (in not materially different circumstances who is not disabled) would not have been treated any differently. Other colleagues were offered roles and the description of the Band 4 roles were said to be Ward based or predominantly Ward based.

165. Accordingly, that decision was not related to the Claimant's disability in any way.

166. Mr Pattison had said that he required the roles to be Ward based because some administration functions needed to be carried out in person. Photocopying was a non-Ward requirement (although the Claimant rarely, if ever, did that) due to patient confidentiality and that the Band 4 person (e.g. the Claimant) would be required to do this if a Band 3 person was unavailable.

167. We have concluded that these are very minor matters when taken in comparison to the role of the Medical Secretary as a whole. However, there is no evidence from which we could infer discriminatory reasoning behind Mr Pattison's treatment of the Claimant in this area.

168. In his evidence, Mr Pattison stated that the Claimant was a valued employee and he wanted to retain her in post. It is a sad fact that he did not make this sufficiently clear to the Claimant and certainly did not discuss with her the prospect of continuing in her role as she had always done it. But that lack of proper communication between Mr Pattison and the Claimant was not something which was because of the Claimant's disabilities.

169. Accordingly, while the Claimant was placed in a Ward based role without adjustments (a role she did not ever carry out) this was not an act of direct discrimination because the offer of the role as described related to the role as described in the Administrative Review and the Claimant's disabilities were not relevant to that fact.

Failure to Make Reasonable Adjustments

170. The Claimant relies on two provisions, criteria or practices of the Respondent:

    170.1 the requirement for administrative staff to work within a Ward based setting; and

    170.2 a requirement that all staff working on the Ward must undertake a 'Prevention and Management of Aggression' course.

171. We deal with the second of those quite simply. The Claimant had not undertaken such a course and was not being required to do so.

172. The requirement for administrative staff to work within a Ward based setting was set out in the job description within the Administrative Review and was never resiled from. The Respondent operated to that provision, criteria or practice as part of the Administrative Review and for the future.

173. The Respondent has accepted that working in a Ward based environment would put the Claimant at a substantial disadvantage in comparison with those who are not disabled. We conclude that those who share the Claimant's disabilities would be similarly and equally disadvantaged for the same reasons and circumstances as disadvantaged the claimant.

174. Although the Claimant has identified four steps which she believes it was reasonable for the Respondent to take to avoid the disadvantage, we remind ourselves that it is not for the Claimant to identify the adjustments that could be made, although it is helpful for a Claimant to do so. The four steps which the Claimant identified are as follows:

    174.1 Arranging a meeting to discuss her role and disabilities;

    174.2 Arranging an Occupational Health Review without delay;

174.3 Agree to her request to be allocated suitable alternative employment in a Band 4 Crisis Pathway role; and

174.4 A guarantee that she would never have to work on the Ward.

175. The most obvious adjustment which the Respondents could have made, however, was to allow the Claimant to continue to carry out her role as she had done previously. Indeed, during the course of the Hearing the Respondent's witnesses stated that this would be the case. But as Mr Pattison honestly stated, he could not *"evidence"* that the Claimant had been told this. We have found as a fact that she was not.

176. This is deeply regrettable in the circumstances of this case because had the Claimant been told this, none of these problems would have arisen, this Tribunal case would almost certainly not have been necessary (or if it had the issues would have been much more limited) and the Claimant would have been able to continue (and perhaps would continue to this day) to be employed in the role which she had previously undertaken and clearly enjoyed.

177. This would have been established had there been proper communication and in particular, a proper discussion about the Claimant's role, her disabilities and how the role could be adjusted to address the disadvantages which she clearly suffered as a result of her disabilities.

178. Clearly, obtaining an Occupational Health Report, prior to decisions being made in the Administrative Review so that those making the decisions could be properly and fully informed about the Claimant's abilities, disabilities and whether any adjustments could be made to accommodate them, would have been a very sensible approach and would have been entirely appropriate. The delay in obtaining the Occupational Health Report is deeply regrettable and for the reasons we have set out in our findings of fact, inexplicable.

179. The Claimant met the essential criteria (and achieved a mark in interview which rendered her *"appointable"*) for the Band 4 Crisis Pathway role.

