EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr H Clark	v	Practice Plus Group Health and Rehabilitation Services Ltd

Heard at: Reading Employment Tribunal

On: 14 to 18 August 2023
25 September 2023: Hybrid hearing (submissions only)
25 and 26 September 2023: Discussion in chambers

Before: Employment Judge George
Ms J Woodhead
Ms C Tufts

Appearances
For the Claimant: Mr S Keen, counsel
For the Respondent: Mr S Nicholls, counsel

RESERVED JUDGMENT

1. The claimant was disabled by reason of severe neck pain from 21 April 2021 and the respondent had constructive knowledge of that from 2 May 2021.

2. The claim of unfair dismissal contrary to s.94 Employment Rights Act 1996 (hereafter ERA) is dismissed because the claimant lacks the qualifying service under s.108 ERA.

3. The claim of automatic unfair dismissal contrary to s.103A ERA is not well founded and is dismissed.

4. The respondent discriminated against the claimant contrary to ss.15 & 39(2)(c) Equality Act 2010 (hereafter EQA) by dismissing her with effect from 24 December 2021.

5. The respondent discriminated against the claimant contrary to s.15 & 39(2)(d) EQA by Natalie Miller treating her negatively (as set out in paragraph 201.11 below) and by Mrs Miller's conduct of the meeting on 8 September 2021.

6. The claim of indirect disability discrimination is not well founded and is dismissed.

7. The respondent was in breach of their duty to make reasonable adjustments by failing to provide the auxiliary aids of a suitable office chair and a vertical mouse.

8. Otherwise, the claim of breach of a duty to make reasonable adjustments is not well founded and is dismissed.

9. The claim of unauthorised deduction from wages is dismissed on withdrawal.

REASONS

1. Following a period of conciliation which lasted from 18 March 2022 to 28 April 2022, the claimant presented a claim on 27 May 2022 by which she complained of unfair dismissal, automatic unfair dismissal on grounds of protected disclosure, detriment on grounds of protected disclosure, disability discrimination and unauthorised deduction from wages. The claims arise out of her employment by the respondent, latterly as a Medical Lead, which ended following her resignation on notice. The effective date of termination was 24 December 2021.

2. In this hearing, which took place in person, we have had the benefit of a bundle of documents containing the documents in the index which were numbered from page 1 to 1,282. Although the medical evidence disclosed with the impact statement was found in the main hearing file, for ease of reference it was provided as a separate bundle and page numbers in that bile are referred to as MB page 1 to 32. The claimant gave evidence in support of her claim and was cross examined on a 142 paragraph witness statement which she adopted in evidence. The respondent relied upon the evidence of:

   2.1 Natalie Miller – Head of Healthcare at HMP Wormwood Scrubs (hereafter 'WWS') since March 2021 who line managed Dr Clark;

   2.2 Ryan Burfoot – Regional Manager for London and the Isle of Wight who was Mrs Miller's line manager,

   2.3 Dr Jonathan McAllister – Regional Medical Lead London who provided clinical supervision to Dr Clark, and

   2.4 Louise Batchelor – Head of HR.

3. At the relevant time Mrs Miller was known by her surname prior to marriage of Walkes but she will be referred to as Mrs Miller or NM in these reasons.

4. The respondent defended the claim by an in-time response received on 21 July 2022 and at initial sift the case was listed for a three-day hearing and the parties were directed to provide an agreed list of issues and agreed

case management orders. They did so on 2 December 2022 providing the agreed list of issues of that date which is at page 60. The parties agreed that a five day listing would be needed to consider issues of liability only. This list of issues and case management orders were approved and on 15 January 2023 the parties were ordered to comply with their proposed timetable. In these reasons paragraphs in the agreed List of Issues are referred to as LOI 1, 2 or as the case may be.

5. Unfortunately the agreed List of Issues, while faithfully replicating allegations in the particulars of claim, is difficult to follow in some respects. It identifies the headline issues and, for the most part, the correct legal tests. One alteration was made to LOI 23 in the reasonable adjustments claim which appeared to confuse the test for reasonable adjustments with the test for indirect discrimination. However, there were two ways in which the factual issues were expressed which proved problematic at the hearing; the challenges were overcome as we explain below.

6. In the first place there were some allegations against Mrs Miller which, as originally expressed in the particulars of claim, lacked sufficient detail to be easily understood and the imprecise wording had been included in the list of issues. For example, LOI 4.b. alleged that Mrs Miller's behaviour had worsened as a result of a protected disclose. In LOI 15.d. she was alleged to have "treat the claimant negatively". Secondly, another practice adopted was to cross refer to paragraphs in the particulars of claim rather than replicate in the list of issues the factual allegations which were said to amount to particular legal wrongs. This is particularly marked in the constructive unfair dismissal claim LOI 6. The problem was heightened by the fact that when one referred to the relevant paragraph number in the particulars of claim, for example, paragraph 31 on page 37, that paragraph itself cross-referred internally in the particulars of claim to paragraphs 14 to 17.

7. During preliminary matters discussed at the outset of day 1, Mr Nicholls, on behalf of the respondent, drew attention to the challenges that he correctly argued that would pose, in particular since he needed to cross-examine the claimant before Mr Keen would cross examine the respondent's witnesses. Having said that, Mr Nicholls said that he had been able to identify from the claimant's witness statement factual matters that it appeared to him she was arguing amounted to the conduct complained of in LOI 4.b. and LOI 15.d., for example. The tribunal made very clear to the representatives that we would need to know from the claimant and/or her representatives exactly what acts were said to amount to these allegations and to be satisfied that they had been explored with the relevant witness in sufficient detail to make it fair to make findings about them. We briefly explore the feasibility of the representatives using the tribunal reading time to review the list of issues but it seemed unlikely that this would be achieved without delaying the start of evidence. It was not therefore, a proportionate use of time. Trusting to the experienced counsel to rely in closing only on those matters which were canvassed in cross-examination, we proceeded on the basis of the agreed list of issues.

8. The hearing opened with the tribunal outlining a timetable to the representatives with a view to delivering judgment on Friday afternoon. Both representatives, who had not been involved in preparation for the case prior to the final hearing, agreed that such a division of the five day time allocation was insufficient for an exploration of the issues that was commensurate with the importance of them. Although both counsel expressed themselves prepared to follow a direction by the tribunal that they complete all cross examination of all witnesses by the end of day 3, they argued that with the number of documents and with three respondent's witnesses with witness statements of more than 20 pages in addition to that of the claimant, the tribunal would probably need a day to read and they therefore suggested that the remaining time should be given to oral evidence with a direction made for written submissions and the tribunal to reserve judgment. Mr Nicholls, in particular, argued us to take into consideration that, if successful, the claim was likely to be a high value although no schedule of loss had been prepared thus far. Given the likely delay in finding another date and the fact that both parties were prepared for the hearing, they were keen that it should proceed but were, in effect, applying for the tribunal to accommodate the extra time that the parties said was necessary.

9. The overriding objective of the tribunal rules is to deal with cases justly and fairly: dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding delay so far as compatible with a proper consideration of the issues and saving expense. When the parties have failed to notify the tribunal in advance that their previously agreed time estimate is inadequate, it causes inconvenience to other tribunal users because the tribunal is faced with the decision about whether to require the parties in front of it to reduce the time spent analysing the evidence and in cross-examining witnesses in order to fit the case into the allotted time, postpone the case entirely, or reserve judgment and allocate additional time for discussion. Either of the last two options mean that tribunal resources have been impacted because if the case is postponed then the tribunal sitting time, which could have been allocated to another litigant, will not be used for its intended purpose. But if discussion time is scheduled at the tribunal's convenience then it is likely that cases, which had been scheduled to be heard in that adjourned time, will be impacted by the fact that the employment judge and tribunal members in the present case cannot be allocated to other hearings.

10. On the other hand, having seen the detail in the witnesses statements and the number of issues to be considered, the tribunal agreed that two or two and a half days of tribunal time was not going to be sufficient to give a fair hearing to the parties' evidence. The tribunal was able to find dates when they could reconvene for discussion in the not too far distant future and agreed to allocate to reading and evidence the original five day time allocation. Originally the intention was that if the tribunal read for half a day then half a day would be available for submissions at the end of the week. However, it became clear during the middle of the week that in part due to the way the factual issues were interlocked and overlapping issues in the list

of issues, written submission would be of benefit. Both representatives were able to attend by CVP at 9.30 AM on the first day allocated for discussion and that was done by way of a hybrid hearing; the panel meeting together in the hearing centre.

11. Therefore, in the end the parties had something over four days for evidence; directions were made for exchange of written submissions and for a response, should that be thought necessary. Both representatives took advantage of that and the respondent's skeleton submissions and response are referred to as RSK 1 and RSK 2 in these reasons. The claimant's skeleton submissions and response are referred to as CSK 1 and CSK 2 in these reasons. Both counsel provided bundles of authorities at the resumed hearing and made brief oral submissions limited to 30 minutes each. In addition to the authorities in the respondent's bundle of authorities Mr Nicholls provided a copy of Chatterjee v Newcastle Upon Tyne Hospital NHS Trust UK EAT/0047/19. Mr Keen for the claimant also provided an opening chronology and closing chronology. Neither were agreed documents but were more in the nature of submissions about the relevance of particular documents or events to our conclusions.

12. We were conscious when timetabling the sitting days, not only that Dr Clark has the health conditions that have been relied on for the purposes of this litigation but also that one of the respondent's witness has a relevant health condition which needed consideration. Neither representative indicated that anything would be needed by way of adjustment beyond regular breaks and this was put in place.

Issues to be determined.

13. We have already explained the challenges that were posed to the parties, their representatives and the tribunal by the structure of the list of issues. Given the pressure of time that the tribunal was already under it did not appear to be proportionate to spend time case managing the claim further to attempt to revise the list of issues. Both parties were represented by experienced counsel and we have taken great care when considering our judgment to check that points which we make the subject of our judgment were put in cross examination to the relevant witness. As we say, we made clear at the outset of day 1 that we expected that cross examination by experienced counsel and submissions would ensure that a fair opportunity was given for the relevant witnesses to answer allegations against them. We take into account, where relevant, arguments about whether particular lines of argument or wording falls within the claim as originally pleaded.

14. It is well known that the list of issues is an important document because it sets the preparation of the parties and their representatives and should not lightly be departed from. However, the claim form and the response are where the actual allegations are found. Where there is cross referencing from the list of issues to the claim form then it is evidently the case that the exact wording of the claim form should be regarded as the case that the respondent has to meet.

15. Some amendments and concessions were made during the course of evidence and prior to submissions which mean that the issues it was necessary to decide were narrowed. In LOI 29, which is the allegation of a breach of duty to make reasonable adjustments by failure to provide auxiliary aids, it was confirmed in Dr Clark's evidence that she only pursued this in respect of a failure to provide a vertical mouse and a suitable office chair. Certain aspects of the protected disclosure claim were withdrawn in CSK 1. CSK 2: para.3 sets out the particular allegations that the claimant no longer pursues. One of those was the unauthorised deduction from wages claim which is dismissed on withdrawal.

16. Where the list of issues was somewhat imprecise about the particular allegations made against Mrs Miller, those allegations were clarified in CSK 1 paragraph 29 which sets out conduct relied on as unfavourable treatment, contrary to s.13 EQA, and the same conduct set out in CSK 2 paragraph 29(b) was confirmed in oral submissions to be the conduct relied on for the alleged detriment set out in LOI 4.b.

17. In the interests of clarity, when starting our discussion the panel annotated the agreed list of issues with deletions, clarifications and comments as a result of the amendments and concessions. That annotated list of issues is attached to this reserved judgment as an appendix. It sets out the factual and legal issues which the parties agreed remained to be decided by the tribunal in order for us to determine the dispute between them as those issues have been explained to us during the course this hearing.

Law applicable to the issues

Employment status

18. The claimant's claims include that of unfair dismissal contrary to s.94 Employment Rights Act 1996 (hereafter the ERA). By reason of s.108 ERA, with some exceptions, that right only applies to an employee who has been continuously employed for not less than two years at the effective date of termination. One such exception is where the reason or principal reason for the dismissal is that the employee made a protected disclosure: s.103A ERA. This is one head of claim relied on by the claimant but she argues that, notwithstanding that, she had the right not to be unfairly dismissed by reason of length of service. Whether or not she succeeds in that argument depends upon whether she was an employee under a contract of employment between 18 November 2019 and 30 August 2020 when her engagement was covered by a SEMP agreement.

19. The task to be carried out by the employment tribunal when determining the nature of the agreement between the parties is to consider what the party's intentions were from the available evidence whether that be the relevant documents, evidence of oral conversations or conduct: Carmichael v National Power Plc. [2000] I.R.L.R 43 HL.

20. In effect, the Supreme Court authority of Autoclenz Limited v Belcher [2010] I.R.L.R 70 UKSC, invites the tribunal to consider first of all is 'what is the true nature of the agreement between the parties?' focusing on the actual legal obligations of the parties (if any) and examining all relevant evidence including the written terms in the context of the whole agreement, the parties' conduct in practice and their expectations of each other. What was agreed might be what is written down but it is not necessarily entirely included in written documents.

21. The guidance of the High Court on identifying a contract of employment in Ready Mixed Concrete South East Limited v The Ministry of Pensions and National Insurance [1968] 1 All ER 4633 QBD has stood the test of time. Three questions are posed, the answers to which inform the tribunal deciding whether there was a contract of employment of the factors pointing for and against such a conclusion.

    21.1 Did the worker agree to provide his or her own work and skill in return for remuneration?

    21.2 Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employment?

