EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104445/2022

Held In-Person in Inverness on 20, 21, 22 and 23 March 2023

Deliberation on 6 April 2023

Employment Judge: R McPherson
Members: E Farrell and F Parr

Ms C Forsyth	**Claimant** **Represented by:** **Mr E Stafford - Solicitor**
Highland Health Board	**Respondents** **Represented by:** **Mr R Davies - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. the Tribunal does not have jurisdiction in respect of the claimant's claims in terms of s13 of the Equality Act 2010 (EA 2010) (direct disability discrimination) and accordingly those are dismissed.

2. The claimant's claims in terms of s19 EA 2010 (indirect discrimination) do not succeed and accordingly are dismissed.

3. The claimant's claims in terms of s20&21 EA 2010 (reasonable adjustments) do not succeed and accordingly are dismissed.

4. The Tribunal does not have jurisdiction in respect of the claimant's claims in terms of s26 EA 2010 (harassment) with exception of alleged harassment on 8 June 2022 which claim does not succeed and accordingly all such claims are dismissed.

5. The claimant's claim for constructive unfair dismissal does not succeed and accordingly is dismissed.

REASONS

Preliminary Procedure

1. The claimant presented her ET1 on **Tuesday 20 July 2021,** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Thursday 27 May 2021** and issue of the ACAS Certificate on **Thursday 8 July 2021**) against the respondents following termination of her employment with the respondent as an Emergency Practitioner by reason of resignation, the claimant asserting claims including constructive unfair dismissal.

2. The claimant was represented by E Stafford Solicitor, while the respondents were represented by R Davies Solicitor.

3. The Tribunal was provided with a Joint Inventory

4. After the case management hearing on 4 October 2022, the claimant provided Further and Better Particulars, in a 27-paragraph document setting out responses to matters raised by the respondent. In addition, in advance of this final hearing parties prepared an agreed List of Issues together with an agreed chronology, claimant schedule of loss with the claimant representative providing additional comments by email which were contained within the Joint Inventory.

5. Further and in advance of this hearing, it had been agreed that the claimant, who was the sole claimant witness, would provide evidence in chief by written witness statement, reflecting the claimant's argument that the claimant' memory has been impacted, with Medical Report from her consultant Chest Physician dated 3 February 2023 confirming that the claimant's" *memory is not as good as previously and she has to write down notes to aid her memory… I do not feel that she would be able to withstand giving an oral statement without significant impact on her recovery".* Following confirming the terms of her written witness statement, the claimant was subject to oral cross-examination and re-examination.

6. Respondent witnesses provided oral evidence although Dr Rennie had provided a chronology of aspects of his evidence (TimeLine & Notes) which

was contained within the Joint Bundle which had been reviewed by the claimant and commented upon in her written witness statement.

Exchange of written submissions and supplementary comments following this Final Hearing

7. Following the evidential element of the hearing on 22 March 2023, parties indicated that they were in a position to move directly to written submissions and were thereafter invited to provide written submissions on 23 March with a period that day being provided for the Tribunal to read both and parties to exchange their respective submission following upon which the Tribunal reconvened to allow any supplementary oral submission including on the parties respective submission. Parties were advised that the Tribunal would deliberate on their respective positions at members' meeting on **Thursday 6 April 2022**, being the first available date.

Claims relied upon

8. The claimant relies upon claims of:

   a. S13 Equality Act 2010 (EA 2010) direct disability discrimination

   b. S19 EA 2010 (indirect discrimination)

   c. S20 & s21 EA 2010 (reasonable adjustments)

   d. S26 of EA 2010 (harassment); and

   e. constructive unfair dismissal.

Issues for Tribunal at this Final Hearing

9. The claimant asserts a claim of constructive unfair dismissal. The claimant asserts that the respondent breached the implied duty of trust and confidence. The respondent resists the claim arguing that there was no repudiatory breach, and the claimant did not resign in response to any breach of contract by the respondent. If there was such a breach, the claimant affirmed such a breach by reason of continuing in employment beyond that breach.

10. In relation to the claimant's claim of **Constructive Unfair Dismissal**, the issues for the Tribunal to consider whether the claimant was constructively dismissed included:

    1. Did the alleged breach or breaches of contract relied upon, viewed separately or isolation, or cumulatively, amount to breaches of the claimant's employment contact *a fundamental breach of the contract of employment, and/or did the respondent breach the implied term of mutual trust and confidence, i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?*

    2. If so, did the claimant "*affirm*" the contract of employment before resigning? To *"affirm"* means to act in a manner that indicates the claimant remains bound by the terms of the contract.

    3. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation?

    4. If so – was the dismissal unfair as a result of s95 of the Employment Rights Act 1996 (ERA 1996). Section 94(1) ERA 1996 provides that an employee has the right not to be unfairly dismissed by her employer, and section 95(1)(c) ERA 1996 provides that an employee is to be regarded as dismissed if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

Issues for the Tribunal

11. **Time limit / limitation issues**

    Questions for the Tribunal were,

a. Were the complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the EA 2010 always having regard to the operation of s.207B(3) of ERA 1996 which provides that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted; s.207B(4); and

b. Dealing with this issue would involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.; and

c. Given the date the claim form was presented and the dates of early conciliation, it was agreed via submissions that any complaint about something that happened before **Monday 14 March 2022** was *potentially* brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

Disability discrimination

12. Section 6 EA 2010 “Qualifying Disability”.

13. The question of a qualifying condition at relevant times in terms of s 6 EA 2010 was not conceded.

14. The Tribunal had regard to the following questions:

a. Did the claimant have a physical or mental impairment at the relevant times (that is at the times of the alleged acts of discrimination). Specifically, and as set out, did the claimant have a physical impairment, namely cognitive impairment due to the post-viral condition known as Long Covid, at the relevant time?

b. Did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

c. If so, is that effect long-term? In particular;

1. When did it start; and

2. has the impairment lasted for at least 12 months?

3. Is, or was, the impairment likely to last at least 12 months or the rest of the claimant's life if less than 12 months?

d. Are any measures being taken to treat or correct the impairment? But for those measures, would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

15. In relation to s13 of EA 2010: discrimination arising from asserted disability, a person discriminates against a disabled person if they treat that person unfavourably *because* of something arising in consequence of that person's disability. This requires consideration of whether the claimant was a disabled person for the purpose of s6 EA 2010 at the relevant time.

16. Beyond that, the issues so far as insisted upon for Tribunal included:

17. **Section 13 EA 2010: direct discrimination because of a protected characteristic of disability.**

a. Has the respondent treated the claimant as in a particular manner (what does the claimant assert as the treatment and when does the claimant say it occurred)? The claimant gave notice of the comments /events complained of in relation to s13 EA 2010 in ET1 Paper Apart narrating the paragraphs relied upon together with Further and Better Particulars as giving fair notice of the treatment being the comments made as set out below describing (page 25 para 68) "*the failure to support the claimant during her absence, the dismissive natures with which her condition was treated, the pressure exerted on the claimant to return to work night shifts*" as

1. "*During conversations with"* Dr Rennie on (page 28 para 2) **Monday 29 November 2021** *"he did not appear to take the Claimant condition seriously and made a number of references*

alluding to the fact that the Claimant was simply suffering from stress" he described that "*don't you think this is just stress*"; and

2. When the claimant returned to work as part of her phased return, it was suggested, on **Monday 6 December 2021**, there were no other senior staff in the department for the first hour (the claimant said in evidence it was 45 mins); and

3. The claimant discussed her condition with her Clinical Director line Manager, Tracy Ligema. It was agreed that she would continue working as her symptoms allowed. The claimant advised Tracy Ligema of her ongoing symptoms and the difficulties presented to the claimant because of these. The claimant further discussed the nature of her role and how she sought no clinical responsibility and that required a low cognitive load. The claimant was advised by Tracy Ligema to "*do what you can and let me know if there is anything we can do to help".* The claimant felt supported to continue in this role as Clinical Director which was different to her role in the Emergency Department; and

4. Further pressure was placed on the claimant to work nightshift. Dr Rennie emailed the claimant on **Sunday 2 January 2022** asking about working nightshifts from 10 January onwards per the rota. Dr Rennie was aware that the claimant had not recovered, and her symptoms remained the same. The claimant felt that this implied the inability to work was a personal choice and unwillingness on the part of the claimant. The respondent failed to support the claimant and failed to address how the claimant perceived her condition might impact upon patient care; and

5. By **Tuesday 4 January 2022** the claimant felt that her concerns had not been listened to and that her request not to work nights had not been supported. The claimant felt that there was no

support for her and accordingly handed in her notice to Dr Rennie that day. The claimant gave 3 months' notice. In response to the claimant handing in her notice attempts were made by the respondent to convince her to stay on the basis of trying to get "*extra staff on nightshift".* This would not address the claimant's issues and she declined. The claimant was placed on a phased return on 5th January 2022; and

6. On **Monday 10 January 2022** the claimant was working in the ED on a reduced shift as part of a phased return she had a discussion with Dr Rowlands an emergency department consultant who advised that the cognitive symptoms she was experiencing sounded like those he had when off sick with stress and asked was she not simply stressed; and

7. On **Monday 21 February 2022** the claimant was working in the emergency department on the 8.00 am to 4:00 pm shift due to her ongoing condition she was struggling cognitively but her symptoms pertaining to fatigue had improved. During that shift she attempted to discuss patient care with the consultant on duty Dr Gary Kerr. She was treated disparagingly by the consultant. She was advised that these were "*easy cases"* and that to support her mental health problems she could be given "*ECG with a defib"* which the claimant understood to refer to electro convulsive therapy. The claimant interpreted this as not being a helpful comment but a further disparaging comment in respect to her condition; and

8. On **Tuesday 22 February 2022** the claimant was advised by Dr Kerr that perhaps she should dye her hair purple because "*that is what people with mental health problems do."* The claimant was humiliated by this comment and lack of support.

b. Was that treatment "*less favourable treatment*", i.e., did the respondent treat the claimant less favourably than it treated or would

have treated others ("comparators") in not materially different circumstances?

c. The claimant relies on hypothetical comparators.

d. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

18. **s19 EA 2010 indirect disability discrimination**

a. Issues for the Tribunal under section 19 EA 2010 would include what is the *"provision, criterion or practice"* that the claimant says the respondent generally applied to its employees and which the claimant seeks to rely upon. The PCP relied upon was the requirement to work nightshift.

b. Did the respondent apply the PCP(s) to the claimant at any relevant time?

c. Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the characteristic, e.g.*, "non-disabled employees "*?

d. Did the PCP(s) put persons with whom the claimant shares the characteristic, e.g., "*other disabled employees"* at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, e.g., "*non-disabled employees",* and in what way?

e. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

f. If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? In the present claim the respondent asserts that the asserted PCP of requiring the claimant to work night shifts was never applied (page 58 para 38), however in the alternative if it is determined that the asserted PCP was applied, it was a proportionate means of achieving a legitimate aim.