180. If the Respondent had an agreement with the Trades Unions that new posts would be the subject for competitive interview, that did not, on the face of it, supersede the Respondent's own Re-Deployment Policy. However, a reasonable adjustment to that agreement would have been to allow *"slotting in"* to avoid redundancy or dismissal on medical grounds.

181. Although the Claimant contended for an adjustment that would *"guarantee"* that she would <u>never</u> have to work on the Ward, that had not been the situation previously. That was clearly the Claimant's reaction to being told that she would have to work on, or predominantly on, the Ward or in a Ward based role.

182. Accordingly, the Respondent failed to make reasonable adjustments when they applied a PCP that administrative staff carrying out the work which the Claimant did, had to work within a Ward based, or predominantly Ward based, setting.

183. That put disabled persons at a substantial disadvantage and the Claimant suffered that disadvantage.

184. The reasonable adjustment would have been to allow the Claimant to carry on with her work as she had done previously, working from an office separate from the Ward. The fact that the Respondent during evidence before us said that this would have been the intention (but that that was never communicated to the Claimant) not only points to the fact that this would have been a reasonable adjustment, but demonstrates that the failure to properly communicate with the Claimant about this has led to these proceedings, the loss of the Claimant's employment and the loss to the First Respondent of someone who is described to us as a valued employee.

185. Further, another reasonable adjustment would have been to allocate the Band 4 role in Crisis Pathway to the Claimant. She was the only candidate for that post who was subject to potential re-deployment or for redundancy on medical grounds. No agreement apparently reached with the Trades Unions would supersede the terms of the Trust's Policy on re-deployment. The agreement was, as far as we have been shown, never communicated to the employees at large and certainly not to the Claimant. In the absence of any proper evidence about this agreement, we struggle to find that it existed but assuming that it did, it was subject to the obligations in Sections 20 and 21 of the Equality Act 2010 and the reasonable adjustment to that would have been not to apply the requirement for competitive interview in circumstances where the Re-Deployment Policy was in place.

186. Accordingly, the Respondents failed to make reasonable adjustments when they did not allow the Claimant to continue in her role as she had previously carried it out (notwithstanding their evidence that this would have been permitted) and when they failed to allocate the Claimant the Band 4 Crisis Pathway role.

Unfair Dismissal

187. The Claimant has identified 13 events which she says amounted to a breach of the implied term of mutual trust and confidence entitling her to resign. We deal with those in turn:

(1) *A Manager falsifying information that the Claimant had given permission to disseminate an Occupational Health Report*.

There is no doubt that a draft Occupational Health form was completed which erroneously stated that the Claimant had agreed to the dissemination of the Report to the employer (and had agreed to do so without first seeing the Report herself).

This form was completed by the Second Respondent Ms Holland.

That part of form is for completion by an Occupational Health Practitioner, not the employer or employee.

The Claimant identified this error immediately. There had been no forging of her signature as she suggested in the Grievance Feedback meeting, but rather there was an indication that she had given consent which she had not.

When the matter was brought to the attention of the Second Respondent, she apologised for the error (which she described as a misunderstanding) and her apology was repeated on another call approximately two weeks later. These events took place on 19 March and 2 April 2021.

We conclude that this was a genuine error by the Second Respondent, it was not a deliberate attempt to create a circumstance where an employee's consent was presumed or communicated incorrectly and we recognise the apologies from the Second Respondent as being demonstrative of someone who had made an error and no more.

The event in question occurred on 15 February 2021, seven months and eleven days before the Claimant resigned, but we do not find that the incident could reasonably be taken to contribute to a loss of trust and confidence in her employer by the Claimant. It was a simple, genuine error which whilst the Claimant has made much of was no more than that.

(2) *The Claimant alleged that the Second, Third and Fourth Respondents discussed on several occasions the investigation into the Claimant's Grievance, as did the Fourth, Fifth and Sixth Respondents.*

There was no evidence to support this allegation. The Second Respondent was not involved in the Grievance and the Fourth Respondent as Investigator would of course be required to contact both the Fifth and Sixth Respondent as part of her activities. The Sixth Respondent was the Grievance Officer and the Fifth Respondent was someone from whom the Second Respondent would take advice as a representative of Human Resources.