    21.3 Were the other provisions of the contract consistent with it being a contract of service?

22. One example of a factor the presence of which is consistent with a contract of service or of employment and the absence of which is inconsistent with such a contract is mutuality of obligation. Clark v Oxfordshire Health Authority [1998] I.R.L.R. 125 CA is authority for the proposition that mutuality of obligation is an irreducible minimum for the relationship to have the hallmarks of employment rather than some other kind of relationship.

23. A further issue which arises for consideration is whether there is sufficient control over the putative employee in the sense meant by McKenna J in Ready Mixed Concrete (para.21.2 above). He referred to control as including: "the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done." ([1968] 2 QB 497 @ 515 F). Control is also an irreducible minimum legal requirement for a contract of employment to exist. However, as Buckley J explained in Montgomery v Johnson Underwood [2001] IRLR 269 CA, there are many examples of activities were direct control is absent and the employment or controlling management "may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist." (para.19).

Protected disclosure detriment

24. In the present case it is accepted that the communication relied on by the claimant was a protected disclosure so there is no need to set out the law on what amounts to a qualified and protected disclosure.

25. If the worker has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. So far as material, s.47B provides,

> "47B.— Protected disclosures.
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
> …
> (2) This section does not apply where—
>
> (a) the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of [Part X])."

26. By s.48(1A) of the ERA, a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of s.47B. As with Equality Act 2010 claims, there is a detriment if a reasonable employee might consider the relevant treatment to constituted a detriment: Jesudason v Alder Hey Childrens NHS Foundation Trust [2020] IRLR 374, CA.

Constructive dismissal including on grounds of protected disclosure and/or discriminatory grounds.

27. Section 103A, so far as is relevant, provides that:

> "An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

28. Dismissal includes where the employee terminates the contract of employment (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct: s.95(1)(c) ERA – commonly referred to as constructive dismissal.

29. The leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

30. In the present case, one of the arguments run is that the claimant resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for the tribunal is whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

31. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then they were constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

32. Once they have notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.

33. An authoritative explanation of the last straw doctrine is found in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that,

when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

34. The doctrine was considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ explained that

> "there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in *Addenbrooke* which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so." (paragraph 45)

Before giving the following guidance,

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy." (paragraph 45)

35. As can be seen from the above quotations from the relevant sections of the ERA, the test of causation is different when one is considering unlawful detriment contrary to s.47B ERA to that applicable to automatically unfair dismissal contrary to s.103A ERA. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] I.R.L.R. 64 CA.

36. A dismissal case where the respondent has terminated the contract of employment involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

37. In a constructive dismissal case, the reason for the dismissal (if any) is therefore the employer's reason for the conduct in response to which the claimant resigned: Salisbury NHS Foundation Trust v Wyeth (UKEAT/0061/15: paras: 30 & 31). The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

38. Where the claimant has the right not to be unfairly dismissed, the legal burden of proving the principal reason for the dismissal is on the employer although the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

> "… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …
>
> 57
>
> I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
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> 58
>
> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of

> primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
>
> 59
>
> The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

39. However, where the employee lacks the requisite two years' continuous service to claim unfair dismissal under s.94 ERA, they have the burden of showing, on the balance of probabilities, that the reason or principal for the conduct in response to which they resigned (in a constructive dismissal case) was a protected disclosure.

40. It is sufficient for a discriminatory constructive dismissal that discriminatory considerations materially influenced the conduct that amounted to the repudiatory breach of conduct. In principle, a 'last straw' constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination.

> "Where there are a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. … it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory." De Lacey v Wechseln Ltd [2021] IRLR 547, EAT para.69.

The meaning of disability

41. A person has a disability, for the purposes of the EQA, if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EQA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT. As it says in paragraph B1 of the Guidance on the definition of disability (2011), this requirement reflects the general understanding that disability is a limitation going beyond the normal differences which exist among people.

42. When considering whether the adverse effects on the claimant's ability to carry out day-to-day activities are substantial the following factors are among those to be taken into account (see the Guidance Section B),

    42.1 The time taken to carry out an activity,

    42.2 The way in which an activity is carried out,

    42.3 How far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of the impairment (see paragraph B7 – cited in full in RSK1 para.114);

    42.4 The effects of treatment;

    42.5 There may be indirect effects, such as that carrying out certain day-to-day activities causes pain or fatigue (See Guidance on definition of disability (2011) paragraph D22).

43. In the Court of Appeal's decision in All Answers Ltd v W [2021] EWCA Civ 606, their summary of the relevant law is at paras 24 to 26:

> "24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities….
>
> 25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056,...
>
> 26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act

> which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

44. It is argued on behalf of the respondent, relying on Condappa v Newham Healthcare Trust (EAT/0452/00) that the mere fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not, on its own mean that disability is established (RSK1 para.116). Mr Nicholl explained that he simply relied upon it to argue that the test of disability remained the statutory test of whether there was a more than trivial adverse effect on the claimant's ability to carry out day-to-day activities and whether the pain or difficulty experienced by the claimant satisfied that test was a matter for the tribunal.

45. Thus clarified, there did not appear to be a difference between the representatives' respective position on the applicable law; although Mr Keen (CSK 2 para.9) argue that pain is capable of amounting to an impairment, we did not understand him to disagree with the proposition that the question overall remained whether the impairment caused the requisite more than trivial adverse impact. He also emphasised that the comparison is between the way the individual carries out an activity and how they would carry it out if they were not impaired: Paterson v Commissioner of Police of the Metropolis [2008] ICR 152, EAT.

46. The EQA provides that, where an impairment is being treated, then it is to be treated as having a substantial adverse effect if, but for the treatment, it is likely to have that effect (Sch 1 para 5(2)). However, where the effect of continuing medical treatment is to create a permanent improvement rather than a temporary improvement it is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect (See 2011 Guidance at B16 and C11 and C5 and following).

Direct discrimination

47. The claimant alleges that she was the victim of disability discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination, for the present purposes, is where, by dismissing their employee (A) or subjecting him to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

48. All claims under the EQA (including direct discrimination and discrimination for a reason arising in consequence of discrimination) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of

cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the following guidance is still applicable to the equivalent provision of the EQA.

48.1 When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

48.2 We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

49. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

50. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

51. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

Discrimination arising from disability

52. Section 15 EQA provides as follows:

> **"15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

53. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Employment Code (2011) is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
> *EHRC Employment Code paragraph 5.6.*

54. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler (as she then was) in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

> "the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

> (i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

55. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

    55.1 On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

    55.2 The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

    55.3 The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

    55.4 Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

    55.5 The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

56. The other potential defence is lack of knowledge of disability. This requires the respondents first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled. It is not a defence relied on to the s.15 EQA claim in the present case.

Indirect disability discrimination

57. Indirect disability discrimination, for these purposes, is where the employer applies a rule; a provision, criterion, or practice ("PCP"), to use the words of

the Equality Act 2010, which does not on the face of it discriminate between those who are disabled by reason of bipolar disorder and those who are not, but which puts, or would put, the disabled group generally at a particular disadvantage and puts, or would put the claimant at that disadvantage. The limitation of the claimant's group to those who have the same disability is stipulated by s.6(3) EQA. Once the PCP has been identified, the scope of those potentially affected by it should flow logically from the PCP.

58. When considering whether the disabled group has been put at a particular disadvantage, it is necessary to consider all those whom the PCP affects, either positively or negatively, while excluding those who are not affected by it, either positively or negatively: ECHR Employment Code (2011) para. 4.18. The requirement is for a causal link between the PCP and the disadvantage experienced by the group, not between the protected characteristic and the disadvantage. Although the claimant's disadvantage may provide support for the argument that there is group disadvantage, there may be circumstances particular to the claimant which do not exist in the wider group which means that proof of the claimant's disadvantage is not sufficient evidence to show that the group disadvantage exists.

59. The respondent relies upon the case of Little v Richmond Pharmacology Ltd [2014] ICR 85, EAT. The facts were that an initial refusal of a flexible working request was overturned on appeal and the EAT held that the requirement to work full-time had been disapplied in the claimant's case and she did not suffer any disadvantage as a result.

60. If the claimant succeeds in showing the group disadvantage and that they have been or would be put to the same disadvantage then the burden passes to the respondent to show that the PCP is a proportionate means of achieving a legitimate aim in accordance with the caselaw referred to in para.55.5 above.

Breach of duty to make reasonable adjustments

61. The obligation upon an employer to make reasonable adjustments in relation to disabled employees, so far as it is relevant to this claim, is found in ss. 20, 21, 39 and 136 and Schedule 8 EQA 2010.

    61.1 By s.39(5) the duty to make reasonable adjustments is applied to employers;

    61.2 By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

61.3 By s.20(5) the duty to make reasonable adjustments also arises where the lack of an auxiliary aid or service puts the disabled person to a substantial disadvantage in relation to their employment in comparison to persons who are not disabled.

62. When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

63. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

64. By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the legislation consolidated into the EQA was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

65. Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

66. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include “any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.”

67. The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL where it was described as being “triggered” when the employee becomes so disabled that he or she can no longer meet the requirements of their job description. In Mrs Archibald’s case her inability, physically, to carry out the demands of her job description exposed her to

the implied condition of her employment that if she was not physically fit she was liable to be dismissed. That put her at a substantial disadvantage when compared with others who, not being disabled, were not at risk of being dismissed for incapacity. Thus the duty to make reasonable adjustments arose.

68. Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it was explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP.

69. In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies"

Furthermore (at para.19);

> "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

70. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it or whether the proposed adjustment would be disruptive: Smith v Churchill Stairlifts plc [2006] ICR 524, CA.

Findings of fact

71. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based

upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

72. There are two issues on which we make findings of fact on and reach conclusions on as preliminary issues before making those findings of fact which it is necessary for us to make to decide the issues which remain following those determinations. The first is the question of the nature of the claimant's employment status between 17 November 2019 and 31 August 2020. The second is the question of whether the claimant's neck condition means that she is disabled within the meaning of s.6 EQA by reason of a physical impairment as well as by reason of a mental impairment.

Employment status

73. The outline chronology of the claimant's contractual status is that she started employment with the respondent on 23 April 2019. The claimant requested a change to her status on 23 September 2019 referring to a significant change in her personal situation that meant she had to refocus her priorities and work more flexibly in a freelance capacity:

> "For the time being however, I do not feel that a full time salaried GP role is suitable for me, and I therefore request that my employment status be changed to that of self-employed GP". (see mail at page 182)

74. It is clear from the following correspondence that the change from permanent salaried role to SEMP was effective from 18 November 2019 (page 184) and Dr Clark discusses in her email of 22 November 2019 that before giving notice apparently she discussed with Dr Brew alternatives to her giving up her salaried position.

75. She states in her statement at paragraph 2 that she continued working at HMP WWS as a General Practitioner under the category Self-Employed Medical Practitioner or SEMP, working Monday, Tuesday and Thursdays "Except for the month of December 2019 when I was medically off due to stress, and a further two weeks in March 2020", due to her daughter's illness.

76. Dr McAllister describes the role of both salaried GP and SEMP in his paragraph 5. He has worked in both capacities and as a bank GP: he works as a salaried GP doing a bank shift typically on Mondays and Wednesdays with Thursday being his assigned day for leadership tasks and on Friday he is employed as a salaried GP working at WWS. Therefore, Dr McAllister, while providing clinical supervision to the claimant in her role as Medical Lead for WWS, was also a salaried GP; in effect part of the Clinical Team that she provided leadership for. He states that a bank GP shift is essentially the same as a salaried GP shift with a difference that you do not have to accept a bank shift. However, a GP engaged as a SEMP has, he says, a number of differences. The clinical requirements are the same but SEMP is not required to do any of the management work expected of an employed GP, "A SEMP can simply turn up, do the clinical work and then

leave." He also states that a SEMP can turn down shifts or send a substitute and it therefore provides more flexibility.

77. Although Dr Clark never sent a substitute that we have heard, she did accept that she was able to turn down shifts as appears to be apparent from the time that she took off in December 2019 and March 2020. We accept Dr McAllister's evidence on this point as a whole; in particular the lack of management work mean that, in general, a SEMP does not attend meetings.

78. It is argued on behalf of the claimant in CSK 1 paragraph 54 that the nature of the relationship did not change when she moved form salaried to SEMP. It is argued that the terminology changed but there was no change in the type of day to day interactions. We reject that argument for a number of reasons.

79. Although the claimant did write to the respondent on 3 June 2020 to flag up that she had been asked to do work that she was not sure was within the remit of a SEMP, the height this evidence reaches is that the claimant was occasionally asked to do tasks that the respondent would not ordinarily ask a SEMP to do. Other than that the submissions made in paragraph 54 are inconsistent with key aspects of the claimant's evidence as a whole. She said in oral evidence that she did not have the restrictions of an employee and it is clear from the wording of her request that initiated the change at page 182 that she had the benefits of flexibility in mind. The absences we have referred to are consistent with her not having to accept shifts and she did not need to book annual leave. She has chosen not to be employed for perfectly understandable reasons at a particular time in her life.

80. She remained a SEMP from 18 November 2019 until 31 August 2020 when she started the Lead GP role in an acting or interim basis as set out in her paragraph 7. The difference in role is clear from page 203 where she refers to "a brief update on my first week in post" and describes challenges that she expects she will have in the future in combining clinical workload with leadership time. There has been frequent reference in the evidence in the case to attempts made by the claimant to put some structure into her day to day tasks by way of job planning and to some flexibility being agreed about the eight clinical GP sessions she was to undertake. Although the job description at page 106 was illustrative to some extent (in that it referred to a cluster role which hers was not), it is apparent that the role was completely different from the day to day role of a SEMP.

81. As a clinician there would undoubtedly be some element of the respondent not directing ways in which the claimant carried out her tasks but we have no doubt that when she took the Lead GP role she was committing to working particular days in a week at the direction of the respondent, rather than habitually working specific days, three days a week, for her convenience. The contract (page 112) is dated 26 March 2021 and is intended to govern the parties relationship from 1 April 2021 when the claimant took over on a permanent basis.