19. **s 20 & 21 EA 2010: reasonable adjustments (for disability)**

a. Did the respondent know, or could it reasonably have been expected to know the claimant was a person with a disability?

b. A "PCP" is a "provision, criterion or practice" broadly which may be said to be generally applied by an employer. What does the claimant assert that the respondent had / or applied as a PCP(s) which may be said to be **generally** applied by an employer (or could be so applied), that is a general rule applied by the employer to everyone in a business, but which is relied upon in the claimant as putting workers, here with a disability, at a particular disadvantage.

c. The claimant refers to the claimant having failed to comply with its obligation under 20(3) EA 2010 to make reasonable adjustments by pressuring the claimant to work when it was not safe to do so. The claimant pleads that continued rostering of the claimant to nightshifts or lateshift amounted to a failure to make reasonable adjustments. The claimant pleads that it would have been a reasonable adjustment to have the claimant work in a supernumerary capacity, not work nightshifts, gradually increase hours and responsibilities, not to have to the claimant assume the responsible senior lead role when working. Further the claimant refers to a requirement to work nights and (as a further requirement, a requirement to return to work before being fit to do so. The Agreed List of issues describes in the context of the reasonable adjustments whether the respondent failed to make reasonable adjustments those adjustments including “Not work night shifts”.

d. Did any of the alleged specified PCP’s put the claimant at a **substantial disadvantage** in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, and in what respect what does the claimant say this was.

e. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

f. If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and what they should be.

g. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

20. **Section 26 of the EA 2010 harassment related to the protected characteristic of disability.**

a. Did the respondent engage in conduct as alleged being the conduct alleged on all of the dates set out above for section 13 EA 2010: direct discrimination, 1 to 8**,** together with the claimant's assertion that she provided her manager in ER with regular updates on her health, the report (shared with her ER manager) from OH clearly stated she was fit to continue in other roles, the claimant felt this email [dated 8 June 2022 which set out that "*Matters of this matter may involve an investigation by NHS Scotland Counter Fraud Services" "There may occur a potential fraud element if the employee then works during the hours they have been signed off for … This is due to the employee's potential dishonesty as they have worked during their sickness without discussing this first with their manager."*] implied she had been dishonest in her account of her medical condition and also implied that she had committed fraud, despite no policy being provided to adequately explain the basis for this. This claimant found this behaviour intimidating and again felt that her medical condition was being questioned.

b. If so, was the conduct unwanted?

c. If so, did it relate to the protected characteristic of disability?

d. Did the conduct have the <u>purpose</u> of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

e. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (Whether conduct has this effect involves taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

21. In relation to **Constructive Unfair Dismissal**, the issues were:

1. What is the *implied, or express term (or terms) the claimant relies upon* as fundamental breach of the contract of employment and/or the respondent's breach of the implied term of mutual trust and confidence.

2. The claimant sets out in her ET1 that the treatment she asserts she was subjected, commencing in **November 2021** shortly after the claimant had made the respondent aware that she suffered from and was continuing to suffer from the effects of Covid, which conduct included, it is alleged failing, to take the claimant's protestations about her impaired ability to work, seriously and failing to make reasonable adjustments and through failing to address the claimant's issues in respect of impaired ability to work placed the claimant and patients at risk and as narrated in the preceding paragraphs of the ET1 individually or in the alternative, cumulatively amounted to a repudiatory breach of the implied or express terms claimant contract of employment which are said to be sufficiently serious (so as) to justify the claimant's resignation. The final straw was said to be the prospect of returning to work without the recommendation of Occupational Health having been followed (by the respondent) with consequential risk of harm to patients, the claimant anticipating that she would not be supported in such an event.

3. i.e., did it, without reasonable and proper cause in response and from that date conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it

and the claimant in failing, to take the claimant's protestations about her impaired ability to work, seriously and failing to make reasonable adjustments and through failing to address the claimant's issues in respect of impaired ability to work placed the claimant and patients at risk?.

From this the issues for the Tribunal would include:

4. If so, did the claimant "*affirm"* the contract of employment before resigning? (To "*affirm*" means to act in a manner that indicates the claimant remains bound by the terms of the contract.)

5. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation)?

Remedy

22. If the claimant was discriminated against, issues in relation to remedy would include assessment of any injury to feelings award.

23. If the claimant was unfairly dismissed, issues in relation to remedy would include, what loss is attributable, did the claimant minimise her loss; whether it be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, under Section 122(2) and 123(6) ERA 1996, and if so, to what extent?

Findings in fact

24. The claimant was engaged as an Emergency Practitioner (EP) within the Accident and Emergency Department of the respondent's Raigmore Hospital Inverness from 31 August 2015 to 4 April 2022. This claim concerns the claimant's role as EP.

25. The respondent is the relevant health board operating Raigmore Hospital, Inverness within which is the Accident and Emergency Department known as AE.

26. The claimant since obtaining her medical degree in 2003 the claimant has had various clinical roles within the NHS in Scotland including JHO in Elgin and thereafter in Glasgow and as SHO3 in Emergency Medicine in Aberdeen and beyond the NHS for 3 years worked as a medical officer for a private occupational health firm, returning to Emergency Medicine initially as a Speciality Trainee Locum at Raigmore Hospital which was followed by GP training. In addition, the claimant in the period to April 2022 the claimant worked as a locum GP both in hours and out of hours, as a medical officer for a private occupational health firm and a volunteer medical adviser.

27. Further and separate to the role of EP, the claimant was invited by Dr Andrew Rowland in December 2020 to staff the role of what was then a new respondent service Flow Navigation Centre/Rescheduling Unscheduled Care (FNC) and has been employed by the respondent as **Clinical Director** of **FNC** initially as interim Clinical Director in February 2021 and subsequently in September 2021 as Clinical Director which role is a desk-based role and remains in that role with the respondent.

28. Further and again separate to the EP role, the claimant was employed as **Locum GP Cover** for Eating Disorders by the respondent within Child and Adolescent Mental Health Service (**CAMHS)** at Raigmore from February 2022, the claimant having concluded initially that it would, in terms of physical demand and cognitive load, be more manageable than EP within ED. The claimant intimated to the respondent by email on 7 April 2022 that she felt that her position within CAMHS had become untenable intimating that she understood that 7 days' notice was appropriate as locum.

29. The claimant cannot currently drive longer than 30 minutes, currently suffers from noise/light sensitivity, has not spent sufficient time in General Practice to enable her to return as a GP without completing a GP's returners position and is currently unable to commit to this due to both other work commitments and

ongoing health issues. The claimant is currently unfit for high cognitive load work.

30. EPs operate within the respondent AE Department being rota'd to 3 possible shifts Dayshift (which is either 8 am to 4 pm or 8 am to 8 pm), Backshift (4 pm to Midnight which may also be referred to as Lateshift) and Nightshift (8 pm to 8 am or 11.30 pm to 8 am).

31. The respondent operates a horizontal system of seniority in that all those engaged in AE can input into the care and treatment and in particular with the exception of consultants all qualified doctors whether they be AE's or Speciality Doctors or otherwise rota'd on a shift are regarded as equal standing. The respondent does not operate a hierarchical system attributing senior roles to AE's or Speciality Doctors based on their status. Senior role on a shift may be held by a consultant (including one who may be on call), a Speciality Doctor (some of whom are former consultants or EPs) or an EP. Unlike EP's Speciality Doctors do not work Nightshifts.

32. Subsequent to the claimant working a rota'd nightshift on the AE ward, in the period Monday 2 August 2021 to Thursday 5 August 2021 a trainee GP doctor who had worked alongside the claimant, raised an issue with Dr Michael Rennie who is the respondent's Consultant in Emergency Medicine and AE Service Clinical Director, concerning a delayed thrombosis of a patient which resulted in a report known as a Datix being created.

33. On **Monday 2 August 2021** Dr Rennie emailed the trainee GP noting that he was *"really sorry that your last shift finished on a low, and I was saddened to see you upset, as I think you are a great doctor and have worked really well and hard in the past 6 months. You should not be upset with yourself, I could see you knew things were not right. It is clear from your notes that in spite of an atypical history of epigastric pain you recognised abnormality in the initial ECG as I would expect you to do, you asked your senior for advice. I cannot ask anymore of you than that. I'm sorry I didn't spend more time speaking to you this morning, though I did think it might be best to let you get to bed. I know Eve spoke to you in more detail and she intimated it had been a tough*

set of nights. Would you be able to tell me about the nights and any challenges you faced, everything you say will be in will be treated in confidence, If you would prefer we can speak rather than e-mail. As you might understand I have completed a DATIX so we can learn from the likely delayed thrombosis of" the patient *"though as I have already said I have no concerns with how you approach this and. It would be helpful if you could share your reflections upon what happened during the assessment of"* the patient *"was there anything that made things more challenging than they should have been? Don't lose sleep over this, you did everything appropriately for your stage of training. If it would be helpful to chat then please say. Thanks for all your hard work over the past six months. I've always enjoyed and valued having you on shift with me thanks."*

34. The trainee replied with comments including describing it was the best team she had ever worked in, describing the department as fantastic, she was hoping to do some locum shifts and would very interested to work in the department again in the future.

35. On the same date (page 133) at 6.46 pm Dr Rennie sent an email to the claimant headed Thrombosis/Datix "*It seems like you probably had some challenging night shifts how were they?. Unfortunately a DATIX was submitted regarding "*named patient "*from early Monday morning. The Datix relates to a delay in reperfusion therapy. I know"* named trainee *"was a little upset this morning having thought she had missed something. I would be grateful for your recollection of events and the ECGs, also if you had any thoughts into what could help the decision making process for reperfusion especially out of hours thrombosis*"

36. On **Tuesday 3 August 2021** (page 133) the claimant replied to Dr Rennie's email describing shifts as being "*pretty miserable"* and indicating that both the trainee and claimant were exhausted by the end "*I don't remember this man at all. I'm normally quite good at picturing something about patient if I've had anything to do with them but this one doesn't ring any bells at all. I phoned in but then notes must be in your office. Could you send me a copy of the notes/*

ECG?". Dr Rennie replied by email on **Wednesday 4 August 2021** with copy notes and ECG as requested.