In any event, the Claimant has not suggested that she knew about this alleged collusion at the time of her resignation and nor was she aware of the nature of any suggested amendments to the Investigation Report made by the Sixth Respondent. These matters came to her attention or her concerns arose, after she had resigned so that they cannot have contributed towards her decision to resign.

(3) *The Claimant alleges that the Fifth and Sixth Respondents failed to protect the Claimant from the Second Respondent's threat to remove her*

from her Medical Secretary role using the Administrative Review as the vehicle to do so.

This allegation relates to meetings on 19 March and 1 April 2021.

The Second Respondent's account of the meeting on 19 March 2021 is corroborated by two contemporaneous documents. The first is her email at 3.03 pm on 19 March 2021 to Richard Green and Lisa O'Cain stating that she had had an opportunity to speak to the Claimant, apologise for the misunderstanding (in relation to the consent for the dissemination of the Occupational Health Report) but the Claimant did not feel this had been investigated seriously enough or acknowledged, even though the Claimant confirmed that she was not seeking action to be taken against Ms Holland.

Ms Holland stated that she understood the Claimant had suggested she had been acting fraudulently, which she said had caused her upset and she asked the Claimant not to discuss this, although the Claimant said she needed support and would not refrain from discussing the matter as she felt it had occurred.

Further, the contemporaneous note prepared by Ms Holland supports this version of the conversation.

The Claimant's own record of this conversation has varied in that there was no complaint that the Second Respondent had made a threat about using the Administrative Review to remove her when she raised her Grievance (by contrast claiming that the Second Respondent had threatened her with an allegation of gross misconduct); the list of issues identifies a direct threat to *"remove the Claimant from her job using the Administrative Review as the vehicle to do so"* but in her witness statement said that the Second Respondent claimed it was dangerous to criticise her as she was the Lead on the Administration Review which would decide who continued to work at Wedgewood.

The Respondent in submissions rightly points out that if the Claimant had been told this and had concluded that this was a threat, she would surely have raised this as part of her Grievance but she did not do so.

We cannot conclude that the Second Respondent made a threat to remove the Claimant from her post using the Administrative Review as the vehicle to do so. Therefore the Claimant has not satisfied us that this threat took place so that the Fifth and Sixth Respondents did not have any *"duty of care"* to the Claimant to protect her from a threat which we have found was not made.

(4) *The allegation is that the Fourth Respondent misrepresented the Claimant's Grievance (regarding the Occupational Health Report) and reported accusations that the Claimant had not made.*

It is correct that the Grievance Investigation and Report did not address the issue which the Claimant raised.

The Claimant raised a complaint about the alleged giving of consent to the dissemination of the Occupational Health Report. Throughout the Grievance the Fourth Respondent (and the Data Protection Officer with whom the Claimant had had contact and who was interviewed as part of the Grievance) failed to observe the obvious and clear difference between giving consent to being examined by an Occupational Health Practitioner and giving consent to any Report thereafter made to be sent to the Claimant's employer at all and / or without the Claimant first having sight of it.

These matters were conflated over and over again despite the Claimant pointing out the error.

The conflation or the failure to distinguish between those two separate things – consent to an examination and consent to the dissemination of a Report – is bluntly inexplicable.

Whilst the completion of the form in that way was an error, it was that error about which the Claimant was complaining and the focus of the Grievance Investigation was towards whether or not the Claimant had consented to a Referral to Occupational Health.

This clearly weighed heavily in the Claimant's mind and we accept that whilst the genuine error made by the Second Respondent could not reasonably contribute to a loss of trust and confidence, the abject failure by the Fourth Respondent (and the Data Protection Officer) to see the clear and obvious difference between consent to a Referral and consent to a Report being sent to the employer without the Claimant seeing it first, caused the Claimant substantial frustration and anger which could and we conclude did contribute to a loss of trust and confidence in her employer.

(5) *The Claimant complains that the Fourth Respondent's Grievance Investigation Report recommending that the Claimant be subject to disciplinary action based on allegations the Claimant had not made, also contributed to the loss of trust and confidence.*

However, the Claimant did not see the Report until 15 October 2021 and had resigned almost a month previously. She did not, therefore, resign as a result of this matter nor could it have contributed to her loss of trust and confidence in her employer.