82. It is true that, as originally provided, the contract stated 18 November 2019 as the start of her continuous employment. That is the start of the SEMP contract. The claimant wrote (page 271) to Ryan Burfoot stating that her start date had been 23 April 2019 because she had been employed between then and 18 November. However, she does openly state she had a SEMP agreement and is not sure how that works. By that she appears to be recognising that the SEMP contract is different compared with what came before and after.

83. As is common ground, the parties are not able to agree a different date as the start of continuous employment from that which is objectively the case. We do not consider that there was sufficient control over the claimant in the relationship as a SEMP and she was not an employee during that period. The claimant has, viewed objectively, been employed for two separate periods and the period which ended with resignation and which is the subject of this claim, started on 31 August 2020. There was some evidence of a limited nature that the claimant was occasionally asked to do tasks that the respondent would not ordinarily ask a SEMP to do but that is insufficient to suggest that in reality the agreement between the claimant and the respondent between 18 November 2019 and 30 August 2020, was something other than the claimant being a SEMP or that there was no change to the claimant's status during that period.

Was the claimant disabled by reason of severe neck pain.

84. The claimant's disability impact statement is at page 74. The claimant was not alleged to have exaggerated the symptoms of her neck pain that she describes. However it is not true to say, as Mr Keen does, that she was not cross-examined upon that evidence. As it concerns the neck condition her evidence starts at section 8 on page 79. This follows a brief outline in paragraph 4 where she states that she began to experience severe neck pain, extremely hypertension, and headaches from April 2021. She later discovered that she had a cervical disc prolapse at C5/C6 and degenerative changes at C6/C7. It is this which is referred to as a neck condition. The impact statement was finalised in January 2023 and therefore when she describes the then present impact upon her of the neck condition it is that impact as at that date.

85. The chronology of events is set out in paragraph 24 and following of her witness statement. After a build-up she describes driving home from work on 21 April 2021, feeling extreme pressure in her head and then feeling something "pop" at the back of her neck. She had a severe headache that did not settle with rest and a simple painkiller and when she measured her blood pressure it was extremely high. She attended Accident & Emergency that evening and a general doctor arranged a CT scan of her brain. This excluded a haemorrhage but when she attended her GP the following morning her blood pressure was still significantly high. She saw a neurosurgeon on 28 April 2021.

86. She had been attempting to work from home and explained the situation to the respondent in emails that she catalogues in paragraph 26 of her

statement. She had also been exchanging texts with Mrs Miller and her deputy (page 305) which show that she has had physiotherapy and reported a disc protrusion. She was anticipating an MRI scan and stated: "I cant drive, stairs are hard, I cant sit at a desk and probably ought to follow her advice and accept I should stop work.". Mrs Miller replies sympathetically that she is probably best not to work in those circumstances and should be resting: Mrs Miller says that she and will make an Occupational Health referral.

87. MB page 7 is the Consultant Neurosurgeon's letter of 12 May 2021 following a review of the claimant's condition the previous day. The MRI scan of her head is said to be normal but "In the cervical spine she has significant foraminal stenosis on the left side at C5/6 and C6/7 with associated nerve root compression". The neurosurgeon reports some improvement with physiotherapy which we understand continued until about August 2021. The letter also evidences pain and paraplegia between neck and left hand and paraplegia of her right hand.

88. The claimant was seen again by the neurosurgeon in clinic on 25 May 2021 where the diagnosis is "Bilateral, mild carpal tunnel syndrome and the MRI shows mild degenerate change and nothing else." The symptoms are described as continuously improving and she is discharged back to the General Practitioner. The Occupational Health report at page 375 relates to a consultation on 10 June 2021, by telephone, when Dr Clark reported that the symptoms of carpal tunnel syndrome had settled down:

> "Presently Dr Clark is being treated with physiotherapy. She informs me that she has a very stiff neck with highly restricted movements. Her pain is aggravated by movement of the neck and it radiates to the left hand. She informs me that she did try to work during this period of absence, however working on the computer has led to aggravation of her symptoms and she has been advised not to work until such time that she recovers."

89. The claimant is described as not being fit to return to work and "She is not in a position to lift or carry loads and has great difficulty in using the keyboard." There is a recommendation that, as Dr Clark works from home, there should be a workstation risk assessment. Although the 1st OH doctor states that the clinical condition is likely to be covered by the EQA, since he also states that the long-term effects can only be assessed after she has been reviewed, he does not make plain the basis of his apparent opinion that this is to be a long-term condition. Nevertheless, as at the 10 June 2021 there is clear evidence in this Occupational Health report of what we accept to be a very significant adverse impact on the claimant's ability to carry out day to day activities as at 10 June 2021.

90. It appears by the date of the next Occupational health assessment by telephone on 12 July 2021 (page 455) that the claimant's condition has improved quite a lot. In this medical report the physician discusses not only the neck condition but also the impact on the claimant of bipolar disorder. The claimant has experienced secondary depression and the Occupational

Health Physician reports that she is taking new medication for bipolar depression which is described to be working for her.

> "She states that the medication can make her feel drowsy, and she has to take it around 10pm before going to bed."

91. She is described as having mild carpal tunnel syndrome and is fit to return to work: "She is able to manage her day to day routine without any problems. She keeps fit by doing exercises yoga and activities such as walking and gardening."

92. Recommendations in this report are:

> "Please consider doing a stress risk assessment at work.
>
> Please consider a hybrid working model allowing her to combine on-site and off-site work.
>
> Please consider restrictions on late shifts on Mondays from 5pm to 11pm as she has to take medication which makes her feel drowsy and could affect her driving back home."

93. The claimant returned to work following the absence connected with her neck condition on 5 July 2021 on a phased return which we cover in more detail below. Initially she did a few hours a week with the intention that she should build up to full-time from August 2021.

94. In the impact statement, the claimant describes experiencing pain following short spells of daily activities that involve rotation movements such as "ironing, washing up and gardening." She estimates a short spell to be 15 minutes. She states that the pain starts in the left side of her neck and if she persists in the activity pain extends to the other arm and chest wall. Although she describes developing severe pain every few months that lasts two to three days and requires codeine there is no evidence that she had experienced such an episode over the relevant period which is May 2021 to the end of her employment in December 2021. Certainly there is no evidence that she experienced such a relapse while she was at work that the respondent would have been aware of. The second OH position whilst giving the usual caveat about the disability issue being a legal decision and not a medical one, states that the provisions are unlikely to apply, "as they are unlikely to have significant longer term functional restrictions if their treatment were to be removed".

95. The physiotherapist report of 16 November 2022 (MB page 32) indicates the end of physiotherapy was 29 August 2021 and that the claimant had improved progressively throughout the session. She stated in evidence that she had not been back to a physiotherapist because she had been taught what she needed to do when she felt things were slipping. The claimant stated, and we accept, that she still had symptoms in August 2021 when she stopped the physiotherapy sessions.

96. Her evidence was that she had not been in that exact condition (as described to the 2nd OH doctor) since then because it was a degenerative condition although with treatment there were ways to manage it. She described things that might set it off such as sitting on a garden chair picking things up for 20 minutes doing gardening. And it seems to us that she was therefore avoiding certain activities in order to prevent a relapse. Some of the evidence she gave was from after the relevant period and we therefore ignore it. It is clear that initially she was significantly incapacitated and describes lying in bed on heavy duty painkillers but accepted that the pain did settle. She stated the things she avoided doing were that she would stop doing things that involved rotating movements such as ironing or vacuum cleaning or standing for long periods. "I would just limit the duration and make myself stop. I need to be very strict … I get to the end of the second shirt and don't be tempted to carry on". She stated that she could drive for two hours but she would not generally go further than that.

97. MB page 32 is good evidence about the claimant's state of recovery as at 29 August 2021 where it was much easier to move her neck. Some sense of degree of improvement is apparent from comparing that with 10 July 2021 in the second Occupational Health report. The mild carpal tunnel syndrome was described by the claimant as involving symptoms that she regarded as "significant enough" because she was dropping things and had difficulty feeling things but it settled because she was not using her wrists so much. Those had improved by the time of the second OH report.

98. Overall, it seems to us that in the period July 2021 to September 2021 there probably still was a more than trivial adverse impact on the claimant's ability to carry out day to day activities although the impact was reduced. We need to consider what evidence there is of the length of time that that would last, the likelihood of recurrence and whether the extent to which the claimant avoided activities which exacerbated her pain was itself a significant advert impact on her ability to do them. Other contemporaneous evidence is that in the return to work outcome letter of 16 July 2021 on page 510. Dr Clark had reported to Mrs Miller that the neck pain does still cause her problems and may well be a long-term pain. No one in the respondent organisation, including the managers, have suggested that Dr Clark is exaggerating the symptoms she experiences. Although it appears that things had improved sufficiently that by the end of August 2021, provide the claimant avoided doing certain tasks, she had reduced pain levels to a point where she could sustain attendance at work, the impact on her ability to carry out day to day activities of avoiding those tasks needs to be considered.

99. The 3rd OH report was based upon a telephone assessment on 3 September 2021, right at the end of the reference period. It is argued by the respondent (RSK1 para.121) that the ability to manage the neck symptoms with minor coping strategies such as micro breaks are of a kind made to people with or without a disability and provide no indication that the neck condition had a substantial adverse effect at the time. What was meant by micro breaks (page 737) seems to be a 20 second break in clerical type

every 20 minutes as well as changing position with use of the rising/falling desk (which was not available at work). This does not, in our view, detract from our findings about the extent to which the claimant's avoidance of day to day tasks which involve rotational movements was an adverse impact on her ability to do them.

100. We bear in mind the Guidance on the definition of disability (2011): para B7 and the guidance that:

> Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example, by use of a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day-to-day activities.

101. In this instance it seems to us that if the claimant stops ironing after two shirts, if she is stopping activities such as vacuuming or gardening after only 15 to 20 minutes then the avoidance of these activities is itself a substantial adverse impact on her ability to carry them out. We accept that that has probably been a steady state of affairs since late August 2021. This is even without considering the chances of a relapse. We accept that the claimant did not have a relapse in the relevant period and that the evidence from that period does not itself discuss how likely it is that she would have a relapse. There is nothing beyond the simple fact that she has, and is accepted to have, a degenerative condition to lead to a conclusion that a relapse could well happen. We do accept that she carried out physiotherapy exercises as an intervention. On the one hand that might be regarded as treatment, the effect of which should be ignored. On the other, it is, we think, more akin to taking a regular exercise class, or, as the claimant also does, practicing exercises derived from yoga as self-care.

102. The fact that she is curtailing several different normal day-to-day activities after unusually short periods of time we conclude satisfies the test of a substantial adverse impact and that, according to the information she provided to Mrs Miller in July 2021, was likely to be a long-term situation. We consider that the test of disability is made out and the claimant was disabled by reason of a neck condition at the relevant period.

Data protection breach

103. On 3 March 2021 the claimant reported to Mr Burfoot that the previous day she had found sensitive personal data relating to herself on the shared drive on the respondent's computer system. The details of what she had found are in her paragraph 17. It was on shared drive to which the entire departmental staff had access and included the claimant's name, address, salary, interview notes from her initial appointment and financial details of a very personal nature. Mr Burfoot was, rightly, horrified and on 5 March 2021 he emailed her with an apology for the inappropriate storage of her personal information (page 248). He states:

> "Just also to say sorry for the manner in which your personal information was stored it wasn't appropriate by any means and I am keen to make sure we learn from this and also how this came about."

104. The incident was investigated and the claimant went for an interview on 26 March 2021. The claimant criticises the investigation that was carried out in terms of the relevancy of some of the questions she was asked. However, our view is that the principal ground for reasonable criticism of the investigation is the length of time it took to conclude.

105. Mr Burfoot gives evidence in his paragraph 13 of the steps he took to commission an investigation and part of the difficulty seems to have been that key personnel were no longer in the respondent's employment. The IT system itself appears to limit the extent to which the history of access to a particular saved file can be established and the one person who it could be seen had access to the file can not remember doing so. On 7 September 2021 Mr Burfoot emailed Dr Clark to say that he was finally in possession of the investigation but needed to go through it with the HR business partner. As will be seen from the later chronology the claimant started a period of sickness absence a few days later.

106. The investigation report is dated 17 August 2021 but as at the time of the response to the claimant's grievance in May 2022, she had not received a copy of it or any details about the outcome of it. Those were provided on 5 May 2022 (page 1165).

107. Mrs Miller moved to WWS as Head of Healthcare in March 2021; the previous Head of Healthcare having left in September 2020. Leadership had been provided at WWS in the meantime by an Acting Head of Healthcare. She was the Deputy Head of Healthcare at WWS and she reverted to that substantive position when Mrs Miller joined.

108. Mrs Miller therefore started working at WWS after the data breach had been notified to Mr Burfoot. Her evidence on this, which we accept, is that she became aware of the claimant's report to Mr Burfoot of the data protection breach in approximately mid-April but she did not have any input whatever into the investigation. Notes of the interview with the claimant are at pages 265-267. The case against Mrs Miller in relation to the data protection breach complaint is that it is said to play a part in her arriving at the conclusion that the claimant was challenging as it was part of the reason why she considered the claimant to be someone who complained and was difficult, CSK1 paragraph 46. There was scant cross examination of Mrs Miller about this. It was simply put to her that she was not happy with the complaint and her response was to ask why that should be the case. No evidence has been put before us to suggest that this was an issue that remained in the mind of Mrs Miller in any respect. She knew the complaint had been made but there is nothing at all in the large number of documents in the case that suggests that it intruded on her thoughts in any context at all.