37. On **Tuesday 17 August 2021** the claimant responded, briefly describing that she would be keen to back through the ECGs when she was back in that week (Wednesday/Thursday backshift) "I *genuinely have no recollection of this patient. I'm normally quite good at remembering... so I'm quite annoyed with myself I can't recall a thing about"* the patient.

38. On **Wednesday 18 August 2021** Dr Rennie had a scheduled meeting with the claimant regarding issues around the trainee GP's concern and the Datix. The claimant understood Dr Rennie to indicate that the cardiologist consultant did not feel delay had been to the detriment of the patient. The claimant felt that the criteria for thrombosis had not been met and was upset that a Datix had been submitted. Further the claimant had wished at that meeting to discuss her concerns regarding a locum doctor who had submitted a complaint about the claimant regarding the way the claimant had spoken to that locum. The claimant was not provided with a copy of the complaint, but it had been described to her by Dr Rennie, and it had been indicated that the claimant should apologise, however, as the claimant regarded the complaint to be unfounded the claimant refused to apologise.

39. In the course of the discussion with the claimant, Dr Rennie set out that he recognised the challenges of working on Nightshift and raised the possibility of fatigue with the claimant. In addition, Dr Rennie discussed the issues surrounding the Datix being raised means of support and education available to the claimant and expressed concern as to the claimant's well-being and identified the risk of (clinical) burnout.

40. The claimant in response set out that she recognised the risk but did not consider that there was an immediate issue. The claimant set out that she recognised the challenges of Nightshift and expressed the view that Nightshift was an integral part of the EP role and thereafter initiated a conversation with Dr Rennie about the possibility of the claimant changing to a separate role

known as Speciality Doctor, a role which had been created within the AE department but which unlike EP's were not deployed during Nightshift.

41. Thereafter the claimant worked her role as EP in AE as set out in the rota including in October: Friday 15 October Nightshift, Saturday 16 October Nightshift and Sunday 17 October 2021 Nightshift. However, on **Friday 22 October 2021** the claim tested positive for Covid.

42. On **Tuesday 26 October 2021** the claimant started 10 days of self-isolation.

43. On **Sunday 1 November 2021** the claimant issued an email to Dr Rennie headed "SD post" and set out that the claimant *"was hoping we could set aside some time for a chat in the not-too-distant future. My next shift isn't until the 19th and I'm conscious that time is moving horribly swiftly. I'm keen to revisit our discussion on the transition to Specialty Doctor and if this remains possible. I'm still interested in making the move but obviously need to make sure it's feasible from both a professional and financial standpoint. I hope you're doing OK and the department isn't a total nightmare. Sorry to have added to your burden with my dalliance with covid!"*

44. On **Friday 5 November 2021** and while the claimant remained in covid isolation she had a telephone discussion with Dr Rennie, Dr Rennie discussed a Fellow Post and the need to advertise same. Further the claimant described that she felt she was suffering from "*brain fog"* in response to which Dr Rennie suggested that a referral to Occupational Health would be appropriate. The claimant and Dr Rennie agreed that the claimant could self-refer to Occupational Health, rather than the respondent act to refer the claimant to Occupational Health.

45. On **Friday 12 November 2021** the claimant attended a European Training Course an Instructor Candidate at Raigmore Hospital, the claimant was unable to complete the second day as she felt unable to concentrate.

46. On **Wednesday 17 November 2021** the claimant had a telephone discussion with Dr Macleod the consultant on the next scheduled shift (Dayshift 19

November), indicating that she was keen to try to go back, but wanted the consultant to be aware so that they could keep an eye on her.

47. On **Friday 19 November 2021** the claimant ended the Dayshift (8 am to 8 pm) which she was working early, around 2 pm having attended to 2 patients, having she considered memory lapses during that shift and having fallen asleep for an hour unintentionally.

48. On **Monday 29 November 2021** the claimant was due to work the Dayshift (8 am to 4 pm), however, the claimant swapped with a colleague and attended a telephone Occupational Health consultation with Dr Hilditch instead. Dr Hilditch in response to the claimant indicating that she was concerned that not returning to work would be seen as malingering indicated that she could do whatever she wanted and asked the claimant, who had experience as an OH doctor, how the claimant would like to structure her phased return to work. Dr Hilditch agreed at that time with the claimant's proposal that the claimant work restricted 4-hour shifts on non-consecutive days up to 3 days per week, that the claimant not assume the senior role and that the claimant would not work Nightshift. The claimant asked that a copy of the report be provided to Dr Rennie The claimant subsequently issued an email to Dr Rennie at 4.03 pm which set out "*I'm just off the phone from my OH appointment. If you've got 5 minutes to catch up this afternoon it would be good to discuss the outcome. A phased return has been suggested so I'll be I'd be keen to get something organised and at least try to get back to some semblance of normality as soon as possible".* This was followed by a telephone call with Dr Rennie in which a phased return to work as proposed by the claimant was agreed between the claimant and Dr Rennie whereby the claimant would attend (restricted 4-hour) shifts, she would be supernumerary that is, she would not hold any seniority, would not be identified in the rota and she would not be required to work Nightshift. Dr Rennie did not say to the claimant "*don't you think this is just stress"* and or make comment to that effect at or about this time (page 30 para 6). Dr Rennie at all times took the claimant's condition seriously including by agreeing to the adjustments which had at that time been suggested by the claimant reflective of the claimant's position at that time to Occupational

Health and thereafter by implementing Occupational Health advice set out in reports.

49. On **Tuesday 30 November 2021** Dr Rennie was provided with copy Occupational Health Report **(the November 2021 OH report)** which set out that Dr Hilditch had spoken with the claimant and "*We agreed I would write to you with advice on her fitness to work as an Emergency Practitioner. Dr Forsyth has been unwell over the last month due to a medical condition. Though recovered from the acute phase, she is still recovering her physical and mental stamina. It is not unusual for someone with her condition to take two to three months for their stamina to return fully. She is undertaking appropriate personal measures to restore her fitness. Dr Forsyth is keen to remain at work, although, after a recent 12 hour shift, found the duration and concentration more than she could manage because of her health. While I consider Dr Forsyth to be fit for work, in recognition of her returning stamina, I recommend some temporary adjustment to her work. Specifically, I advise she works no more than three four-hour shifts per week, ideally spread through the week rather than consecutively. I also recommend that she does not work overnight and that she does not assume the responsible senior lead row when working. This will help her pace her energy, enable ongoing recovery and ensure that, should she struggle, there is sufficient senior cover. I am hopeful this approach will be required for just around the next four weeks or so. If she has been managing successfully, then she could return to her normal hours afterwards. However, if the demands are too much, it may be that working reduced hours need to continue for a few weeks longer. I will review Dr Forsyth by telephone after the New Year and write afterwards with an update on her health and fitness for work, along with the need for any ongoing adjustments. If you have any questions about this letter, please do not hesitate to contact me".* The November OH report represented the views of the claimant both as a patient and as someone with experience of Occupation Health including the creation of reports, there was no input from the respondent. The report's reference to "*overnight*" was a direct reference to the Nightshift operated in ED rather than Backshift working and was an indication that the claimant should not work Nightshifts (being either 8 pm to

8 am or 11.30 pm to 8 am). It did not identify a direction that the claimant should not work Backshift which ran 4 pm to midnight. It described that the claimant had been unwell over the last month.

50. On **Wednesday 1 December 2021,** the claimant returned to work with her scheduled work pattern of 8 am to 4 pm being adjusted as she had requested to accommodate her phased return to 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to one patient. The senior role was provided by a consultant and 2 senior registrars. While the claimant's recollection is that there was no senior staff in the first 45 minutes of her shift that is 8 am to 8.45, she was not at any time, including during that the 45-minute period required to act in a senior role, nor was she expected to do so. The sole patient she attended to was not in the initial 45-minute period. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

51. Also on 1 December 2021:

    1. At 9.50 am Dr Rennie issued an email to the respondent's Senior Manager suggesting that it would be helpful to meet urgently within the week describing major problems brewing largely stemming from the current pressures and particularly those felt overnight and the impact this was having on the EP's he described that the claimant (although not identified) had seen OHS this week and she had subsequently spoken to him and for various reasons (without giving details) has been recommended that she work no more than 3 four-hour shifts per week, ideally spread through the week rather than consecutively. Dr Rennie also recommended that the claimant did not work overnight, and that the claimant did not assume the responsible Senior Lead Role. Dr Rennie additionally described a separate EP had an appointment with OHS that day and he anticipated the outcome would be that they cannot do Nightshifts, but he would update when he got more

information. Dr Rennie also described a further EP formerly complaining regarding the unsuitability of current working conditions. Dr Rennie further described sustained overnight pressures and ongoing problems with contingencies which loaded further pressures on the EP. While Dr Rennie described that he told colleagues that there were plans to try and improve the situation and he had for many months been pushing the various aspects of the business case for doing so, but described there was tangible frustration at all levels and concluded that the EPs needed to be valued and receive their SPA equivalent time and have some of the night pressures improved *"Unfortunately a domino effect is already happening".*

2. At 10.42 am Dr Rennie issued a further email, copying in his earlier email, this time to his consultant colleagues, including Dr Kerr and admin which described there were *"significant problems and pressures across the department, but this is particularly affecting the EPs with I anticipate more than one being on OHS restricted duties. I will update, but I think it will be worthwhile aiming to have a consultant meeting this Friday morning at 930*"; and

3. At 12.57 pm (following the conclusion of the claimant's restricted shift 8 am to 12 noon) Dr Rennie had a telephone discussion with the claimant confirming that the work pattern would continue as 4 hours as the claimant had requested, working alternate days again as the claimant had requested, the claimant elected to truncate the phone call after 2 minutes. Dr Rennie had at that time anticipated that the claimant would work the alternate days to include Sunday 5 December 2021 and that existing published rotas would be adjusted in due course; and

4. At 3.33 pm the respondent Admin Manager issued an email to Dr Rennie which described that she had had the claimant on the phone following Dr Rennie's telephone conversation with the claimant earlier that day and that the claimant "*advises that she will not be able to carry out the Sunday"* (that is 5 December 2021) *12 hour shift and that when she is on Friday this week for 8am to 12 noon she will catch up*

with" Dr Rennie " *then. Her plan would be to work Monday Wednesday and Friday next week 8 am to 12 noon".* The existing OH advice issued to the claimant and copied to Dr Rennie did not describe any clinical reason for the claimant not attending the Sunday shift. While the Admin Manager referenced a 12-hour shift that reflected the existing published rota hours rather than the 4-hour adjusted shift for that day which Dr Rennie had already confirmed to the claimant above. The reference to the claimant's plan reflected the autonomy afforded to the claimant.