(6) & (8) (6) *The Claimant complains that the First Respondent denied her access to evidence obtained in the Grievance Investigation and further, (allegation (8)) that the First Respondent refused to provide the Investigation Notes prepared as part of the Grievance.*

It is accepted by the Respondent that the Claimant was sent the Investigation Report but not the evidence obtained in the Grievance Investigation or the Interview Notes. These were appendices to the Report and contained supporting evidence in Interview Notes. The Investigation Report summarised the evidence.

This matter, however, post dated the Claimant's resignation. As the Respondent pointed out in submissions, the Claimant could not legitimately complain about an Investigation Report being provided without the Annexes until she had the Report itself and would not have known that the Report would be provided in that way until she received it. She received it on 15 October 2021, substantially after her resignation and therefore these matters could not have contributed to her decision to resign.

(7) (9) These two allegations can be properly considered together.

That there was a delay in producing the outcome of the Investigation into the Claimant's Grievance with different explanations being provided for the delay and (9) a delay in producing the Grievance Outcome which was, the Claimant alleged, calculated to allow the implementation of the Administrative Review.

There was substantial and, we conclude, unreasonable and inexplicable delay in producing the Grievance Investigation and Outcome.

The Fourth Respondent was appointed as Grievance Manager in May 2021, the Claimant was interviewed in June 2021 and the following day sent to the Fourth Respondent the list of specific allegations as requested. Further interviews took place on 28 June and 30 June 2021, following which initial thoughts were sent by the Fourth Respondent to the Sixth Respondent. The investigations were concluded and a first draft of the Report was complete on 30 July 2021.

However, the Fourth Respondent was told by the Fifth Respondent not to submit the Report as the Claimant might be raising another Grievance. Thereafter on 17 August 2021, the Fourth Respondent asked the Fifth Respondent for an update and was told to send the Report to the Sixth Respondent *"when she returned from holiday"*.

This was done on 31 August 2021.

On 2 September 2021, the Final Report was sent to the Sixth Respondent after some verbal feedback.

The Claimant had been chasing this matter. On 29 July 2021 she asked for progress and was told that it was hoped that the Report would be sent to the Manager by the end of the following day. On 13 September 2021 there was a further prompt and the Fourth Respondent said she had been

> *"asked to hold on to the Report which was completed at the end of July"*

as the Claimant had,

> *"raised another complaint"*

and there was,

> *"some discussion I believe as to whether it was appropriate to combine the two complaints into one investigation"*

and that

> *"the grievance has been completed within sufficient time scales according to Trust Policies".*

There was no legitimate reason why the Report should be *"held on to"* on the basis of another complaint. No such further complaint had been made and even if it had been, there was no reason why this should hold up the publication of a Report into a Grievance which had been concluded. The *"Trust Policies"* which identified that a timescale of May through to September for the Investigation and publication of a Grievance Report was a *"sufficient timescale"* particularly when the Report had been finalised on 2 September 2021, but was not sent to the Claimant until 18 October 2021.

We accept that this delay and the excuses provided for it would contribute to the Claimant's loss of trust and confidence in her employer.

The Respondent knew that the Administrative Review was taking place. The Claimant was concerned that matters should be resolved before decisions were taken (particularly to her detriment) at the conclusion of the Administrative Review, but the Respondent did not act promptly as they should have done.

The reasons given for delay were in part untrue. The Claimant had not made a second complaint and the reason for holding the Report back was said to be in case she did so. That would apply, we conclude, to any Grievance. Any aggrieved employee might have another reason to raise another Grievance, but that should not prevent (unless the two were inextricably linked) the completion of the Investigation and publication of the Report into the first Grievance.

The allegation that the Respondent "refused" to provide the investigation notes is factually correct. The respondent's evidence was that this was a conscious decision taken to protect the Claimant's mental health and well-being , but the basis on which that decision was taken, by whom, when and with matters being taken into account was not explained in evidence and nor was it put to the claimant at the relevant time. It was not, as far as we have been told, a standard practice or in line with any stated policy or procedure. That part of the complaint is upheld and contributed to the claimant's loss of trust and confidence in the Respondent.