Reception work

109. The job description at page 106 for Lead GP at HMP WWS was given to the claimant on 14 September 2020 shortly after she started in the interim role. The job summary states that it is to:

> "provide dynamic leadership of the medical profession across the relevant cluster of Care UK Health in Justice services and within this, to be pivotal in engaging the medical workforce to support the delivery of the organisation's objectives, thus ensuring the provision of an effective, high quality medical workforce within the available resources."

110. As stated above, the reference to a cluster role was not apt (page 1240) but the principle of providing leadership of the medical professionals and medical workforce within the prison is. The job description states that "The post holder will be required to maintain clinical practice within one of the prisons in the cluster to maintain clinical skills and clinical credibility."

111. Discussions about a revised job description were still taking place at the time of the events which led to the claimant taking sickness absence in September 2021. A new job description and was provided to Dr Clark by Mrs Miller on 7 September 2021 (page 745 - with the job description at page 746). This later job description for Medical Lead talks about the need to "Identify and utilise evidence based best practice through benchmarking and clinical guidelines" but does not appear to include an express requirement to carry out the role of a GP in the prison. Nevertheless, since an essential qualification is inclusion on the GMC Register, it seems implicit that the postholder would maintain practice. We conclude there is nothing in either job description and certainly not one in the job description provided for the interim role that requires the postholder to carry out all of the tasks of a full-time salaried GP in the prison. No consultation with Dr Clark about the new job description had yet taken place when her sickness absence started.

112. As we consider in more detail below, the claimant was issued with a manager's employment contract when that was provided in March 2021 (page 112) which sates that the employee's normal duties will be confirmed by the employee's line manager (Clause 3.1). The contract which the respondent asserts should have been used (page 320) states that the duties are outlined in the job description. Again, whether one looks at the contract that was actually executed or the one the respondent says should have been executed, the contractual documents are not specific about exactly which tasks the postholder is obliged to carry out.

113. Nevertheless, evidence is given by all witnesses that the Interim Lead GP and, in due course, the Medical Lead, were expected as part of their role to carry out the clinical work of a GP in the prison (RB paragraph 7). The claimant write shortly after starting in the interim role (page 203) to say that she was carrying the bulk of the more difficult clinical work and she accepted in evidence that carrying out the clinical duties of a GP was part of her role. Mrs Miller says in her paragraph 37 that she regarded not doing the late reception as a change to the claimant's contract "Because as Medical Lead I understood she was required to carry out all GP tasks and this was one of them." However, Mrs Miller does not explain why it was so important that the Medical Lead personally had to do evening reception duties. She does not explain why it is so important for the prison or for the provision of healthcare services to the prison that the Medical Lead does the evening reception duty at least once themselves.

114. Having described the duties she was carrying out in her paragraphs 10 and 11, in paragraph 16 of the claimant's statement she talks about the lack of job plan. It is clear from emails such as that at page 221 to 222 that from early on in her role, first Dr Clark was involved in constructing and implementing a new model of care and, secondly, the job description did not specify in detail any routine clinical duties or schedule. This lack of clarity was something she drew to Mr Burfoot's attention at an early stage.

115. Mr Burfoot describes in his paragraphs 7 and 8 the reporting structure into which the Lead GP fitted and stated:

> "We needed someone who would carry out the clinical work of a GP seeing patients from their arrival at WWS and in their day to day care during their time in prison and who in addition to this, would organise and lead GPs and prescribing colleagues, such as Advance Nurse Practitioners and lead on clinical strategy generally."

116. He also states that he hoped that Dr Clark would help to redesign the rota to make better use of all clinicians.

117. Dr McAllister gave evidence about what shifts on the reception entailed. They involve receiving people who have newly been sent to prison either when remanded from a police station or when remanded after attending court. If they have been transferred from a police station they may arrive in the afternoon and so the afternoon reception, starting from 1 or 2 PM, would deal with that category of prisoners. However, the majority would arrive after 5 or 6 PM having been transported from court. Therefore the evening reception involved processing a larger number of prisoners and could involve working until 10 PM or sometimes later.

118. The tasks to be caried out in an evening reception were accepted by the claimant to be an important part of prison work; an essential part of prison care. She described the prisoners needing health screening by the Advanced Nurse Practitioner (hereafter the ANP) and sometimes being individuals with complex needs that needed immediate prescriptions either from the ANP or the GP on duty. Some may need methadone or may be on regular medication which would need to be charted and identified as soon as the prisoner arrived.

119. However, Dr Clark also stated that she was in the process of seeking to redesign how care was provided and ensure that clinicians were used where they were of most value. Her opinion was that GPs were of most value to patient with complicated histories but was of the view that care assessments could be safely done by staff appropriate triaging the patients and that this was something that the ANP was doing well. So she accepted that it was an important part of prison work but her opinion was that it did not necessarily have to be done by a GP depending on the skill mix that was available.

120. There was an exchange between Dr Clark and Mr Burfoot in November 2020 about a request by a particular GP, Dr Mark, who had asked to reduce

the number of his sessions and do no evening reception work. On page 220 Mr Burfoot wrote an email to Dr Clark saying:

> "Now OOH is a major part of prison work and I don't quite know how we could cover that in the interim as we wont get a SEMP GP to come in just for reception."

121. Dr Clark appears initially to have taken the view that Dr Mark should not be permitted to not do evening reception and her explanation which we accept was that she thought precedent would suggest he should not be taken off it. However, she moved to a moderated view.

122. Our finding on the evidence before us is that, prior to the depressive relapse he experienced in May 2021, the claimant was not saying that she personally did not want to do the evening reception. Nor was she saying that the session was not important work. However, we think that it is probable that she had articulated the view, as part of looking at new models of care, that it may not be the best use of a clinician GP who should be used where they were of most value.

123. Mrs Miller was adamant that the Medical Lead had to do the evening reception which she referred to repeatedly as being a contractual requirement but also that it was an expectation, however she added: "That doesn't mean we cant put in reasonable adjustments."

124. When it was put to Mr Burfoot that he had not included in his witness statement evidence about why the medical lead needed to work on at least one evening reception, he said it was a high risk area and:

> "At all my other sites the Medical Lead all do at least one evening reception: Pentonville, Belmarsh – we expect them to do that to fully understand that structure. My preference is for that to happen because that gives the best oversight of the service."

125. The claimant countered that by saying that appropriately qualified clinical colleagues could report to her as Medical Lead about the pattern of events at evening receptions.

126. There was a difference of view between Dr Clark and the managers about this. Dr McAllister said that reception was the highest risk area of the prison. We accept his evidence that *if* you need to experience reception by being personally present then you need to experience the *evening* reception because the bulk of those arriving at the prison from court mean that it is the most characteristic of the challenges of reception and the pressures are greatest in that evening session up to 10 or 11 PM at night. One of the questions we have to consider is whether the Medical Lead needs to do that personally as part of their weekly rota of duties. It was what the claimant was doing prior to her sickness absence in May 2021. The respondents have provided evidence that it is their belief that it is necessary and that in other prisons that is what happened. Mrs Miller was adamant that it was a contractual requirement although the basis for that conclusion was tenuous and is not found in the documents. She had also formed the view that the

claimant had wanted to stop doing evening reception prior to her ill health but we are quite satisfied that that was not a matter of personal preference. The most that can be said is that the claimant thought it was not a good use of time. Redesigning the rota was clearly part of her remit (see Mr Burfoot's email of 21 August 2020 although that does not specifically refer to the evening reception). Part of redesigning a more streamlined and efficient rota should involve considering how GPs generally should be used.

127. We have set out above our findings about what the evening reception involved but have come to the conclusion that the respondent has not provided cogent evidence to support their opinion that it was something the Medical Lead should do in order to be able to carry out the tasks that were part of their core duties set out in the job description. The respondent's arguments on this are set out in RSK 1 paragraphs 8 to 16 but in particular at paragraph 11 where it is acknowledged that it was not an express provision in her contract but:

> "It was considered desirable for the claimant to see for herself what was happening on evening reception so that she could effectively perform her duties in particular monitoring clinical services and feeding back her findings to management."

128. The respondent's evidence does not address why this could only be done from personal observation or why it had to be done weekly.

Managing the claimant's absence and return to work.

129. We have discussed in some detail above the circumstances of the claimant's sickness absence which was recorded to be from 4 May 2021 until 4 July 2021. However, the onset of symptoms on 21 April 2021 meant that the claimant was working from home while affected by the neck condition from then onwards. The certificates at pages 1108 and 1009 confirm that the reason that she was unfit in this period was "large cervical disc protrusion and associated radiculopathy".

130. In her paragraphs 30 and 31 she explains that during that absence she developed a depressive relapse of the bipolar type-2 disorder which she was diagnosed with in November 2011. This relapse necessitated the claimant starting a course of quetiapine for treating depression in someone with her disorder. She explains that it has successfully controlled her symptoms. Her course commenced on 18 May 2021 and in the impact statement (page 76 onwards) explains that she has to take it between 8pm and 9pm to avoid any 'hangover' to the following day; by that she means excessive sleepiness the following day. She states that as a result of taking this medication she becomes drowsy, unsteady on her feet and sometimes develops slurred speech.

131. She describes the challenge that she personally faces if working the late shift, in the second paragraph on page 77. She points out that the day begins at 9am although she would usually be on site between 30 minutes and an hour before that with the evening reception shift scheduled to finish

at 10pm but often finishing 10.30 or 10.45 pm. If she took quetiapine at her usual time of 8 to 9pm, she stated she would not be able to stay awake, may have trouble speaking and be unsteady walking before the end of the shift. She would be unable to drive because she would not be able to control a car safely and would struggle to keep awake as a passenger on public transport or taking taxis at night and would also be vulnerable as a result.

132. A report was provided by Dr Cohen to the claimant's GP dated 18 May 2021 a copy of which the claimant provided to Mrs Miller. Among matters that he observed and recounted were that the claimant was "Struggling with an irrational sense of guilt about being absent from work", had poor sleep "with a tendency to wake early and then she ruminates on problems" and "also struggles with feelings of suspiciousness in terms of what people think of her, but these are not held with delusional intensity," Following this clinic the claimant agreed to the recommended drug of quetiapine.

133. The claimant had been keeping Mrs Miller informed about her neck condition as we see not least from page 305 where on 2 May 2021 she reports the identification of the disc protrusion (see paragraph 86 above). Even before this text, on 30 April 2021 Mr Burfoot wrote to HR including to Ms Batchelor (page 297) as follows:

> "I have been going through Dr Clark's contract today and for some reason she has 91 days sick? Is this standard of a Lead GP contract as I didn't put she was having a manager's contract.
>
> Can you let me know please as I think she is about to take a period of extended leave".

134. Ms Batchelor responds very quickly saying she thinks it is an error.

135. The draft contract had been the subject of some emails from the end of March 2021 which we have already referred to in connection with the employment status point. Mr Burfoot provided a copy of it to Dr Clark on 26 March (page 270) saying, "Please see attached your final contract. Any questions please do let me know". It appears the claimant had already received it from HR. Mr Burfoot says, in a follow-up email, that he had put the claimant down on "The best pension the company can offer as an exception". This is a reference to the employer's pension contributions in the leadership template contract which are 5% whereas in the medical template contract are 4%.

136. On 29 March Dr Clark emailed Mr Burfoot and asked for some clarifications: she queried whether she should have a further probation period; furthermore it is apparent that the employment start date in the draft is 18 November 2019 (the start of her SEMP agreement) and she questions that. She also has a query about the annual leave. Mr Burfoot confirms no probation period is required and the contract is amended in part, as we see at page 273. It is therefore clear that the terms of the contract were negotiated, specifically by the removal of the probationary period and the

increase of the pension provision. We also accept that the claimant genuinely thought that this was the right contract and was pleased that the leadership position had been recognised in a management contract.

137. On 4 May 2021, when the claimant's manager has accepted she should not be at work, the day her official sickness absence starts and when it is acknowledged by the respondent that she was about to take an extended period of sickness absence, they wrote to her (page 317 to 318) saying that they have picked up an error in the contract template and apologise saying:

> "We have corrected this by drafting the attached – this is based on the standard template used for all medical roles. I would be grateful if you could review and confirm your acceptance."

138. The importance of the email is set high.

139. The claimant has also written on 30 April to say that she has made no arrangements for the MPCCC meeting because she is due to have a MRI scan that day. It seems clear that Mr Burfoot raised his query at a point when he knew the claimant was working from home undergoing medical investigation. When it was put to him that as soon as there was a medical problem and before the claimant had taken formal sick leave, he was looking at her contract, his answer was that he felt like it had been flagged to him there was an error in the contract. He referred to hearing that it was not a lone error from a number of sources. By this, he appeared to be trying to suggest that he had not looked at the contract because the claimant was on sick leave but because someone had alerted him to the error.

140. We regret to say we do not believe Mr Burfoot about this. It is clear from the wording of the email that1 he is aware the claimant is about to take a period of sickness absence or is likely to do so. The respondent has not produced any evidence that there were other errors of this kind where a wholly incorrect template was used. Mr Burfoot described an error in his own contract where he had been allocated the wrong expense scale but this concerned the use of a completely wrong template and Ms Batchelor found no similar such mistake. Furthermore, the exchange of emails makes clear that Mr Burfoot asked a question about the sick pay entitlement and then the error is discovered, not that it was the other way round.

141. His evidence was not a satisfactory explanation for the wording of his email and it is all the more curious because had his response to the knowledge that the Medical Lead was about to take a period of sickness absence been to find out what the budgetary consequences were to be, that in many ways would have been unremarkable. The fact that he has dissembled about the reason for it causes us to be more cautious about his evidence in general. It causes us to think that he was conscious when answering questions that he had something to hide.