5. At 4.37 pm Dr Rennie issue an email to the respondent Admin Manager (he did not copy in the claimant and other EP's) which described "*that is disappointing in light of the conversation"* the claimant *"and I had earlier in the day that is that she is not able to even cover 4 hours of Sunday shift we therefore need to consider that Caroline is off the rota at least until January and will need to plan accordingly. Unfortunately I think there will be limited uptake from the EPs for extra shifts. As the most pressing issue we will need to find a shift cover for this coming Sunday. As an additional concern, I'm just off the phone with"* further EP *"who has confirmed that both OHS and cardiology recommend that he was permanently off nights"*, Dr Rennie described that the further EP felt bad about it but given his significant health issues he fully understood this issue. Dr Rennie described that he needed to sit down with the master rota and identify all the gaps along with the Admin Manager

6. At 5.18pm Dr Rennie (p160) issued an email to consultant colleagues including Dr Kerr which set that claimant had an occupational health recommendation that she be treated "*essentially super nummary working 4 hour morning shifts on Mon/ Wed/Fri - seems to be the case until OHS review in January"*, he did not identify the clinical cause, nor the date of the January review (it took place on 31 January 2022). He described a second EP had received OHS recommendation that they be taken off nights permanent, and further described an immediate

problem being the Sunday EP dayshift and described he would review rotas to see where their other problems lay and confirmed that respondent Senior Manager (in response to his email earlier that day) had by then approved advertising to recruit clinical fellows to get to 11 on rota, 2 EPs to get them SPA equivalent time and some additional rota flexibility and one consultant.

52. On **Friday 3 December 2021,** the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to one patient. The claimant was not at any time required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

53. Also on that day Dr Rennie attended a Consultant Business Meeting at 9.30 am with other consultants including Dr Rowland at which Dr Rennie described under the heading of Current Staffing Issues & Business Case Update, accurately having regard to November 2021 OH Report, that the claimant had "*temporary work restrictions, effectively off rota*", he also described that a further EP was permanently off nights (that was due to significant health issues of a life-limiting nature). Dr Rennie set out that there were several gaps impending due to these issues including night shifts and he would review the potential need for locums. Under the heading EPs, it was described that there were x10 20-hour EPs in post, a different EP was permanently off Nightshift, the claimant was "*on restricted duties- hopefully only short term"* a further EP was on maternity leave and identified the person filling the maternity leave vacancy.

54. Dr Rennie and others within the ED were aware of the then-emerging clinical identification of what has become known as Long Covid. While Covid itself was a relatively novel virus, there was existing clinical recognition of post-viral syndrome as a not uncommon long-term effect of a viral infection. There was

no culture within the ED of presenteeism, rather the attendance of any employee in a clinical setting who was not, in fact, fit to attend created unnecessary and unwanted risks and reduced the ability of Dr Rennie to point to absence necessitating locum cover which would be authorised, given the important role of ED within Raigmore. The then-current OH report, the November 2021 report identified an expectation of the claimant's recovery within 2 to 3 months.

55. At 4.58 pm that day the respondent Admin Manager issued an ED weekly rota for the week commencing Monday 6 December 2021 to the whole ED department including the claimant (the week commencing 6 December 2021 rota). It did not identify to any recipient including those who would be in attendance on the various rota's shifts that the claimant would be in attendance in any capacity and further identified a specific EP or other Senior Lead as cover for each shift the claimant had intimated her plan to attend (in a supernumerary capacity) for a restricted 4-hour period on Day or Late Shift.

56. On **Monday 6 December 2021,** the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to one patient. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid in connection with the claimant.

57. On **Tuesday 7 December 2021** at 6.43 pm Dr Rowlands, who had previously experienced a period of stress-related absence, in an attempt to offer empathy and support to the claimant, in the knowledge that she had been absent from work from the 3 December 2021 Consultant Business Meeting sent a text message which read "*Hi Caroline sorry to hear your not feeling on top form at the moment I know how rubbish that can be. Not helped by dark nights and storm Barra en route I bet but I hope both pass with little or no damage. Best wishes, Andrew".* Dr Rowland's reference to knowing how

"*rubbish that can be"* was a reference to his own period of work stress-related absence. Beyond being aware that the claimant was off, he was unaware of any specific diagnosis offered in relation to the claimant by Occupational Health.

58. At 7.56 the claimant responded to Dr Rowlands "*Thanks Andrew, I think I'm finally on the mend but it's taken its time. Covid has been very bizarre experience, but I have some taste back so at least I can comfort eat now".*

59. On **Wednesday 8 December 2021**, the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to two patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid in connection with the claimant.

60. On **Friday 10 December 2021,** the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to two patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid in connection with the claimant**.**

61. On **Sunday 12 December 2021**, the claimant called the duty ED consultant informing she would be unable to come in on Monday (being her next scheduled restricted phased return to work shift day) and she was aiming to get an appointment with her GP.

62. On **Monday 13 December 2021**, the claimant emailed Dr Rennie "*Just a quick note to keep you in the loop. Last week didn't go as well as I'd hoped*

and I've not had a great weekend. I have a GP appointment tomorrow for an MOT and I'm waiting on OH getting back to me about a review. I'll let you know when I have more information. I can't apologise enough for this I've never been in a situation before. Please believe me I'm doing everything I can to sort it out".

63. Having presented at her GP on **Monday 13** or **Tuesday 14 December 2021** the claimant was signed off work by her GP for a period of 21 days (to 4 January 2022); the GP identified the condition in the Fit Note as being "*viral infection – Post Covid19"* with the GP Fit Note being issued 14 December 2021 (**the December 2021 Fit Note**). The claimant explained to the GP that she thought she was suffering from long covid but had concerns that there may be another underlying diagnosis which the claimant had missed.

64. On **Wednesday 14 December 2021,** the December 2021 Fit Note was provided to the respondents.

65. On **Wednesday 15 December 2021** at 11.57 am, Dr Rennie issued an email to consultant colleagues including Dr Kerr, some EPs and admin which described that the claimant "*has a run of midweek nights starting"* Monday *"10th January which I'm concerned may need covered. Things up to that point are currently covered.".*

66. On the same date Dr Rennie responded to the claimant's email of 14 December *"I'm sorry to hear things have gone downhill. Wendy made me aware of the"* FitNote "you *dropped in yesterday. I hope that affords you the time to get back to your useful self. Take the time needed to rest and let me know if I can do anything to help."*

67. On **Thursday 23 December 2021,** the respondent Admin Manager issued an email to all medical staff which included the claimant with a Rota for the weeks commencing Monday 27 December 2021 and Monday 3 January 2022. It did not identify to any recipient including those who would be in attendance on the various rota's shifts that the claimant would be in attendance in any capacity and further identified a specific EP or other Senior Lead as cover for

each shift the claimant had intimated her plan to attend (in a supernumerary capacity) for a restricted 4-hour period on Day or Late Shift.

68. On **Thursday 30 December 2021,** the claimant proposed to Dr Rennie that she operate on a phased return to work on terms the claimant set out starting Wednesday 5 January 2021 "*I hope you had a lovely Christmas. I am delighted to report that I think I'm properly on the mend this time. Not quite firing on all cylinders, but much more like my 'normal' self. I have a couple of things to sort out with the GP (appointment today) but I should be back next week, all going well. I'm conscious that the last time I came back it was too soon and was actually really detrimental, so I'm cautious about trying to hit the ground running. I know it must be an utter ballache, but if I could come back on the phased return idea that I was on before I think that would be best. I have another appointment with occ health but not before my line runs out. Would it be possible to start this next week, on the Wednesday/ Friday? I would do Tues/Thurs but I have some FNC stuff on the Thursday morning I have to do, and I'm trying to balance the time between the two. I have everything crossed that I'll get back to full usefulness in the next few weeks and hope you can all bear with me until then. Apologies again for letting the side down."*

69. On **Sunday 2 January 2022** at 00.16 am, Dr Rennie issued an email to the claimant "Glad *to hear you are feeling somewhat better, you are not letting the side down. Given how things were it does seem sensible to have a phased return. Did your GP make any recommendations? If you and your GP are happy that you return this coming week (Wed 5th and Frid 7th) that would seem sensible. I think the rota has you down for night shifts from the 10th of January. What are your thoughts about those? You will understand we will need to make plans. Happy New Year."*

70. Dr Rennie did not put any pressure on the claimant. He invited the claimant to advise on any GP recommendations. While Dr Rennie described, in the context of the claimant's current role, that the rota had the claimant down for night shifts, he commented simply to obtain the claimant's comments on that aspect of the EP role and expressly said *"what are your thoughts*" as the ED

required to make plans around cover reflecting the effective autonomy afforded to the claimant to operate to her own plan. He did not reference the claimant's previous request to move to Speciality Doctor.

71. At 10.24 am the claimant sent an email to Dr Rennie (which Dr Rennie did not read until 5 January as he was on leave in the interim and which on reading he intended to follow up with the claimant in person as she was on shift that day), copied to the respondent's Admin manager and the respondent's Senior Manager which set out "*Fortunately there was nothing drastic from the investigations with my GP who has very much left the decision in my hands. I am desperately keen to get back to work in the ED, but with a degree of caution. The simple answer to the night shift question is that I have no idea. The worst bit about coming back to work after something like this is there's no way to know until you've done it, which is why doing it gradually makes sense. Even if it makes me feel like a terrible colleague. If my symptoms had been more physical than cognitive, it would be an easier guess. Both aspects have improved dramatically but the level of cognitive functioning required in ED isn't something you can easily replicate. Realistically, can we safely say that I am in a fit state to be in to be the senior on overnight after two shifts over phased return? The OH recommendation was not to do nightshift until my review on the 13th. If nothing else, I feel I should stick to this from a governance perspective. I hope you understand that this decision would be infinitely easier to verbalise if there hadn't been issues regarding how secure I felt in my role in the department prior to contracting Covid. Whilst these issues are ongoing and certainly haven't been helped by my prolonged absence, I would like to offer my assurance that if I had felt I was physically and cognitively safe to work I would have done so. My previous request to stay in the department in the role of Specialty Doctor should not be taken as a conflict of interest and I would ask that this be disregarded from my current situation. However, I would appreciate the opportunity to resume discussion on this matter as soon as possible as unfortunately continuing as an EP remains untenable."*

72. The claimant expressly set out that both aspects of her symptoms had "*improved dramatically"* and that the OH recommendation, reflecting her own

position, was that she did not work the Nightshift, the claimant did not reference backshift (4 pm to midnight) as being excluded by OH report.