Allegations 10, 11 and 12 can be properly considered together – they are:

(10) *The refusal to provide an explanation for the Grievance outcome;*
(11) *A failure to provide information about the Claimant's Right of Appeal a decision; and*
(12) *The denial of the Right of Appeal against the Grievance Outcome.*

There was no formal Grievance Outcome letter and the Claimant was not sent details of how to appeal, although she was told in the meeting of 18 October 2021 that she had a Right of Appeal.

However, the Claimant had resigned before any of these events. She resigned in September 2021. The Grievance Feedback meeting was on 18 October 2021. The Grievance Outcome letter would have followed that meeting, as would the written notification of a Right of Appeal. They cannot therefore be considered as having contributed to the Claimant's loss of trust and confidence in her employer.

(13) *The failure to offer the Claimant suitable alternative employment in a non-Ward based role.*

We have already found this was a failure to make reasonable adjustments. The Respondent's failure to put the Claimant into this role (having failed to make adjustments to her existing role, having required her to interview for the role contrary to the Re-Deployment Policy and based upon an unpublished and on the face of it, potentially discriminatory given that no adjustments were made to it – was a serious breach of the implied term of trust and confidence between employer and employee.

The Claimant was placed in an impossible position. She was told that her existing role would be changed to require her to be Ward based, or predominantly Ward based. Subsequent evidence of this would not necessarily have been the case and it was never communicated to the Claimant. She therefore applied as a first preference for the Crisis Pathway role. She was the only person who applied for it that required re-deployment and the Re-Deployment Policy would prevail over any agreement (at best informal and certainly not to override the published Trust Policies) that competitive interviewing was required. The Claimant met the essential criteria. The role would have been one she could carry out and would have alleviated her concerns about being Ward based, or predominantly Ward based.

The Claimant did not in her email which followed her resignation (23 September 2021) explain her reasons for resignation. She simply advised the Respondent that she had found another job and was asking to make arrangements as she had been invited to start the following Monday.

The question we have to consider is why the Claimant was looking for that alternative work and the answer is simple. She could not carry out her previous role because the Respondent insisted that it was Ward based, or predominantly Ward based and the Occupational Health Report made it perfectly clear that she could not undertake that work. The Respondent had failed to make the obvious reasonable adjustment to allow her to continue to carry out the work as she had done previously, or – if they had reached a conclusion that that could be done – did not communicate it to the Claimant at all. Further, had failed to provide her with the obvious alternative role and had acted contrary to their own Re-Deployment Policy by preferring a candidate who (whilst they performed better at interview) was not seeking redeployment and indeed was seeking a promotion.

The Claimant was therefore told that she would be given her *"second choice"* in the Administrative Review – her old job but Ward based or predominantly Ward based and this, as the Respondent well knew, she could not fulfil.

That was why the Claimant was seeking alternative work and that was why once it was obtained, she resigned.

We do not accept that the Claimant delayed too long in resigning. We consider that the combination of a failure to make adjustments to the Medical Secretary role as redefined in the Administrative Review, together with the failure to appoint the Claimant to the Crisis Pathway role, was of itself a fundamental breach of the Claimant's Contract of Employment and destroyed trust and confidence between the employer and employee. The Claimant resigned in the face of that breach. The earlier matters (misrepresentation of the earlier Grievance concerning the Occupational Health Report, the delay in producing the outcome of the Investigation into her subsequent Grievance and the provision of different explanations for the delay) were contributing factors, but the failure to make reasonable adjustments to the Medical Secretary role when coupled with the failure to appoint the Claimant to the Crisis Pathway role, were sufficient of themselves to justify the Claimant's resignation and she resigned in the face of those latest breaches of that implied term.

Summary

188. Accordingly, the Claimant's complaint that she was the victim of unlawful discrimination when the Respondent failed to make reasonable adjustments, contrary to Sections 20 and 21 of the Equality Act 2010 as set out above is well founded and the Claimant was unfairly dismissed.

189. The remaining complaints which the Claimant brings are not well founded and are dismissed.

190. A telephone Case Management Hearing will be fixed to give directions as regards the issue of Remedy.

10 August 2023

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Employment Judge M Ord

Sent to the parties on: 30/8/2023

For the Tribunal Office: N Gotecha