142. As the claimant's counsel said, there is no evidence that the respondent has looked for other contracts that had been issued on an incorrect template. As we say, Ms Batchelor gave evidence that she had gone and checked but

at this time the claimant's had been the only instance of it. There is no comparison to use as to what approach was taken by the respondent in attempting to change the contract template that had been issued in error because there is no comparable example. We draw the conclusion that Mr Burfoot asked the question he did on page 297 because the claimant was believed to be about to start a period of extended absence and Mr Burfoot was worried that she appeared to have a contractual entitlement to 91 days sick pay.

143. There was no immediate response to the email at page 317 to 318. The difference in sick pay is quite significant in that the GP is entitled to 80 hours sick pay in any rolling 12 month period (page 320). On 7 May 2021 Mr Burfoot chased for news (page 337) as follows:

> "Is there any news on the contract being reissues (sic) to Dr Clark as she has gone off long term sick this week (with a dislocated shoulder Natalie?) and I am concerned she is taking advantage of this error in her contract and keen to get this conversation underway and what we can do.
>
> I am not keen to not pay her if she needs the time off but not happy she can just have 91 days.
>
> I think this error has gone out in quite a lot of contracts just generally as hearing whispers from other staff."

144. Mrs Miller interjected to provide some information about the neck condition and states there is a bulged disc which could "potentially be surgery or long term sick". Ms Batchelor pointed out that if Dr Clark has not been in work she would not have access to her work emails and stated: "It does present a dilemma in terms of her current absence from work and sick pay to be provided." Saying that they would wish to support Dr Clark "however this may not equate to 91 day of sick pay". Nevertheless, Ms Batchelor points out that they would need Dr Clark to agree to the attached contract to be able to enforce a shorter period of contractual sick pay.

145. Mrs Miller offers to forward the email to the claimant's private email account and does so (page 339) saying:

> "I hope you are doing ok. I am aware that you haven't accessed your work emails, so I have forwarded and email was sent to your earlier this week. There was an error in issuing your contract and this was picked up and rectified by HR. Your new contract is attached. Happy to have a call later to discuss, I have also copied in our HRBP."

146. It was when it was suggested to Mr Burfoot that he was thinking about the financial aspects of the claimant's sickness absence that he said that he merely had to assure himself and others that he was aware of any projected overspend because of the accountability he has for costs. That was not his immediate explanation (see para.139 above). He denied that he was suspicious that the claimant was taking advantage of a long sickness entitlement in order to take sick pay and it was suggested to him that the words implied he thought she was malingering. His response was that he

was probably not the right person to make that judgment. This was not an answer to the question asked.

147. We do not think that you can explain the words that Mr Burfoot uses in the email at page 337 to 338 in any other way than that he thought that Dr Clark would use 91 days of sickness absence because she had 91 days paid sickness absence under her contract; that he thought that she would take sick leave because she was being paid for that absence. Despite his denials this is a clear implication from the wording "taking advantage of this error" or even the words "gone off long term sick this week", which might be seen as more neutral were it not for the implication that she is taking advantage. Similarly, although one can understand someone responsible for a budget not being happy that a contractual error has led to an increase in cost, the way he expresses it is that his unhappiness is that "She can just have 91 days" which tends to suggest he is querying whether she really needs 91 days but presumes that she will take 91 days.

148. There is absolutely nothing that we have been taken to that would justify this kind of aspersion being levelled at Dr Clark. There was no indication whatever that she was anything other than a reliable employee, even a dedicated employee. It is not even clear that this point that the claimant knew there had been an error so Mr Burfoot did not have any basis for this apparent suspicion that she is taking advantage of anything. She did not have a pre-existing poor sickness record and she had continued working from home despite having a disc prolapse. He has no reason at all for casting these aspersions at her. He was given an opportunity to explain the wording of this email and could not do so.

149. We find that the respondent sent out the replacement contract because they knew the claimant needed to agree to a change and because there was a level of concern in the business about the cost and about the perception that the claimant was taking advantage of a contract to which she was not entitled. The two emails received by the claimant which alert her to this are Mrs Miller's at page 339 (quoted at paragraph 145 above) and Ms Batchelor's at pages 317 - 318 (quoted at para.137). Although we accept that, as a matter of fact, the use of the management template for the Medical Lead had been an error, the wording of those emails makes it sound like a technical error in the format of the contract rather than anything that is going to impact the details of her terms and conditions. Overall we think that this was being presented as a fait accompli and the claimant's perception that that was the case is an entirely fair one for her to have. Reasons that we come to that conclusion are as follows:

    149.1 It is very poor practice, even if someone is not off sick, for HR to present a replacement contract to an employee without pointing out the differences. The differences between these contracts purported to reduce the amount of the pension contribution, substantially reduce the amount of company sick pay and introduce a new probationary period. The fact that the respondent later accepted that the pension contributions had been negotiated, as had the probationary period, is neither here nor there. Those were changes

on the face of the contact sent on 4 May which would have been to Dr Clark's disadvantage.

149.2 To do that during the employee's sickness absence when the change would be most disadvantageous to the employee in its impact on her company sick pay entitlement seems to us to be borderline underhand.

149.3 Although the wording of Ms Batchelor's email asks her to review the contract and confirm her agreement, overall, it is presented as something that she should just agree to.

149.4 We think that the respondent was putting the claimant under pressure because they wanted to change her sick pay terms before she was sick for any longer. This is because they are convinced, correctly, that she should not have been given those terms but also because they are anticipating that she might be off for as long as 91 days and they think she is taking advantage of this more generous contractual entitlement.

150. Given those matters although technically the respondent accepts that consent was needed and invites her to provide it, taking these two emails as a whole, it does not do violence to the English language to describe what happened as a revocation of the original contract and replacing it with another that is less favourable to the claimant. The respondent, by their emails, are saying that the original contract was entirely wrong and presenting the replacement as a technical change that she needs to confirm her acceptance of.

151. Simply as a matter of good employee relations practice we strongly disapprove of the actions of the respondent in presenting a replacement contract to the claimant during a period of sickness absence, Regardless of the nature of the change it would be bad practice but when the change would include a reduction of her company sick pay entitlement from 90 days to 10 days just as she started a period of absence which has already been certified to be likely to be at least a calendar month, and she may be facing neck surgery, does not give us a high opinion of how sympathetically the respondent views sickness absence in general.

152. The later email from Mrs Miller on 16 July 2021 at page 483 when she forwards the second Occupational Health report to Ms Batchelor, includes the sentence, "As you know she was issued an incorrect contract and this meant she has taken several months off work sick". It was put to Mrs Miller that that sentence led to the inference that Mrs Miller believed had the claimant had a different contract she would not have had so much time off work. She said that that was not what she had said but also said in evidence "She was able to take several months off work because it was written into the contract that she could". This did not convincingly refute the allegation and does lead to an inference that Mrs Miller, like Mr Burfoot, thought that Dr Clark had taken sick leave because she had an incorrect contract and not because she needed time to recover. This was not an

inference that Mrs Miller was able to dispel in cross-examination, given the answer that we have just quoted.

153. During Dr Clark's absence in early June 2021 there was a CQC inspection due and the claimant, despite still being on sick leave, did volunteer to be involved in assisting on that. The initial Occupational Health referral led to a report dated 15 June 2021 at page 375. At that point Dr Clark was still unfit for work. She apparently described doing some work from home and there was a suggestion that the respondent "May have a workstation risk assessment carried out" as she works form home. It is common ground that the claimant in fact made her own arrangements for equipment that she considered to be supportive in her home such as a sit-to-stand desk.

Workplace assessment

154. There was a meeting between Mrs Miller and the claimant to start to plan her return to work on 22 June 2021 (see paragraph 44). In paragraph 45 the claimant gives evidence that at that meeting it was agreed, amongst other things, that there would be an on-site workstation assessment.

155. The outcome of this meeting appears in an emailed letter at page 404 where it had been agreed that the claimant would return to work on 5 July 2021 with a phased return. Initially this was to be three days a week for two hours a day and the initial plan covered three weeks pending a further Occupational Health referral. The claimant explains in her paragraph 48 that, on the same day, she had a consultation with her psychiatrist and decided to disclose her bipolar disorder to her employer which she did during a telephone call on 28 June 2021. Mrs Miller's initial response was supportive and when Dr Clark forwarded to her a report of the psychiatrist that initial email response of page 410 is warm and supportive. Mrs Miller explained that she was able to relate to and understand the situation the claimant was in.

156. In the second Occupational Health meeting which took place by way of telephone assessment on 12 July 2021, Dr Clark explained to the physician the medical factors based upon her mental health condition and the impact of the new medication.

157. In Mrs Miller's paragraph 25 she also discusses the meeting on 22 June 2021 and says that they had talked about a workplace assessment at work taking place on Dr Clark's return. We accept that the workplace assessment needed to be completed with Dr Clark physically in the workplace after she returned to site. There also appears to have been an initial lack of understanding by the assessor that they would need to attend at the prison to carry out the assessment face-to-face because the employees were not able to take photographs in a prison and therefore could not upload photographs of Dr Clark sat at her desk (page 591). In our view, Mrs Miller must have known that as soon as the claimant was back on site she was going to need a workplace assessment to be carried out in order to provide her with the equipment needed to support a return and to

reduce or avoid the risk of her symptoms being aggravated which might lead to further sickness absence.

158. After the 2nd Occupational Health referral there was a further meeting on 16 July 2021 which is relevant for a number of issues but, for present purposes, it led to a revised return to work plan which was emailed by Mrs Miller to HR and Mr Burfoot on 16 July (page 507). According to the schedule at page 508, the first date on which the claimant would be back on site was 21 July 2021. That was to be for three hours and then the following week (beginning 26 July) she was to work four days, five hours a day, alternating on site and at home between Monday and Thursday. She was then going to build up the number of hours that she was working on site and the number of days a week she was working on site over the following two weeks. We see no particular reason why the workplace assessment could not have been arranged to take place for the first day on which she was on site, 21 July, but certainly by the week commencing 26 July when the claimant is due to be on site for five working hours a day. There is no sufficient reason why arrangements could not have been made in advance for the assessment to take place on her return.

159. It is clear from Mrs Miller's paragraph 41 that she did not arrange for the workplace assessment to be commissioned until early August. Page 567, dated 2 August 2021, is an email thanking Dr Clark for her consent form which states that the referral has just been sent. This was the claimant's fifth week back at work and second week when she was working on site for at least half of her hours. From Monday 16 August the claimant was due to be working full time and it appears the intention would have been for her to be at least four days a week on site. Although there is evidence that there were problems outside Mrs Miller's control for an element of delay once she started to arrange for the assessment (see page 599) and she had to resend the relevant consent on more than one occasions, the whole process could and should have been started prior to Dr Clark returning on site. The assessment took place on 24 August 2021 and the recommendations are in a report at page 678. The recommendations are at page 683: in particular, they are for a fully adjustable chair with arm rests and soft tyre castors and vertical mouse both of which need to be provided immediately.

160. Mrs Miller says that this led her to order equipment. She cross refers to pages 718 to 719 which are an exchange of emails between her, HR and management which show that she has obtained a quote for those items by that date. However, there is no evidence that the equipment had been ordered by the time the claimant became unfit to work following the meeting of 8 September 2021. So that statement in Mrs Miller's paragraph 50 is inaccurate and in cross-examination Mrs Miller was not able to point to any documentary evidence that the items had in fact been ordered. She stated that the claimant had been unfit to work and then had resigned.

161. Although Mrs Miller may not have been present on the day of Dr Clark's return to work, the essential details set out by Dr Clark about the deficiency of the equipment available to her on her return were not disputed in any

meaningful way. Mrs Miller's evidence appeared to accept that a chair had to be found for her in the corridor. The plan was for Dr Clark to do five hours on site two days a week and even if she was not to be seated at the same desk for the whole of those five hours, the fact that the respondent had not made any preparations for her return suggests a failure to treat the needs of her health condition seriously or to attach any kind of importance to their responsibility to support her in the workplace. Our view is that Mrs Miller ought reasonably to have had the workplace assessment arranged to take place on Dr Clark's return on 26 July 2021.

162. We understand that this is an organisation operating in very difficult circumstances and that all involved have extremely demanding jobs which bring them into contact with and involve managing high risk and high stress situations to support a difficult sector of the population. Resources are stretched. Nevertheless, had Mrs Miller started the process following 16 July meeting or even within a week of that, that would have had the effect that the assessment took place on the claimant's return. Once the process was started in early August it took about three weeks for the assessment to take place. Within about two weeks of that Mrs Miller has received a quote and was asking for a consent to purchase. We accept that those stages would have needed to take place in any event and that two week period is probably not unreasonable. Had the respondent acted as they should have done, the order would have been placed by the second week in August 2022 in all probability and it would have taken perhaps two weeks for the equipment to arrive.

The 2nd OH report

163. The meeting on 16 July 2021 between Mrs Miller and Dr Clark was also an opportunity to discuss the second Occupational Health report. There is relevant internal correspondence prior to the meeting.

164. The 2nd Occupational Health report was sent to Mrs Miller on 15 July 2021 (page 470). It details (page 455) that Dr Clark is taking new medication for her mental health recommended for bipolar depression. Dr Clark has informed the Occupational Health Physician that the new medication "Can make her feel drowsy, and she has to take it around 10pm before going to bed." In the opinion and outcome on page 456 the final bullet point asks the respondent to:

> "Please consider restrictions on late shifts on Mondays from 5pm to 11pm as she has to take medication which makes her feel drowsy and could affect her driving back home".

165. In this report the physician puts forward as a reason for considering the restrictions that the claimant has to take medication which makes her feel drowsy, she has to take it around 10pm before going to bed, and it could affect her driving back home.