73. The claimant's reference to feeling secure in her role was a reference to the Datix raised following the concern of the trainee GP.

74. As set out in her email of 2 January 2022, the claimant as of this date considered that remaining in her role as an EP was untenable.

75. On **Monday 3 January 2022**, Dr Rennie issued an issued to all EPs including the claimant, consultants, Speciality Doctors and admin which set out "*Happy new year. Apologies for this being my first e-mail of the year but as is almost predictable with the current situation we continued to have pre-existing rota gaps alongside some additional COVID related gaps. For the coming couple of weeks, the gaps I'm aware of are: Thursday 6th January: extended EP gap 0800-0000 Offers of any hours within this time period would be gratefully received Monday 10th January to Thursday 13th January 13 January: 2330-0800 Nightshift gap Please consider your possible availability"* a similar WhatsApp message was also issued.

76. On **Tuesday 5 January 2022**, the claimant returned to work, the claimant was not identified as on the rota page which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid in connection with the claimant.

77. On that date, the claimant having researched matters on the internet for her intended resignation and having concluded that she wished to offer 3 months' notice of termination being her contractual notice period, attended a meeting with Dr Rennie at which Dr Rennie had planned to intimate that that cover for nights shifts would be arranged and offer reassurance that there was no need to cover nights, however, proceeded to intimate her resignation at the outset, handing a typed letter to Dr Rennie (**the January 2022 Resignation Letter**)

dated 5 January 2022, signed by the claimant which set out "*Please accept this letter as formal notice of my resignation from the role of Emergency Practitioner in the Emergency Department Raigmore hospital. in line with my 3 month notice period, my last working day will be the 5th of April 2022. I write this with great regret as I have no wish to leave the department or the practice of emergency medicine. In the six years I've been in the post, the EP role has changed dramatically and for reasons we have previously discussed the role no longer provides me with any job satisfaction. However, I would be very keen to remain in the department as a specialty doctor should have post become available. I would like to thank you for being so supportive of me during my time here, and the wider ED team for being such a fantastic team to work with."* The claimant identified in her discussion with Dr Rennie, that she wished to remain on the medical bank staff including beyond the resignation date.

78. In the January 2022 Resignation Letter, the claimant accurately described that she had previously discussed with Dr Rennie her view that the role no longer provided her with job satisfaction, in that she wished to transfer to a different role, that of Speciality Doctor. A significant difference in the role of EP and Speciality Doctor was that Speciality Doctors did not work any nightshifts, that was the primary reason for the claimant wishing the alternate role. The claimant elected to set out in her letter of 5 January 2022 that she would work her notice, rather than resign immediately, as she considered that this would give her a greater opportunity to successfully apply for the role of Speciality Doctor. The claimant did not resign in response any material concern as to any interactions she had while employed with the respondent, including but not restricted to any alleged harassment. The claimant did not reference any alleged harassment event as she did not consider that she had been subject to same.

79. Separately on the date and in an email which the claimant did not previously see Dr Rennie copied the resignation letter to senior colleagues by email "Please *find attached a copy of"* the claimant's *"resignation letter which she is handed to me today. Her reasons are largely contained within the letter, and*

It is clear she has not been enjoying the EP role for a while and particularly the nightshifts with the increased pressure they pose. Having been signed off with her post COVID illness she is back on a phased return and is due to see OHS next week so is not yet in a position to return to her nightshifts though I am hopeful that" the claimant *"will be able to fulfil her night shifts towards the end of January and up to her leaving date 5th April."* The claimant "*still has a desire to work in emergency medicine and has again expressed the desire to apply for the specialty doctor role, of which we still have one vacant post, the funding was partly tied up with one of the clinical fellow posts which I presume will be released in February and enable us to advertise for a specialty doctor. I am in the process of finalising the EP job pack for advertising the additional substantive EP posts that were agreed before Christmas, so this would give us an opportunity"* the claimant's *"vacancy into this advert. I've copied in medical staffing colleagues- "the* claimant *"would wish to remain on the medical staff bank beyond her resignation date. Is there anything else I need to do to formalise this resignation?"* Dr Rennie accurately described that the November 2021 OH Report did not propose that the claimant be permanently restricted from Nightshifts.

80. On **Monday 10 January 2022,** the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to three patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant. When the claimant engaged with Dr Rowlands on that date he expressed supportive comments, as he had done in his email of 7 December 2021 and which the claimant had thanked him for on that date, drawing on his own experience of stress-related ill health absence. He did not suggest that the claimant was simply stressed.

81. On **Wednesday 12 January 2022,** the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 6 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

82. On **Thursday 13 January 2022,** the claimant attended Occupational Health Dr Hilditch who set out in report to Dr Rennie (**the January 2022 OH report**) copied to the claimant that the claimant's "*health is continuing to recover. Her main issue is with diminished physical stamina. She explained she needed some time off work recently and upon returning has found sustaining normal life normal length shifts challenging, she is however keen to remain at work while she continues to recover. I advise Dr Forsyth is fit for work. However, in order to support her ongoing recovery and enable her to continue to work safely, I recommend she does not participate in overnight work until March of this year. The condition she has will be aggravated by sleep disruption and impair her eventual recovery, so time now in minimising sleep disruption will hopefully offer a benefit to her longer term fitness. In the hope"* the claimant *"will manage satisfactorily at work and continue to recover as hoped, I have not arranged a review appointment as a routine matter. If however, she encounters any unforeseen difficulties I will be pleased to advise in the future. If you have any questions about this letter, please do not hesitate to contact me."*

83. The **January 2022 OH report** reflected the claimant's own description of her position to the OH doctor. The respondent including Dr Rennie did not have any input into the report its terms or recommendations. The claimant who was aware of the different terms used for shifts did not describe that she would be impacted by working Backshift, as a result, the only reference to non-working was *"overnight"* which reflected the Nightshift. The January 2022 OH did not

suggest the claimant should not work the Backshift. The claimant did not, in the remaining period of her employment as an EP, suggest that the January 2022 OH report precluded her Backshift. While it described that the claimant had found sustaining normal length shifts challenging, it described that the claimant was keen to remain at work while "*she continues to recover*" and did not propose that the respondent continue to allocate restricted hour shifts. In contrast to the November OH report it did not suggest any limitation on the claimant operating as Senior Lead while on shift. The January 2022 OH Report did not propose that the claimant be allocated shifts on a non-consecutive day pattern.

84. On **Friday 14 January 2022** the claimant attended work with the adjusted phased return to work shift being 8 am to 12 noon. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry pick which patients she elected to attend to and on the shift, she attended to 3 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

85. On that day Dr Rennie received the January 2022 OH report and concluded (despite different readings being offered by others) that the claimant would remain off nightshift for the duration of the offered notice period.

86. On **Monday 17 January 2022** and consistent with the January 2022 OH Report the claimant attended Backshift being 4pm to midnight. The claimant did not indicate to Dr Rennie or the respondents that she should not work Backshift. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 9 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so, there was consultant and

speciality doctor cover. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

87. On **Tuesday 18 January 2022** and consistent with the January 2022 OH Report the claimant attended Backshift being 4pm to midnight. The claimant did not indicate to Dr Rennie or the respondents that she should not work Backshift. At all times the claimant had not been identified on the rota which had been circulated to all relevant staff as responsible senior role nor indeed had been identified as attending at work. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 5 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so, there was consultant and speciality doctor cover. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

88. On **Friday 28 January 2022** and consistent with the January 2022 OH Report the claimant attended Backshift shift being 4 pm to midnight. The claimant did not indicate to Dr Rennie or the respondents that she should not work Backshift. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 4 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so; there was consultant cover. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

89. On **Saturday 29 January 2022** and consistent with the January 2022 OH Report the claimant attended Backshift being 4 pm to midnight. The claimant did not indicate to Dr Rennie or the respondents that she should not work Backshift. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 7 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so, there was consultant cover. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant. The claimant had a brief discussion with Dr MacLeod, consultant on the shift who indicated that the claimant should come in later the following day as the claimant was exhausted.

90. On **Sunday 30 January 2022** and consistent with the January 2022 OH Report the claimant attended Backshift being 4 pm to midnight. The claimant did not indicate to Dr Rennie or the respondents that she should not work the Backshift. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 6 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so; there was an alternate EP as cover. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

91. On **Monday 21 February 2022** and consistent with the January 2022 OH Report the claimant attended Dayshift being 8.00 am to 4:00pm shift and while due to her ongoing condition, she was struggling cognitively her symptoms pertaining to fatigue had improved and did not indicate to Dr Rennie or the respondents that she felt unwell or otherwise should not work the Backshift. At all times the claimant was able to cherry-pick which patients she elected to attend to and attended to 8 patients. Cover was provided by the consultant on duty Dr Gary Kerr. In the course of that shift, she discussed patient care with the consultant. She was not treated disparagingly. She was not advised that these were "*easy cases"* and was not advised that to support her mental health problems she could be given *"ECG with a defib".* No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

92. On **Tuesday 22 February 2022** and consistent with the January 2022 OH Report the claimant attended Dayshift being 8.00 am to 4:00 pm. The claimant did not indicate to Dr Rennie or the respondents that she should not work the Backshift. At all times the claimant was able to cherry-pick which patients she elected to attend to and attended to 6 patients. Cover was provided by the consultant on duty Dr Gary Kerr. On that shift and while in course of a discussion with Dr Gary Kerr, the claimant was not advised that perhaps she should dye her hair purple because "*that is what people with mental health problems do."*.

93. On **Wednesday 23 February 2022** and consistent with the January 2022 OH Report the claimant attended Dayshift being 8.00 am to 4:00 pm. The claimant did not indicate to Dr Rennie or the respondents that she should not work the Backshift. At all times the claimant was able to cherry-pick which patients she elected to attend to and on the shift, she attended to 2 patients. The claimant was not at any time, required to act in a senior role, nor was she expected to do so, there was speciality doctor cover. Following having elected to attend a patient during which she had a memory lapse of 20 to 30 seconds, the claimant approached her educational supervisor, Dr Regan who was very supportive saying that if the claimant didn't feel safe, she should not be in attendance and told her to go home. No members of staff expressed any disparaging comments regarding Covid or Long Covid regarding the claimant.

94. On **Thursday 24 February 2022** the claimant started a period of Fit Note-certified sick leave provided by her GP which extended until the end of her employment.

95. On **Friday 25 February 2022** Dr Rennie issued an email to the claimant notifying her that the role of Speciality Doctor was being advertised.