166. Prior to meeting with the claimant Mrs Miller forwarded that to the HR Business Partner and Mr Burfoot (page 469) and then later the same

morning to Ms Batchelor (top of page 469). In the first email Mrs Miller expressed herself as being "a little confused" by the report being about Dr Clark's mental health. She continued:

> "Helen is the Medical Lead and is needed on site and she also works late on a Monday. I feel this OH opportunity has been used by Helen to get me to change her hours which I know she has wanted to do as she doesn't feel she should work as a GP in reception and she feels she should work at home."

167. She also stated that "I don't feel that a change in working pattern will benefit the business", and in the second email later the same morning, stated to Ms Batchelor (copy to Mr Burfoot) "As you know she was issued an incorrect contract and this meant she has taken several months off work sick." She comments that this second Occupational Health report talks about adjusting her working hours around her mental health medication and says:

> "This is not why she is off and not why I referred her. I am not intending to review her working pattern or allow her to work as a Medical Lead from home."

168. The claimant did, in any event, have some homeworking principally when carrying out leadership duties. Although that particular aspect is pursued before us as an adjustment that was needed on grounds of her mental health condition [LOI.25.a], no evidence or argument has been put forward as to why it was an apparently reasonable adjustment.

169. The comments that we would make about these two emails by Mrs Miller are that the statement she makes about what she needs Dr Clark to do are worded as definitive statements. She is very focussed on what impact allowing Dr Clark not to work evening shifts will have operationally without any apparent consideration of what the impact is on Dr Clark of having to do those hours. She does appear to have grasped that there is another health condition which might need different adjustments and her unhappiness with that situation is apparent.

170. The wording of the email is very damning of Dr Clark. Phrases such as "this OH opportunity has been used by Helen" read as though Mrs Miller has in mind that Dr Clark is using the fact she is taking medication as a result of being a person with bipolar disorder in order to get something that she wants for reasons which are unconnected with the impact of her health condition. There was objective evidence that Dr Clark would be disadvantaged by having to work late and that there had been a change in circumstances since any previous discussions about whether or not it was a good use of a GP's clinical time to carry out evening reception work. It is not denied by the respondent that the medication was new or that that medication has the effect of causing extremely drowsiness which change in circumstances appears to have escaped Mrs Millar at the time.

171. The arguments by the respondent about what it would have been reasonable to do have all been to the effect that Dr Clark could have shown flexibility about the time of day at which she took the medication in order to

enable her to carry out the evening reception. The respondent does not apparently argue that Dr Clark could have taken medication at the regular time every day including Monday, taken it during her evening clinic and continued to complete those late hours. It seems to be accepted that it would have been unsafe and inappropriate for her to do so because of the risk that she became sleepy and the other consequences of taking the medication that she described. Not only would that be risky for Dr Clark herself, it would be risky for the patients she was treating if their treating physician was impaired because they had taken medication.

172. The respondents argue strongly that as a matter of fact the claimant is not required to do the out of hours evening reception duty from this point onwards and it is true that at no point from the start of her sickness absence until the end of her employment did she do so. However, during the period 15 July 2021 to the date the claimant served notice, it is clear that Mrs Miller did not want to have to agree to this change on a long-term basis. The emails show a total lack of empathy or sympathy with the impact on the claimant of medication to treat her condition. Mrs Miller comes across though these emails as having a very closed mind about whether this is something the business can accommodate.

173. The HR Business Partner responds very quickly at page 474 and recommends that if the questions that Mrs Miller has asked OH had not been answered she could ask for any gaps to be reviewed by them. She points out that recommendations of the OH physician need to be reviewed in line with the business needs bearing in mind reasonableness and the duty under the EQA.

174. It was suggested to Mrs Miller that in saying that the OH report was used as an opportunity by Dr Clark, it was a straightforward allegation of dishonesty. She rejected that saying she thought it was an opportunity and when it was suggested to her that she said that the OH report had been used by Dr Clark to get Mrs Miller to change her hours which was something that Dr Clark had wanted for ages, Mrs Miller accepted that that was what she meant. She stated that she believed there had been a basis for her to make that allegation because she stated that Dr Clark had expressed on multiple occasions that she felt that she was a manager and not a clinician, that she should work 9 to 5 office hours and did not need to work in reception.

175. As we have explained before, it seems to us that there is evidence that a discussion about the appropriate and efficient use of GPs had been had but when someone has experienced a relapse of depression against the background of informing their employer for the first time of a long-standing diagnosis of a serious mental health condition, as a result of which they have started to take new medication, it is quite extraordinary that Mrs Miller should apparently regard that as being used in some way by Dr Clark to obtain an outcome which she thought was beneficial for operational reasons. It does tend to suggest that Mrs Miller did not accept that Dr Clark was accurately describing the impact on her of her medication. This is reinforced by paragraph 34 of Mrs Miller's statement where she sates that she was of the opinion that there was no medical reasons that she was

aware of that the medication had to be taken at a particular time. As we understand it this is not what is said. Dr Clark said it had been recommended to her to take it at the same time every day and the consequence of taking it was that she immediately became very sleepy so it made most sense to take it in the evening. As we have explained, she also had the experience that if she took it too late at night she was excessively sleepy in the morning.

176. Mrs Miller also had available to her the psychiatrist report at page 409 which we have referred to at paragraph 132 above.

177. The discussion on 16 July 2021 took place after the above email exchange and Mrs Miller refers to it in paragraphs 36 and 37 of her witness statement. Dr Clark told Mrs Miller that she needed to take the medication earlier than reported in the 2nd OH report. Mrs Miller explains that she saw the requested change as being a change to the contract (in fact it is not). Her evidence is that she wished to explore all options before reaching a final decision and suggested that perhaps the claimant could change her normal working from home day from Friday to Tuesday so that she did not need to drive to work on Tuesday morning following a late reception duty on Monday. We understand this to have been a suggestion that Dr Clark should carry out a Monday evening reception, drive home and then take her mediation but work from home on Tuesdays so that if she was somnolent on Tuesday morning she did not need to drive into work but was instead scheduling her leadership duties to be done from home on that day. Dr Clark apparently said she did not wish to take her medication later in the evening "because this would disrupt her medication regime" and this is reflected in the wording of the outcome letter at page 510. In that Mrs Miller also states:

> "You have started a new medication that makes you sleepy and then drowsy the following morning. We discussed that you are contracted to do an evening session and this cannot be changed. "

178. As we have found above, Dr Clark was not in fact contracted expressly to do an evening session although we accept that this was Mrs Miller's clear view and was frequently restated by her in evidence as well as, in all probability, in her meetings with Dr Clark. It is therefore a forceful argument deployed to ensure that Dr Clark agrees to what Mrs Miller wants rather than Mrs Miller apparently approaching the issue with an open mind from the perspective of what are the respondent's obligations to this employee under the EQA.

179. The claimant explains in her paragraph 55 that Mrs Miller's proposal did not take account of the fact that if she took her medication after 11pm when she returned home she would be unable to work properly in the morning. We also give weight to the claimant's reasonable desire to follow advice given to her to take the medication at about the same time every day in order that it should be most efficacious. Mrs Miller's proposal presumed that there would be no adverse consequences of not taking the medication at the

same time every day but changing one dose by a few hours and no medical advice had been sought about the practicality of that.

180. There is nothing wrong in principle with an employer and employee having a meeting at which an Occupational Health recommendation of this sort is discussed with the business needs explained and the employee's needs weighed with an attempt to find some middle ground. Any questions about whether alternative adjustments would sufficiently support the employee could be referred to the Occupational Health physician to see whether they sufficiently satisfy those medical needs. In the end this was done and a third Occupational Health referral was made in August.

181. The claimant had also put forward an alternative suggestion that she reduce her hours so that it was easier to recruit a GP to cover Mondays to include the reception duties. This would have reduced the claimant's sessions from 10 to 7. In this the claimant was suggesting a way in which the difficulty for the business in finding cover for that shift might be accommodated. Mrs Miller was very insistent that the claimant should be flexible about when she took the medication in order to do a late night and did not engage with the question put forward by the claimant that it would cause disruption to her medication regime if she was to do so. Bearing in mind the email correspondence which precedes this meeting we think there is evidence from which to infer that Mrs Miller thought that the request to the claimant were merely a tactic to enable Dr Clark to get what she wants but we consider that it was a reasonable concern by Dr Clark about the effect on her of not adhering to a regular medication regime.

182. The rota attached to that letter shows that the first Monday on which the claimant was due to work for eight hours on site was 2 August. This would not have taken in an evening session as we understand it. On 9 August Mrs Miller wrote to Mr Burfoot, Ms Batchelor, Dr McAllister and the HR Business Partner (page 617) following a telephone meeting with Dr Clark when they had discussed her return to regular working hours the following week. It appears that Dr Clark told Ms Miller that she would still not be able to work Monday evenings.

183. There is some reference in this email and in the subsequent exchange to a conversation between Dr Clark and Dr McAllister which Dr Clark refers to in her paragraph 90. Our conclusion on this is that Mrs Miller is probably emphasising what Dr Clark said to her too much. Dr Clark had not noted a particular conversation with Dr McAllister about her medication. The information provided by Dr McAllister in the exchange at the top of page 617 is that Dr Clark had told him that she needed to take her medication at 8pm so that she was not tired the next day. That, and his acceptance in oral evidence that it would be completely impractical and potentially unprofessional for her to take it during a clinic, did not seem to be particularly different to Dr Clark's limited recollection of the conversation. Nor does it seem to be inconsistent with what Mrs Miller reports Dr Clark telling her at the time, namely that Dr McAllister advised her not to work evenings while taking the medication. That could mean not carry on working in a clinic, having taken the medication. It does appear that the

claimant was arguing that a clause in her contract to do with a requirement that she work safely was engaged in relation to that. Mrs Miller asks for another call to discuss and states: "Helen is not willing to negotiate and is only really keen to work Monday to Friday clinic hours".

184. On 10 August Mrs Miller, when trying to set up a conversation with the HR Business Partner, asked for it to take place the sooner the better as Dr Clark was due to work on Monday evening and "as it stands she is not intending to work". The response of the HR Business Partner is to recommend that thought be given to an OH referral specifically to understand more about medication:

> "How long Helen will be on it, what the impact is of taking it, why it has to be a certain time, set out what temporary adjustments you have offered to support this".

185. The HR business partner goes on to say that the second OH report is not clear about whether this recommendation about flexibility around the evening shift was just for the phased return to work or in the longer term. She also sates that clarification about the time at which medication should be taken would be beneficial.

> "This report will help us better understand what adjustments we may need to consider and for how long. At present we are going very much on Helen's feedback and we need to ensure that OH have the opportunity to objectively provide advice for us to review."

186. Page 643 suggests that Mrs Miller adopted those questions.

187. The upshot of that is that there is a third referral to Occupational Health as apparently recommended by the HR Business Partner (page 632). Which Mrs Miller confirmed was advice she had followed. She then emailed the claimant (Page 640) on 12 August 2021 saying:

> "While I wait for your OH appointment we will have to change your working hours to Monday to Friday 9 to 5 until we can sort out this out of hours working."

188. She went on to say that she needed Dr Clark to be flexible and requested her to go on the clinical rota for Friday but use Monday for her leadership work that would enable Mrs Miller to recruit a GP cover. Although this is expressed in a slightly terse way, it is reasonably clear that that is what Mrs Miller is meaning. Although Dr Clark expresses confusion about being required to be flexible we do not read anything into the wording of this particular email. On the other hand it does come across that at this time Dr Clark was unwilling to consider taking the medication at a different time of day. Also on 12 August, Mrs Miller emailed Dr Clark asking to refer her back to Occupational Health and asked her to sign, scan and return the attached form. Dr Clark replies within 45 minutes saying she has just done and will bring it to her shortly. So, despite the evidence that it was not what Mrs Miller would have wanted to do, what the respondent actually decided to do was make the adjustment pending an Occupational Health report.

189. There may have been some technical difficulties with obtaining a wet signature for consent. On 13 August Mrs Miller wrote to Dr Clark saying "In order not to delay your OH referral I will proceed with verbal consent and will attach the signed consent later" and Dr Clark responded again within 45 minutes confirming her acceptance to that.

190. We also note that when the claimant wrote on 17 August 2021 to Mrs Miller about a number of matters she included in that the statement that she was "I am, for immovable health and safety reasons (which is allowed for in my contract), no longer able to cover a late shift". Although this is a statement in the context of a number of operational matters and the purpose of it appears to be to draw attention to the lack of permanent cover having been booked arranged, it does suggest that she was unlikely to be flexible about the respondent's proposal for a solution to their completing objectives.

191. The email from Mrs Miller at the top of page 647 dated 13 August 2021 about progress on the Occupational Health referral states: "As predicted Helen is dragging her feet in providing me with consent. I will chase again". Given her quick response the previous day we do not think there was any cause for that description which is further evidence that Mrs Miller had a negative mindset about whether Dr Clark was genuine in her approach to cooperating.

192. Taking all of the above into account, we find that Mrs Miller had a very firm view that the Medical Lead had to do the evening reception for reasons which have not properly been articulated to us. Mrs Miller perceived Dr Clark's arguments for not doing the evening reception as being motivated by a previously expressed view that GPs should not do it rather than by genuine need that was connected with medication she took for her disability. She regarded Dr Clark as being inflexible about her suggestions about changes she might make to her medication to enable her to do the evening reception and, up to a point, we accept that she was. However, our view is that Dr Clark's inflexibility stemmed from her concern that she should take this new medication, taken it for its anti-depressive properties, as directed at a regular time, whereas Mrs Miller thought that Dr Clark was being inflexible because it would achieve something she wanted for non-medical reasons by another route.

193. Nevertheless, if one focusses upon what the respondent actually did they did not actually refuse the claimant's request that she should not carry out the evening reception work. They put that adjustment in place temporarily while at the same time making it clear that they regarded it as a contractual requirement and stating on a number of occasions that it was non-negotiable. What they actually did was permit it on a temporary basis on 12 August and make a referral to the Occupational Health with a number of appropriately worded questions.

194. The question therefore arises whether we consider that notwithstanding that referral Mrs Miller had made a firm irrevocable decision that Dr Clark was going to be doing the evening reception shift. Despite the very entrenched views that she has expressed she was provided with appropriate advice by

the HR Business Partner and states orally that she took it and did agree to not requiring Dr Clark to work the evening reception until the third Occupational Health report was available. When Occupational Health recommendations had been made in the past then they were implemented although there was delay in implementing the workplace assessment as we have explained. There would have needed to be a conversation about future working practices but we do not think that had Mrs Miller been in a position that she had an Occupational Health report that recommended dropping the evening reception requirement after that had been further investigated and questions answered, had she received firm advice that this was a reasonable adjustment we do not think that she would have absolutely refused to agree to it. On that basis Mrs Miller's very firm view was not, we find, an out and out refusal.

195. The 3rd OH assessment took place on 3 September 2021 and the report is dated 7 September. It was not available to the respondent managers at the 8 September 2021 meeting.

Did Mrs Miller treat the claimant negatively?

196. There is a set of clinical supervision meeting minutes at page 557 from 22 July 2021 which record the discussion about various work related issues. The detail of what is recorded in that document is not of importance in the present case, but we consider that the fact of it is relevant. On a number of occasions when cross-examined about the emails that we will catalogue below, Mrs Miller described herself as not being the kind of person who habitually responded in writing but refuted the allegation that she had ignored concerns that were expressed in a lot of detail by saying that they had been discussed orally. She said that she and Dr Clark spoke regularly, every day even, but she had not wanted to engage in long back and forth emails. She went so far to say that they had spoken for an hour every morning. In the context of the high pressure environment that she and other witnesses describe we find that not plausible. All of the witnesses accepted that there was not enough time for any of the managers or clinicians to do all of the tasks in their roles. The evidence that Mrs Miller and Dr Clark would spend an hour of their day discussing things and handing over clinical details we find not credible. As well as implausible, it contrasts with the existence of the one detailed set of meeting minutes.

197. Having said that, this allegation that Mrs Miller treated Dr Clark negatively is one which needs very careful factual finding. In order to be fair to Mrs Miller, who has found facing the allegations and the resultant publicity, extremely distressing, there needs to be clarity about exactly what it is that she is said to have done and why it is said to be detrimental. In closing, it was made clear that the "worsening behaviour" and "negative treatment" allegations were based on the same matters: the allegation is that her behaviour towards Dr Clark changed to become negative.

198. The first matter that she is criticised for is that it is said that the claimant's management responsibilities were removed from her. A contrast is drawn by the claimant between alleged evidence of progress with various tasks

prior to her sickness absence from early May 2021 and not being permitted "to retake the reins" after she returned, as it is put in the CSK. The progress is said to have include making sure the teams were up to date with pathology tasks because the claimant had made a more flexible rota and it is alleged that she was not permitted to resume responsibility for that work, among other things.

199. We do not find that that allegation has been made out as a matter of fact. We have explained above about the restrictive hours that the claimant was working on her return to work and we accept that Mrs Miller had taken on board the advice from the psychiatrist's report that the claimant was prone to take on more work than she could sensibly cope with. It does appear that a lot of tasks that would have been carried out by the claimant were not done in her absence. Some changes were apparently made for practical reasons such as moving the MPCCC meetings to Fridays, the day that Dr McAllister worked, so that he could chair that in her absence. When the claimant (paragraph 84) refers to the meeting not reverting to a Thursday her suspicion is that it fits in with Mrs Miller's plan that Dr Clark could work on site on Fridays in order to accommodate the recruitment of cover on Mondays. Even if that is the case that does seem to be an operational reason which is caused by the need to make adjustments for the claimant.

200. Overall, the extent to which the factual allegation that management responsibilities had been removed is made out seems to us likely to have been entirely because the claimant was on reduced hours. She had returned from a two month absence, some changes had been made because of her absence so that key tasks were done and not in order to treat her negatively. In stating this we're conscious that we do draw conclusions on the issues as much as made findings of fact about Mrs Miller's actions. In this instance the evidence about Mrs Miller's actions are intertwined with evidence about her reasons for acting. Although this judgment is written linearly, the deliberation process was not linear. We have born in mind at all times when considering Mrs Miller's actions that the burden of justifying them was probably going to pass to the respondent because of Mrs Miller's unjustified belief that the claimant was using her disability related needs to achieve non-disability related aims.

201. Our findings about other specific criticisms of Mrs Miller's actions as follows:

    201.1 The way that Mrs Miller responded to the claimant's concerns about the potential bullying of a GP on about 2 August 2021 is rather dismissive about Dr Clark's reasonable concerns expressed quite properly. The original email is at page 588 and some of what she says is that the GP in question was manifestly treated differently to other members of the team and that he feels he is being set up to fail. Dr Clark warns that it will not provide a secure basis for performance managing him if random decisions are made about his workload. Mrs Miller's response is that says she has no evidence he was treated differently and that everybody has been working non-stop and simply suggests that the GP in question has not managed as well as others. She does not engage with the detail of the concern. The thread of

not having enough GPs for the workload runs through a lot of the correspondence and a lot of the concerns. It is supported by Dr McAllister and Dr Clark's evidence about overwork and the difficulties of the rotas. What Mrs Miller said is unsympathetic but both she and Dr McAllister came across to us as being conditioned to complaints of overwork and conditioned to an inability to do anything about it. So, taken on its own, this effective shrug of the shoulders which comes across through the email at page 606 is not targeted at Dr Clark or evidence of a change of treatment, in our view.

201.2 However, the detailed list of management concerns raised at page 658, we do consider received a response which betrays a level of irritation inappropriate when directed to a fellow professional which requires explanation. This list was sent by Dr Clark on 17 August 2021 and, although Mrs Miller states she understands Dr Clark's frustrations, she also responds by saying:

> "the management of GP services is led by the medical lead and you have not been present so it does make sense that things have slipped aside.
>
> As advised previously, i find long emails like this unhelpful and work better with issues being raised in relevant meetings and actions assigned and followed up on."

201.3 The claimant's email had started with her saying that she was intending to be helpful and did not intend any criticism in her findings about the list of things that needed attention. However, this initial response does express irritation, criticises the claimant for not being "completely constructive" and could be read as suggesting that things have become worse because Dr Clark was absent. She does appear to calm down after Dr Clark apologised for causing Mrs Miller to feel that it was an unconstructive comment and the latter stated in an email (page 654) that she has many priorities and could not get anything done if every member of staff sent her their concerns. In our view, the unreasonableness of Mrs Miller's reaction is that a number of the matters that Dr Clark was raising were operational matters that she needed cooperation from those in management to address not least because, as we understand it, the Head of Healthcare set the rotas including that of the Medical Lead. This need for management response is pointed out by Dr Clark in the original email although she recognises there are competing demands so is "not expecting a speedy response". Mrs Miller, in essence, tells the Medical Lead that the situation has happened because she has been absent on sick leave, that she should get on with it and not bother the Head of Healthcare with emails reporting areas of risk and lack of resource.

201.4 The exchange about the PROTECT audit was also on 17 August 2021. It involves an exchange where Dr Clark was proposing to use a particular form, not because she was carrying out a PROTECT audit - which is something that needs to be carried out externally as

we understand it, but as the basis for clinical appraisal of all clinicians expanding out of work she had done in relation to performance concerns about one individual. The email that is complained about is that at page 651 where, without preamble, as it was put in cross-examination, Mrs Miller barrels into an exchange saying:

> "So we should not be doing the PROTECT Audit in our own regime, PPG have created an audit schedule and we follow that. Chris can you share the schedule with Helen please so she is aware when the PROTECT audits are due."

201.5 This email which breaks into criticism without pleasantries, seems to us to start with the presumption that Dr Clark has done something wrong rather than to seek to find out why she is using a particular form.

201.6 There is a criticism of Mrs Miller for recruiting a GP without the claimant's knowledge; the announcement was made on 19 August 2021. The claimant had been back in post for three weeks at this point on site. However, we cannot see that Mrs Miller was specifically asked in cross-examination why she had not discussed this particular recruitment with the claimant. Recruitment remained part of her role and she had been working on reduced hours. Nevertheless, since this point was not put to Mrs Miller in cross-examination we do not think it right to take it into account.

201.7 The claimant wrote to Mrs Miller on 23 August 2021 at page 677 pointing out that she was running the two GP clinics that day and the one on Wednesday and expresses concern that medical care planning of complex cases will have to be put on hold. She informed Mrs Miller that she has completed a Datix about an incident which involved the absence of care plans. She also expressed her concern that when she notices and raises clinical governance issues those appear to her to be interpreted as her personal feelings. The response at page 676 is suggestive of misunderstanding between the two of them. It does repeat the position that shortage of staff means that Mrs Miller's hands are tied and there are bigger problems but it is not, in our view, short or aggressive in its response. Mrs Miller did reply to the concerns and engaged with some of what Dr Clark said, in particular saying that she has not said that what Dr Clark is raising is a matter of personal opinion. This particular exchange does not appear to us to be remarkable, given the general pressure of the environment. In the circumstances, Dr Clark clearly considers Mrs Miller to have been somewhat patronising as she stated in reply.

201.8 The following day there was a meeting which Dr Clark was unable to attend because she had been asked to cover clinical work at short notice. Mrs Miller emailed (page 688) saying:

> "Please can you speak with Martina and arrange alternative cover for your other duties. This is very important and its been made very clear that we must

attend. I am currently sitting in hospital so unable to dial in but they are expecting you please."

201.9 Although it is true that Mrs Miller is the line manager of Dr Clark in this particular set up she is line managing a clinician who is a professional with her own professional obligations who is required to follow independent professional standards. Mrs Miller is a Registered Nurse and therefore must understand that there are those obligations to patients which transcend the responsibility to be compliant with management instructions. It is not the kind of set up that means that the normal or proper approach to management is hierarchical but should be more respectful of a fellow professional. This interjection does seem to us to have been made on the assumption that Dr Clark does not have a good reason for not attending a meeting notwithstanding the fact that Mrs Miller must or ought to have known that there were such stretched clinical resources on this day. Mrs Miller did not know that Dr Clark was treating a patient with heart failure but the apparent presumption that she was absent from the meeting without sufficient reason was unwarranted notwithstanding that.

201.10 We have explained above that there was evidence in the bundle to show Mrs Miller was kind and supportive towards Dr Clark directly after the disclosure of the bipolar diagnosis and also directly after the onset of the neck problems. Her attitude does seem to us to have been different after receipt of the 2nd Occupational Health report. Not all of the evidence points in that direction. There is an email prior to receipt of the 2nd OH report (top of page 406) dated 24 June 2021 where Mrs Miller incorrectly responds to a question about when the 90 days sick are due to run out, by saying that Dr Clark has been off since the start of April and asks how she is to be paid for a phased return "As she is going to drag this out another three months". This suggests a negative attitude towards Dr Clark taking sickness absence and a suspicion that she is malingering unrelated to the Occupational Health report which disclosed the impact of her medication. Nevertheless, there does seem to us to be evidence to support a change of tone towards Dr Clark from professional but supportive to the obviously irritated; to a mindset that Dr Clark is in the wrong. Instances of the latter are the correspondence that we have set out in paragraphs 201.2, 201.4 and 201.8 above.

201.11 This correspondence varies in terms of the negative impact on the claimant but a public slap-down such as the PROTECT criticism was unfair and disrespectful towards a fellow professional. It was clear from the claimant's oral evidence how offended and distressed she was not to have been trusted in her professional judgment about the meeting of 24 August 2021. We refer to these instances of negative behaviour which have been made out as

201.11.1 The response to the list of management concerns (para.201.2 – 201.3);

201.11.2 The PROTECT audit form (para.201.4 – 201.5);

201.11.3 The email about the meeting of 24 August 2021 (para.124.8 – 124.9).

202. In our view, Mrs Miller has a mindset that Dr Clark has used her bipolar to ask for an adjustment to her working hours that she wants for other reasons. An inference can be drawn that the hostile exchanges were influenced by that mindset and by her obvious irritation at Dr Clark's request for amended hours. The request for amended hours arises out of and is connected with the claimant's inability to work long hours because of the effects of the medication she was taking for her disability. See further in the conclusions section below.

203. Although Dr McAllister talked about Dr Clark being challenging we do not think that he was referring to her being challenging to manage or a difficult colleague rather that she challenged him and others about professional matters. She raised things about the way the service was run which seems to have been affected by a lack of resources and there were many things which had not been attended to prior to her appointment. She sought definition of a job plan to give structure to her workload and then to put in boundaries between clinical and leadership work time. Dr McAllister did say that doctors in general are professional people with different opinions and that Dr Clark was not more challenging than others.

204. There was a sense from the respondent's witnesses that it was unreasonable for the claimant to express concerns about her workload or about how to structure her workload to enable her to be an effective Medical Lead. Dr McAllister said that he had never had enough time to do his job. This arose when he was asked about an email that Dr Clark sent to him on 26 August 2021 at page 698. This reads as though she is coming to the end of her tether. She stated in the email that what she has suggested however nicely she put it is slammed down and that she is experiencing direct rudeness. She complains about behaviour in a meeting the previous day which she attributes to her inability to go to the meeting we refer to at paragraph 201.8 & 201.9 above. She says that she considers herself to be blamed for other people's dysfunction when all she is trying to do is help and the risks she has identified are brushed under the carpet or deliberately concealed. She refers to the error with her contract and the data protection breach.

205. When Dr McAllister was asked about how he felt on reading this email he said that one never likes to hear of any colleague that they are sitting crying when writing an email but said that he thought he would describe Dr Clark as emotional and we think that he meant emotional generally and not just on this occasion. That seems to have been part of his explanation for not acting with any urgency to respond to this email beyond a general

consolatory response and an offer to talk through some of the matters the next morning.