96. On **Monday 28 February 2022** the claimant received an email from the Clinical Lead for NHS Highland CAMHS describing that the claimant, in her role of locum GP within the CAMHS Eating Disorder Clinic, had been a huge asset to the team in recent weeks and remained very keen that the claimant remained in post as they moved forward.

97. In **February 2022** the claimant approached ACAS.

98. On **Tuesday 1 March 2022** the claimant emailed Dr Rennie *"After a bit of a wakeup call in resus last week, I spoke to occ health again today. I'd rather discuss the outcome in person rather than in an email. I'd be happy to come in or talk on the phone. I've spoken to Mandy already about shifts "* – had a further meeting with OH and wished to speak with Dr Rennie.

99. Also on that date the claimant attended Occupational Health Dr Hilditch who set out in report to Dr Rennie (the **March 2022 OH report**) copied to the

claimant *"is continuing to recover from post covid illness. However, she is experiencing cognitive issues, something which is a recognised part of the condition. She described that situations which have multiple competing demands, requiring urgent attention and having to make decisions quickly have been problematic. Again this is typical of such cognitive impacts. She has found therefore that working in the emergency department has been particularly challenging. We discussed her fitness to remain at work in this role and offer regular attendance and effective, safe service"* the claimant "*also explained she would be leaving the department at the end of March this year. I recommend*" the claimant "*takes sick leave from her emergency department post. In all likelihood I do not anticipate she will be fit to return to this post before her contract ends. I do not believe there are any effective workplace adjustments which would enable her to return to work between now and then either. I'm aware*" the claimant "*has other roles within NHS Highland employment and in discussion with her in the context of her health situation, it is my opinion she is sufficiently fit to continue with these. I have not made any arrangements to review the claimant but would be pleased to offer advice in this in the future at you or her request if needed in the meantime if you have any questions about this letter, please don't hesitate contact to contact me."*

100. The **March 2022 OH report** reflected the claimant's own description of her position to the OH doctor. The respondent including Dr Rennie did not have any input into the report its terms or recommendations. The claimant did not raise any challenge to the terms of the **March 2022 OH report.**

101. On **Wednesday 2 March 2022,** Dr Rennie issued an email to the claimant, in response to the claimant's email of 1 March, "*Thanks your e-mail. I have just tried calling you I hope you are ok? I have received an e-mail/letter from Mark Hilditch so I'm aware of the outcome of your meeting with OHS, which I was sorry to read. I agree meeting and talking would be appropriate. This week will prove a little challenging from meeting face to face as our eldest has Covid and "* Partner " *and I are juggling or clinical work and kids at home. Next week would probably be easier for face to face meeting (Wednesday or Thursday).*

If you prefer to talk sooner then I'm available fairly flexible on the phone. Let me know what suits best thanks".

102. On **Wednesday 23 March 2022** Dr Rennie issued an email to the claimant *"I hope you are doing ok. When we last spoke you mentioned the possibility of doing some unpaid shifts in much the same capacity as "*named individual *"I have heard back from medical staffing and there should be no problem doing this. You would get an honorary contract and if at some point you wish to return to paid work in the ED we could look at options down the line, but most important that you get back on your usual self. If/when you wish to pursue the honorary contract idea just let me know and if I can do anything to help just give me a shout"*.

103. On **Monday 28 March 2022** the claimant emailed Dr Rennie, in reply *"Thanks for this. Odd that the prospect of doing unpaid work should cheer me up so much but it did I would be keen to get the honorary contract up and running. I've just taken some leave and I am much improved, but distractions still make my mind go blank. That's fine if it means I come out of Tesco having forgotten everything I went in for, but not so good if I'm at work. Let me know who to speak to in medical staffing and I'll get on with it once I'm back from holiday. I hope your leave has been restful".* Despite the claimant's express intention on 28 March 2022 to work honorary contract the claimant elected not to progress same.

104. On **Monday 4 April 2022** the claimant's employment as an EP with the respondent ended.

105. On **Thursday 7 April 2022** the claimant intimated by email her resignation from the separate role of locum cover within respondent CAMHS, setting out that for various reasons she felt her role with CAMHS has become untenable and intimated that she assumed the notice period for a locum would be 7 days.

106. Prior to 8 April 2022 the claimant had discussions with her professional medical association adviser regarding whether she could hand in her resignation to CAMHS as she did not have a contract.

107. On **Friday 22 April 2022** Ms Caron Cruikshank respondent Divisional Manager emailed to the claimant and others and set out in response to an email with the heading Re Notice of Resignation **"***To confirm. The issues in respect of roster/staff/financial governance in relation to double payment has now been resolved."*

108. Further, in April 2022 the claimant was contacted by a former colleague setting up a private Occupational Health company while it was agreed that the claimant would provide remote consulting hours were not guaranteed and due to indemnity cost the claimant did not proceed with this role.

109. On **Monday 16 May 2022** the claimant issued an email to **(the May/June 2022 series of emails)** Ms Johnstone which set out that **"***I had a chat with* Caron Cruikshank *this morning regarding concerns that I may have been double working whilst signed off sick from one of the three roles within NHS Highland. She mentioned that you had given specific advice on the matter and I would be most grateful if you could provide the HR policy on working in other roles while signed off from one part of the service. This is for personal clarification and for future reference in my role as clinical director of the FNC."*

110. On **Tuesday 17 May 2022,** Ms Johnstone responded thanking the claimant for her email *"I am not sure I provided specific advice as such other than a recommendation for the manager to speak to you to explore. I understand thereafter my colleague … provided some further guidance. In general, if an employee is signed off sick from one job it does not necessarily mean they have to be signed off from another job for which they may be medically fit depending on what they are signed off. Where this occurs it normally requires a discussion hope this helps*

111. On **Wednesday 18 May 2022** the claimant responded to Ms Johnstone indicating that having discussed the situation with the person she mentioned on 16 May, that person suggested the claimant seek "*enlightenment on my situation with you directly"* and commented that "*I actually have a background in occupational health and I'm familiar with the medical aspects affecting multiple roles/ amended duties etc. It is not uncommon for someone to be*

unfit to work for one part of the service yet to be fit to work in another. What I'm seeking clarity on here, is the process that has been followed in my case to ensure that I do not fall foul of such an issue in the future and that I can apply correct HR policy in my management role should this issue arise with any of the FNC clinicians. From an employment law perspective, there is no limitation on the additional work someone can undertake if signed off provided their fit for the alternative of duties and the work they are undertaking would not be seen as the same as the role they have been signed off from. Limitations on additional work are based solely on an individual company's internal policy and therefore, I seek clarity on that of NHS Highland. If someone is signed off sick from one role yet remains fit to work in another, what restrictions are placed on them from a working pattern perspective? What constitutes 'double working' and why? Where would an issue financial governance occur? Given that all the clinicians I manage have multiple roles within the NHS and in the private sector, clarity on these points would be most helpful. Equally, I am due to undergo knee surgery at some point which would render me unable to work, for instance, in the ED, but I would certainly be fit to work from home. I hope therefore you can understand why clearing up this issue in advance is of not insignificant importance."

112. On **Wednesday 25 May 2022** at 11.45 am Ms Johnstone emailed the claimant in brief terms setting out that generally, it would not be appropriate for to be paid twice for the same time, once for being off sick and again for working those same hours in another posted and described that it was therefore important to where a situation was flagged that this was followed up with a conversation to understand the situation and concluded "*I understand that your particular work circumstances were discussed and that no further follow up was required"*

113. At 4.14pm the claimant responded indicating that Ms Johnstone had misunderstood her question indicating that she was looking for "*this specific policy that outlines what constitutes doubled you working and where financial governance irregularities may occur in relation to this I can only assume that such an organisational policy is in place as it does not form part of*

employment law and therefore would not otherwise be an issue with the exception of a teen in clarity on the outcome of my occupational health review unfit for one aspect of a row fit for others my particular situation was not discussed with me in full when I questioned the situation in relation to a wider background of bullying harassment and discrimination and suddenly felt compelled to submit notice of my resignation it was resolved without any further information being sought from me or further information or further discussions being held I therefore remain unclear on how this issue was resolved and what made it an issue in the first place it may be resolved from comes perspective but it is not it is certainly not resolved from mine. Could you provide an answer to the following questions:

- *if someone is signed off sick from one role yet fit remains fit to work in another, what restrictions are placed on them from working double pattern perspective and on what basis?*
- *what constitutes 'double working' and why?*
- *where would an issue of financial governance occur and what would the issue be?*
- *can a copy of the relevant policy policies be provided, in writing?*

If you are unable to answer these questions, can you please provide me with details of someone who can? As per your suggestion are more than happy to have a conversation with the SDM I mentioned in my e-mail earlier today. However, in order to do this I must first have an understanding of these issues so I can ask the correct questions."

114. The claimant did not in her letter of resignation refer to bullying, harassment or discrimination.

115. On **Wednesday 25 May 2022,** Ms Johnstone emailed the claimant in brief terms describing that she found it difficult to add to the advice and guidance that had already been provided and suggested that it might be of benefit to arrange a meeting so she could try to understand the claimant's enquiry better

and asked that the claimant let her know when she was available so they could arrange that.

116. On **Monday 30 May 2022** at 2.20 pm the claimant emailed Ms Johnstone

117. At 3 pm Ms Johnstone responded *"I am sorry that you feel like this. As previously offered we would be happy to have a meeting to discuss your queries and concerns please let me know if that is something you wish to take up so we can agree a way forward I confirmed that I had not been aware of particular details of your situation and I'm not aware of your health issues"*

118. At 3.57 pm the claimant intimated that she would prefer that communications continue in writing, indicated that if her questions were unclear in any way Ms Johnstone should explain any additional information the claimant could provide to clarify them and concluded "otherwise *can you please explain the options for escalating my concerns".*

119. On **Wednesday 8 June 2022** Brigette Johnstone emailed the claimant in response to the **May/June 2022 series of emails**; "*following your e-mail this is to provide further information in relation to your queries. Relevant policies regarding secondary employment include the attendance policy and the Safer Pre and Post-employment checks in NHSScotland Pin Policy… Matters of this nature may involve an investigation by NHS Scotland Counter Fraud services, who provide guidance and assist with potential fraud matters, including where an employee is suspected of sick pay fraud. In general, where an employee has two job roles and is off sick, they will submit a self cert or he fit note (depending on length of absence) to their manager. This is taken in good faith and sick pay is processed, as it is based on trust that the employees sick for that period. There may occur a potential fraud element if the employee then works during the hours, they have been signed off sick for, especially so when the manager knows nothing about it. This is due to the employee's potential dishonesty as they have worked during their sickness without discussing this first with their manager, which has created a benefit for themselves (extra money in terms of sick pay and payment for work). As a result it is important that where we become aware of a situation such as this that this followed up*

and in most cases a fraud investigation can be avoided through conversation Hope this is helpful. Please note that I am now on annual leave until 27th June. If you have any further questions during this time please contact..." colleague "*copied in."*

120. The claimant did not seek any clarification. Ms Johnstone's email of 6 June 2022 was issued response to the queries which continued to be raised by the claimant, in the May/June 2022 series of emails, after Ms Johnstone expressly stated on 25 May 2022 that she understood that the claimant's particular circumstances were discussed "and *no further follow up was required"*. Ms Johnstone did not understand beyond that email, the claimant was referring to the claimant's position as Ms Johnstone had already set out that no follow-up was required and the claimant had posed the wider context question in her email of 18 May that the claimant did not wish to fall foul of such an issue in the future and so the claimant could apply the "*correct HR policy in"* her " *management role should this issue arise with any of the HNC clinicians".* Ms Johnstone concluded to respond to the claimant's continued requests in the context of the express confirmation that there was no follow-up required, the claimant's refusal of a meeting to discuss and the claimant's reference on 30 May 2022 to "*escalating her concerns"* that she should seek to address matters by setting out a hypothetical scenario not related to the claimant. Ms Johnstone did not in her mail of 6 August 2022 refer to the claimant's position either directly or indirectly.

121. In **November 2022** the claimant withdrew her application for a clinical director post in primary care to focus on her rehabilitation.

122. On **Friday 23 December 2022** the claimant was first diagnosed with long covid and considered that the claimant was suffering from Postural Orthostatic Tachycardia Syndrome (POTS) and referred the claimant to cardiology, following upon which the claimant received a confirmed diagnosis of POTS.

123. The claimant currently continues to suffer fatigue and cognitive impairment and anything that significantly raises the claimant's heart rate or means the claimant has to stand for any length of time is problematic, in addition, the

claimant has a dysfunctional breathing pattern. At the date of the hearing, the claimant has a qualifying disability, in terms of s6 of EA 2010.

Conclusions on witness evidence

124. The Tribunal heard evidence from Dr Rennie who the Tribunal considered was wholly straightforward, honest and reliable in their evidence. In addition, the Tribunal heard evidence from respondent Consultant's Dr Andrew Rowlands and Dr Gary Kerr and respondent's Head of People Services Ms Bridgette Johnstone each of whom gave straightforward, honest, and reliable evidence.

125. The Tribunal's conclusion in relation to the claimant is that whilst she was seeking at all times to be honest in her evidence, she was an unreliable historian, and the Tribunal is satisfied that it preferred the evidence of the respondent witnesses in relation to all matters of substance.

Submissions

126. Both parties provided detailed written submissions on the last day of the Hearing. While the respondent challenged certain aspects of the claimant's submission it was understood that the claimant insisted on those submissions.

Claimant submission

127. It is not considered necessary to repeat the claimant's submission. They were detailed extending to some 33 pages providing a proposed timeline, addressing matters of disability status, failure to make reasonable adjustments (s20 & s21 EA 2010), harassment (s26 EA 2010), indirect discrimination (s19 EA 2010), direct discrimination (s13 EA 2010), time-bar and constructive dismissal and remedy.

Respondent submissions

128. It is not considered necessary to repeat the respondent submission which extended to 34 pages addressing matters of including disability status, time bar (in relation to disability claims, it not being argued that the claim for constructive unfair dismissal was out of time), reasonable adjustments (s20 &

s21 EA 2010), indirect discrimination (s19 EA 2010), harassment (s26 EA 2010) and direct discrimination (s13 EA 2010) together with constructive dismissal and remedy

Time

Relevant Law

129. The relevant provision is section 123 (1) (b) of EA 2010.

130. In **Hendricks v Metropolitan Police Commissioner** [2002] EWCA Civ 1686 **(Hendricks)** the Court of Appeal held, in summary, that the ET had been entitled to hold there were discriminatory acts extending over a period of time despite Ms Hendrick's absence from work, the correct test being whether the acts are linked and are evidence of a continuing discriminatory state of affairs.

131. For the claimant reference, at para 9.9 of the submission, was made to **British Coal Corporation v Keeble** [1997] IRLR 336. In that case, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980 which in turn consolidated earlier Limitation Acts.

132. Factors which are almost always relevant to an exercise discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the respondent per **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 at paragraph 19. However: *"There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (Abertawe at para 25)"*. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

133. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim, if it was brought within such other period as the Tribunal considers "*just and equitable"*.

134. In **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 (**Robertson**) the Court of Appeal identified that for Tribunals considering the exercise of this discretion *"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."*

Time

Discussion and Decision

135. **Act and/or Conduct extending over a period and or series of similar acts of failures.** The events complained of in respect of s13 EA 2010 (direct discrimination) and s26 EA 2010 (harassment) were not an ongoing state of affairs in themselves nor when considered together with the complaints in terms of s19 (indirect discrimination) and s20 & s21 EA (reasonable adjustments) the events were not directly linked, they did not amount to evidence of a continuing discriminatory state of affairs, they were a series of one of essentially one of acts. The Tribunal concludes that the events complained of in terms of s13 EA 2010 (direct discrimination) and s26 EA 2010 (harassment) could not be reasonably characterised as part of a continuing act of discrimination along with the alleged act of harassment on 8 June 2022.

136. The requirement to work nightshifts in so far as relied upon in relation to both s19 EA 2010 (indirect discrimination) and s20 & s21 EA 2010 (reasonable adjustments) would, however, have been an ongoing state of affairs continuing from November 2021 to the date of termination.

137. **Just and Equitable extension**. As set out in Robertson an extension to the time limit is the exception rather than the rule. Having considered all the

evidence the Tribunal is not satisfied that it would be just and equitable to extend the time limit to events occurring before 14 March 2022, the claimant had set out in her email of 2 January 2022 that she considered continuing as an EP remained untenable, the claimant had formulated the January 2022 (submitted on 5 January 2022) resignation letter via internet research, she had not referenced any alleged acts of discrimination in same. The claimant had contacted ACAS in February 2022. There was no indication in the contemporaneous OH reports indicating that the claimant was suffering from an impairment which could reasonably be said to preclude the claimant from taking steps to present a claim within time following the events complained of. The Tribunal is not satisfied that there was any reasonable explanation or apparent reasons for the delay nor, in all the circumstances including having regard for the EP role and indeed concurrent other roles held by the claimant.

Constructive Dismissal

Relevant Law

138. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

139. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221 (**Western Excavating**) in which it was held that in order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the

contract by reason of the employer's conduct and she is constructively dismissed.

140. The Tribunal notes that in a complaint of constructive unfair dismissal, Langstaff P in **Wright v North Ayrshire Council** [2014] ICR 77 (**Wright**) at paragraph 2 set out that in considering such a claim "*that involves a tribunal looking to see whether the principles in **Western Excavating (ECC) v Sharp** [1978] IRLR 27 can be applied" and sets out 4 issues to be determined:*

"that there has been a breach of contract by the employer";

"that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract";

"that the employee has resigned in response to the breach, and that"

"before doing so she has not acted so as to affirm the contract notwithstanding the breach"

141. As set out above, the resignation must be in response to the breach, and as described by the Court of Appeal in **Omilaju v Waltham Forrest London Borough Council (no 2)** [2004] EWCA Civ 1493 (**Omilaju**) the *"final straw"* in a series of actions by an employer which cumulatively resulted in a breach of the implied term of trust and confidence justifying repudiation of the contract by an employee need not be blameworthy or unreasonable conduct; however, the test of whether an act was capable of contributing to a breach of the term was objective and it would be an unusual case in which conduct which was perfectly reasonable and justifiable satisfied the requirement.

142. Further, as Langstaff P confirmed in **Wright** para 10, the correct position with regard to causation was set out in the judgment of Keane LJ in **Meikle v Nottinghamshire County** [2004] IRLR 703 at paragraph 33:

'…the repudiatory breach by the employer need not be the sole cause of the employee's resignation…there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental

breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job."

143. Langstaff P in Wright at para 15 continues "*that the crucial question is whether the repudiatory breach played a part in the dismissal. …It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon.".*

Disability Discrimination

Relevant Law

144. It is not considered necessary to set out s6 and Schedule 1 to the EA 2010.

145. In **Tesco Stores v Tennant** [2019] UKEAT/0167/19 (**Tennant**), the EAT held that a Tribunal was wrong to find that an employee who had suffered from depression for a twelve-month period had been suffering from a disability within the meaning of the Equality Act 2010 s.6 during the whole of that period. In addressing whether an impairment had a long-term effect for the purposes of Sch.1 para.2(1)(a), the question was whether there had been 12 months of effect as at the date of the acts complained of.

Issues in Tribunal

S136 (1) to (3) of **EA 2010 (the burden of proof provisions)**

146. The burden of proof provisions are set out in s.136(1)-(3) EA 2010.

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision. "

147. In **Igen v Wong** [2005] ICR 931 (**Igen)**, the Court of Appeal provided the following guidance which, although it refers to the former Sex Discrimination Act 1975, it is considered to apply equally to the EA 2010:

'(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

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

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

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

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

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

(7) These inferences can include, in appropriate cases, any inferences that It is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

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

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

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

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

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the

Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'

148. More recently in **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that '*could conclude'* [The EA 2010 uses the words '*could decide'*, but the meaning is the same] meant: *'[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it.'*

149. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'*

EHRC Code of Practice

The Statutory provisions

150. s15 (4) of the Equality Act 2006 provides that the EHRC 2011 Statutory Code of Practice of, shall be taken into account wherever it appears relevant to the Tribunal to do so.

S20 and 21 of EA 2010

Relevant case law

151. The Tribunal notes the EAT's decision in **Environment Agency v Rowan** [2008] IRLR 20 (**Rowan**) to which it was referred and **Secretary of State for Work and Pensions v Higgins** [2014] ICR 341 (**Higgins**) which confirms and updates guidance for EA 2010, and which indicates that that the Tribunal should identify and then make clear reasoned findings on:

(1) any relevant PCP.

(2) the identity of non-disabled comparators (where appropriate).

(3) the nature and extent of any substantial disadvantage suffered by the claimant.

(4) any step (or steps) which it would have been reasonable for the employer to take.

152. In **Smith v Churchill Stairlifts** [2006] ICR 542 (**Smith**), while predating the EA 2010, it was sets out in relation to the (fourth)step:

> *44 There is no doubt that the test …. is an objective test. The employer must take "such steps as it is reasonable, in all the circumstances of the case …" The objective nature of the test is further illuminated by section 6(4). Thus, in determining whether it is reasonable for an employer to have to take a particular step, regard is to be had, amongst other things, to "(c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities".*
>
> *45 It is significant that the concern is with the extent to which the step would disrupt any of his activities, not the extent to which the employer reasonably believes that such disruption would occur. The objective nature of this test is well established in the authorities: see Collins v Royal National Theatre Board Ltd [2004] 2 All ER 851 in which Sedley LJ said, at para 20: "The test of reasonableness under section 6 … must be objective. One notes in particular that section 6(1)(b) speaks of 'such steps as it is reasonable … for him to have to take'."*

153. The respondent referenced **Ishola v Transport for London** [2020] IRLR 368 (**Ishola**). In the Court of Appeal considered an appeal in relation to termination on grounds of medical incapacity. The former employee appealed, arguing that too narrow and technical an approach had been taken to the reasonable adjustments claim, in that the tribunals below should properly have found that the employer had a PCP of requiring the claimant to return to work without concluding a proper and fair investigation into grievances raised by him, which he said were not properly and fairly investigated prior to his dismissal. The Tribunal had held there was no PCP operated by the former employer

because the alleged requirement was a one-off act in the course of dealings with one individual. The EAT upheld that conclusion. The claimant contended that an ongoing requirement or expectation that a person should behave in a certain manner (here, return to work despite the outstanding grievances) was a '*practice'* within the meaning of s 20(3). At the Court of Appeal Simler LJ set out that:

> ***"37*** *In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*
>
> ***38*** *In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.*
>
> ***39*** *In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-*

off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to 'practice' as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."

154. The Tribunal notes that the content of the former s.18B DDA1995 is now largely replicated by paragraph 6.23 onwards of EHRC Code of Practice:

- Extent to which taking the step would prevent the effect in relation to which the duty is imposed.
- Extent to which it is practicable for the employer to take the step
- The financial and other costs which would be incurred by the employer in taking the step and the extent to which it would disrupt any of his activities.
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance with respect to taking the step.
- The nature of the employer's activities and the size of his undertaking.

155. The issue for the Tribunal is not disadvantage in a general sense but rather whether there was a disadvantage in comparison with people who were not disabled**. Smith** (above) and **RBS v Ashton** [2011] ICR 632 (**Ashton**) at para

14 that "*… an employment tribunal—in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination—must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled"* .

Discussion and Decision

Constructive dismissal

156. The Tribunal's conclusion is that there was no fundamental or repudiatory breach of contract.

157. While the claimant asserts in submissions at para 11.1 that there were a number of effective incidents relied upon being respondent's alleged failures; being to amend her duties; to "*avoid night working*"; to take her condition seriously, arrange for her to see OH, avoid the claimant working when she could have placed a patient at harm, led to a complete breakdown in trust and confidence, the Tribunal disagrees.

158. The Tribunal does not accept on the evidence that there was any relevant failure on the part of the respondent. The claimant retained effective autonomy to identify to OH and the respondents what the claimant considered was appropriate including having regard to patient safety. She was not put under pressure to return and work. The respondent implemented recommendations set out in the OH reports provided and indeed continued to seek the claimant's input including as set out by Dr Rennie on 2 January 2022 asking what were the claimant's thoughts regarding what had been planned as nightshifts in the context of stating he was glad the claimant was feeling somewhat better, accepting the claimant proposal to have a phased return and explicitly asking if the claimant's GP had make any recommendations all in response to the claimant email of 30 December 2022. Dr Rennie sought the claimant's thoughts to obtain the claimant's comments at that stage. The claimant's response of 2 January 2022 while describing that he her symptoms

had improved dramatically, referenced recommendations in the November 2021 OH Report which had made explicitly in the hope that the claimant could "*return to her normal hours"* after, in effect December 2021.

159. The respondent at all times followed the recommendation of Occupational Health. The respondent further invited the claimants' thoughts and provided effective autonomy to the claimant to identify to Occupational Health her position which included consideration of consequential risk of harm to patients. There was no reasonable basis upon which the claimant could anticipate that she would not be supported in the event of harm to a patient.

160. There was no fundamental or repudiatory breach of contract by the respondent which led to the claimant's decision to resign.

Section 6 Equality Act 2010 "Qualifying Disability".

Discussion and Decision

161. The Tribunal has carefully considered all the evidence including the contemporaneous evidence. The Tribunal's conclusion is that the claimant was not and had not been suffering from a mental impairment with substantial adverse effects on her ability to carry out normal day-to-day activities at the relevant times up to the date of termination of the claimant's employment as an EP on 4 April 2022 and during which asserted discrimination took place, having regard to the available contemporaneous evidence, in particular, the OH reports being the November 2021 OH report, the January 2022 OH report and the March 2022 OH report.

162. The November 2021 OH report did not identify that the claimant suffered from significant fatigue and/or had a cognitive impairment due to the post-viral condition known as Long Covid in November 2021. It described that "*although recovered from the acute phase, she is still recovering her physical and mental stamina. It is not unusual for someone with her condition to take two to three months for their stamina to return fully."* It did not describe that in November 2021 there was a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, it set out Dr Hilditch's view that

the claimant was "*fit for work, in recognition of her returning stamina"* and that he was hopeful that the reduced shifts would be required "*for just around the next four weeks or so"* indicating a possible *"return to her normal hours afterwards"* with the possibility that *"working reduced hours need to continue for a few weeks longer".* It did not describe that the impairment had lasted for at least 12 months, nor that it was likely to last at least 12 months. In November 2021, the claimant did not have a qualifying condition within the meaning of s6 EA 2010.

163. The January 2022 OH report, while describing that the claimant's "*main issue is with diminished physical stamina*" set out that the claimant described to the report's author that, the claimant had *"needed some time off work recently and upon returning has found sustaining normal length shifts challenging*" while describing that the claimant was keen to remain at work "*while she continues to recover*". It did not identify that the claimant suffered from significant fatigue and/or had a cognitive impairment due to the post-viral condition known as Long Covid in November 2021. It did not describe that in January 2022 there was a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, it set out Dr Hilditch's view that the claimant was "*fit for work",* that author had not considered it necessary to appoint a review appointment unless in effect there were "*unforeseen difficulties".* It did not describe that the impairment had lasted for at least 12 months, nor that it was likely to last at least 12 months. As of 13 January 2022, the claimant did not have a qualifying condition within the meaning of s6 EA 2010.

164. The March 2022 OH report, while describing that she was experiencing cognitive issues identified that the claimant was continuing to recover from post covid illness. It did not identify that the claimant suffered from significant fatigue due to the post-viral condition known as Long Covid in November 2021. While it recommended that the claimant did not return to EP work before 4 April 2022 (the end of the notice), it did not describe that there was an impact on the claimant's other roles with the respondent and set out that the claimant was sufficiently fit to continue with those. It did not describe that the

impairment had lasted for at least 12 months, nor that it was likely to last at least 12 months. As of 1 March 2022, the claimant did not have a qualifying condition within the meaning of s6 EA 2010 in the period to 4 April 2010.

165. While subsequent medical report was provided dated 3 February 2023 (the report contained a typo in that it initially appears to be dated 3 February 2022) and describes that the claimant was reviewed in December 2022 it did not describe review of contemporaneous records including the earlier OH reports and reflected an assessment made in December 2022.

166. In light of the factual matrix in the present case, having regard to the EHRC 2011 Statutory Code of Practice including para 3.11, the Tribunal is satisfied that there is no relevant matter arising from the Code.

167. The claimant did not have a disability within the meaning of s6 of EA 2010 at the relevant times up to 4 April 2010.

S13 EA 2010 direct disability discrimination

Discussion and Decision

168. In the event the Tribunal had concluded that it had jurisdiction in respect of the events complained of in respect of the s13 EA (Direct Disability Discrimination) claims, on the evidence before the Tribunal, the Tribunal would not have concluded that the events, as found by the Tribunal, amounted to less favourable treatment.

S19 EA 2010 Indirect Discrimination

Discussion and Decision

169. There was one PCP relied upon a requirement to work nightshifts. The respondent did not apply that PCP to the claimant at any relevant time.

S20, 21 EA 2010 Reasonable Adjustments

Discussion and Decision

170. There were two PCPs relied upon

1. Requirement to work nights, which is a reference to a PCP requiring EPs to be available to be rostered to Nightshifts. The respondent did not apply that PCP to the claimant at any relevant time. The claimant was not rostered to Nightshifts at any relevant time.

2. Requirement to return to return to work before being fit to do so. There was no evidence of such an operative PCP. The respondent took care to follow both the advice of Occupational Health (which was effectively directed by the claimant) and indeed the claimant herself.

171. Neither of the asserted PCPs put that claimant at a substantial disadvantage in comparison with persons who were not disabled in that the first PCP was not applied to the claimant and the respondent did not operate the second asserted PCP.

Section 26 (Harassment)

Discussion and Decision

172. While the claimant did not have a disability up to the date of termination as an EP on 4 April 2022 having regard to the contemporaneous Occupation Health reports, the Tribunal recognises that having regard to the question of time bar the Tribunal has jurisdiction in respect of the email of 8 June 2022. However, the Tribunal concludes that was not an act of harassment within the meaning of s26 EA 2010. In the context of the claimant's instance upon comment by the respondent as set out in the May/June series of emails together with the respondent's email of 22 April 2022 and indeed 25 May 2022, the Tribunal is unable to conclude that the terms of the email of 8 June 2022 was unwanted. While it potentially related to protected characteristic of disability it did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Further and taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, it did not have the purpose of violating the claimant's dignity

or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

173. In the event, the Tribunal had concluded that it had jurisdiction in respect of the earlier events complained of in respect of the s26 EA (Direct Disability Discrimination) claims, on the evidence before the Tribunal would not have upheld those as having the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Further and taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect, it did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Conclusions

174. The Tribunal does not have jurisdiction in respect of the claimant's claims brough in terms of the Equality Act 2010 with the exception of the claimant's claim of harassment in respect of email of 8 June 2022, which does not succeed and is dismissed.

175. The claimant's claim of constructive unfair dismissal does not succeed.

176. In all the circumstances it is unnecessary to consider the question of remedy, however the Tribunal notes the current position of the claimant as set out in report dated 3 February 2023 and while noting that that the claimant had elected not to progress with possible post-employment opportunities in all the circumstances does not consider that the claimant failed to mitigate her loss.

Employment Judge: R McPherson
Date of Judgement: 17 April 2023
Date sent to Parties: 25 April 2023