Meeting of 8 September 2021

206. At 11.30 AM on 7 September 2021 Mrs Miller emailed the claimant and Dr McAllister together with the HR Business partner saying:

> "Can we please meet tomorrow morning to discuss your working arrangements and duties. We will be joined by [the HRBP] and also by Jonathan."

207. Given that the explanation before us was that it was to discuss what Mrs Miller wanted Dr Clark to do during a period of three weeks' leave that Mrs Miller was going to take starting 9 September, we notice that it does not include any phrases such as "while I am away" or "in my absence". We also think that it is unlikely that the purpose of such a meeting would be to discuss "Your working *arrangements*" (our emphasis).

208. The HR Business Partner replied to that saying:

> "Would 3 of us from business side be too many do you think as Helen will be on her own? Sometimes the employee may find this intimidating especially if we are discussing a difficult topic? As its informal Helen wouldn't be able to bring anyone to the meeting to support her."

209. Mrs Miller replies to that saying:

> "I will inform Helen that you wont be joining the meeting. I just assumed as you were here it would be useful but I appreciate it may be a lot for Helen."

210. Dr McAllister was not in fact on site on 8 September and joined the meeting by telephone. The response from Mrs Miller to the HR Business Partner accepting that she would not be present was copied to Mr Burfoot, one level further up from Mrs Miller.

211. The previous day, 6 September, Mr Burfoot had emailed Dr McAllister and Mrs Miller, copied to the HR Business Partner, saying:

> "Can we have a meeting tomorrow to discuss the plan for Dr Clark Please as Natalie goes on leave for two weeks and its really not suitable for me to do this as it needs to be HOHC led as otherwise it defeats the point of Natalie taking control of the management."

212. Mrs Miller suggests 9.00 AM in an email (page 721) dated 7 September, and at 8.42 AM Mr Burfoot replies:

> "I have the RM call at 9 but can drop off when its finished".

213. The response from Mrs Miller is:

> "Ok let me set up a call so we can dial in".

214. On the same day Mr Burfoot emailed the HR Business Partner at 1.20 PM saying that he needs to chat with her around the investigation report into the data breach (page 273). Although we have no reason to think that the fact that Dr Clark had complained about that data breached caused anyone to think worse of her, the timing of this email postdates by several hours the previously proposed time for a meeting about Dr Clark and the wording "as well" reinforces the impression from the correspondence at 721 to 722 that Mr Burfoot, Dr McAllister, Mrs Miller and the HR Business Partner met "to discuss the plan for Dr Clark".

215. Dr McAllister's evidence was that he did not know whether they had had that call. As will be seen from our discussion of the meeting on 8 September below, ultimately it led to the claimant's resignation. So, even if as he stated, Dr McAllister had not known that that meeting was going to develop as it did, we think that since the claimant started a period of sickness absence the day after the meeting and resigned just over two weeks later, it is extremely surprising that Dr McAllister has apparently no recollection about what came before it. When he was asked what the difficult topic was referred to in the HR Business Partner's email, he rightly pointed out that that was not an email to him and said: "I don't know I would have phrased it as a difficult topic" and "Meetings between colleagues in those circumstances are never going to be easy". He was unable satisfactorily to explain that "those circumstances" were if they were not merely that Mrs Miller was going on leave.

216. His statement account of the precursor to the meeting is at paragraph 19 where he states that Mr Burfoot wanted to discuss Dr Clark's line management during Mrs Miller's leave. He states that he was aware from Dr Clark:

> "That she felt challenged by Natalie's line management and I was aware that she had reached out to Ryan and myself in a management capacity."

217. Dr McAllister stated that he thought Mr Burfoot wanted the parties to be clear that the line management of Dr Clark sat with Mrs Miller.

218. This suggests to us that Dr McAllister anticipated a certain laying down of the law (our words). However, his only explanation in his witness statement about the preparations for the 8 September meeting was that he and Mrs Miller:

> "Spoke briefly about what tasks Dr Clark needed to focus on whilst Natalie was away, and we decided that it would be helpful to have a meeting with Dr Clark before Natalie's holiday".

219. We reject the implication that this was something decided upon between Dr McAllister and Mrs Miller because the clear implication of Mr Burfoot's email on page 722 is that after a meeting between the four of them there needs to be some interaction involving Dr Clark that is "HOHC led". Also, it was Mr Burfoot who called for the meeting.

220. Dr McAllister repeated in oral evidence that his understanding was that Mrs Miller was going away and wanted to have an idea about what Dr Clark would be doing in her absence, rejecting the suggestion that it had been to discuss the claimant's performance and things the respondent felt she was not doing. It was fairly pointed out to Dr McAllister that a conversation about what Dr Clark would be engaged with or prioritising need not be difficult and Dr McAllister suggested that there is always going to be friction between Doctors and the Head of Healthcare about their competing priorities.

221. Mrs Miller said that she had accidently included the HR Business Partner but we reject the suggestion that she was included in the email by a slip of the keyboard if that is what is meant by that. Mrs Miller also said that she thought that because the HR Business Partner would be on site that she would want to be in the meeting. Like Dr McAllister she professed not to know why the HR Business Partner thought that a difficult topic would be discussed and to be unable to remember the meeting the day before. She also said the need for the meeting had been because she, herself, was not going to be on site for three weeks and as Head of Healthcare needed to delegate to the team. She said she had met with the pharmacist as well. She could not comment as to whether similar emails setting up meetings with others in senior positions had been sent.

222. Mr Burfoot gives evidence about this in his paragraph 44 where he states that he: "Wanted there to be clarity about what Dr Clark should focus on whilst Natalie was away". He refers to being copied into emails which were matters of line management, a role that he had stepped back from, and wanted to be clear that although he was a line management point of contact for Dr Clark in Mrs Miller's absence, it was for Mrs Miller to be clear about what Dr Clark should focus on during that absence. Again, he says that he does not remember a pre-meeting taking place.

223. Pausing there, it would be somewhat surprising for Mr Burfoot to initiate a meeting, key participants say that they are available at a particular time (only 20 minutes in the future) and then for it not to take place. There are no emails in the file which explain what happened next. The implication of Mr Burfoot's paragraph 44 is that the pre-meeting did not in fact take place but when cross examined about the HR Business Partner's comment that 3 from the management side might be too many at the meeting with Dr Clark and asked what happened at that pre-meeting, he stated:

> "I recall having a conversation with Mrs Miller and the HR Business Partner about setting expectations during that time period. I did not have the capacity at that time., I had just taken over Heathrow IRC. I needed some comfort and assurance that things were clear on site with Mrs Miller's absence."

224. This appears to be contradictory to the content of paragraph 44 at least by omission and when asked why it was not in his statement he said that he was happy to amend it but that the message was the same. We disagree: at the least the evidence is not the same. When asked what the continuing problem was given that Dr Clark was still at work, Mr Burfoot compared it with paternity leave which he was due to take the week after the hearing

and said he would have meetings to hand over responsibility for some of the work while he was not there. There is no suggestion that any of Mrs Miller's responsibilities were to be handed to Dr Clark. That would have been the purpose of a meeting with Mrs Miller's deputy and no evidence has been produced of the email arrangements to set up such a meeting.

225. Drawing these several pieces of evidence together, it seems to us that the management side planned a meeting to discuss Mrs Miller having a meeting with Dr Clark before the former left for a period of leave but they all claim not to be able to remember it now. If the proposed meeting between Mrs Miller and Dr Clark was simply to enable the Head of Healthcare to tell Dr Clark those matters which she operationally considered to be priorities, or what matters should be referred to Mr Burfoot in Mrs Miller's absence then why was that not done in either a fully documented management meeting such as that referred to in paragraph 196 above, or in one of the alleged regular morning meetings which Mrs Miller claimed happened daily? We take into account Mrs Miller's statemen that she presumed the HR Business Partner would be present – rather than it being decided that was necessary. However, it would only be useful for her to be present if the topic of conversation was one which might involve HR oversight or input. Purely operational matters and priorities do not qualify on that head, in our experience.

226. There are other matters that can be discounted as possible topics of conversation. When Dr Clark received the invitation she, reasonably, wondered why HR would be joining it. Given the wording of the invitation and the context of a person who was one month back from a phased return to work any reasonable employee would think that working arrangements meant a discussion of adjustments or that the discussion was about her job more broadly. The claimant had been asking for some time to have clarity about a job plan and some of the matters she had mentioned to Mrs Miller and in the impassioned email to Dr McAllister included seeking clarity about her job overall. So, in her response at page 745, the claimant points out that the latest Occupational Health report "Which will obviously affect arrangements" is not yet available and asks for a finalised copy of her job description "As this is essential to the discussion". Mrs Miller replies (page 741) saying that it is not a formal meeting and the Occupation Health report will not be needed:

> "The purpose of the meeting is to set some expectations while we wait for your Occupational Health report on your working hours and duties".

227. Mrs Miller goes on to say that she does not have the job description and it will not be needed for the meeting. Later the same day she provides a copy of the job description and says that she has removed the HR Business Partner from the meeting.

228. This does not add any clarity to Mrs Miller's intentions about the meeting because 12 August 2021 communication already set out what the working hours were to be pending the OH report which makes it unclear what was meant by setting expectations beyond that. Taking the evidence provided

as a whole, we find the respondent's explanation of the purpose of the meeting to be baffling and inconsistent.

229. Exactly what happened in the meeting of 8 September is contentious but it is common ground that the claimant left the meeting when she considered that it was turning into a criticism of her performance. She thought that was unfair when she had not had warning that those were going to be topics of conversation. Before making findings on what happened at the meeting, there is one further piece of evidence about what Mrs Miller intended to happen.

230. The outcome to the meeting was delivered by a letter (page 790) that in part covers topics of conversation that were discussed at the meeting on 8 September but in part matters which Mrs Miller did not have the opportunity to reach. Relevant matters we note from this email are that the claimant was again informed that there was "Still a contractual obligation in place for you to work one OOH session and two leadership sessions" although the evening reception session was on hold. Again, it does not sound very likely that the respondent was going to agree to the evening reception session being removed permanently but that has not been ruled out.

231. There are then matters in the outcome letter such as the following:

    231.1 Mrs Miller states that the risk report was discussed and said that in the meeting she had told Dr Clark that "As the Medial Lead you have overall oversight on this and need to ensure it is done on time every month".

    231.2 Dr Clark is told that she has protected time on a Friday for the MPCCC meeting and that this will need to be held every week. This had been temporarily chaired by Dr McAllister in Dr Clark's absence (see paragraph 199 above) and she had raised problems with the MPCCC Register in her email of 17 August (page 658) which was one that Mrs Miller did not engage with. There is nothing we have been shown which could reasonably have led Mrs Miller to conclude that the claimant had been failing in her responsibilities with regard to this – the claimant could not see why the day allocated to the meeting should not revert to the previous day but that was all.

    231.3 The letter continues to state that Mrs Miller directed Dr Clark to ensure that GPs "Are completing TTO and scripts etc" and that was the point at which Dr Clark stopped the meeting.

232. Contrary to what Mrs Miller says, the directives in this letter do not seem to us to be limited to "arrangements on what you will do while I am on leave" it is setting expectations more broadly about what the respondent considered it to be necessary that Dr Clark should do in her role. The outcome letter reads very much to us as though Dr Clark is being told that she is not doing the following aspects of her role and must do so in future. The outcome letter reads very much like her performance is being criticised and certainly in the penultimate paragraph on page 791 she is being told off for allegedly

going outside the direct line management and not respecting the chain of command. The outcome letter itself reads very much as an informal performance criticism. We consider that the implication is that Dr Clark is going to be judged against whether she carries out these tasks.

233. Given what is in the outcome letter and given the inability of the respondent's witnesses satisfactorily to explain why an allegedly informal meeting should have required so much thought and planning, overall we prefer Dr Clark's account of what took place at it. In all of the circumstances including the abrupt and negative communications directed to Dr Clark set out in paragraph 201.11 above, her perception that "The meeting might [be] a way to build a performance case against me" was not an unreasonable or baseless concern for her to have.

234. Mr Nicholls, on behalf of the respondent, argued that medical evidence which we refer to at paragraph 132 above, supported and argument that the claimant's mental health condition tended to make her suspicious of the motives of others and suggested a tendency to ruminate which was the basis of an argument that the claimant's perception of the respondent's treatment of her and motivations was objectively not accurate or fair.

235. We accept that, put in that way, that was an evidence based submission and therefore not an inappropriate one. However, the psychiatrist's opinion pre-dates the claimant starting the course of quetiapine and so is not reliable evidence that there were medical reasons why the claimant might have misconstrued management intention. In any event, we base our conclusions on an analysis of the respondent's witnesses own documents and their oral evidence when explaining the words they used at the time. It is that which causes us to draw the conclusion that the respondent's conduct at the meeting on 8 September 2021 did involve unfair criticism of Dr Clark's performance, was not merely held with the purpose of setting her agenda for the following three weeks and probably was intended to form the basis of subsequent performance criticisms if things did not change to their satisfaction. Dr Clark made notes at the time which are at page 758 with a typed transcript at page 764. We accept that when Dr Clark began to explain that she felt uncomfortable, that failures were being attributed to her and that she would like the meeting to end, Mrs Miller raised her voice and demanded that Dr Clark stay, and she also stood up when Dr Clark stood up to leave.

236. Underlying this there is a difference of view between Dr Clark on the one hand and the respondent's managers on the other which goes beyond the subject matter of this case. We can clearly see that Dr Clark is complaining that she has identified risks in emails such as that of 17 August 2021, which are brushed under the carpet and the response by management is to criticise her for the way that she has been doing her job and direct her to follow particular priorities. We can quite understand how in this situation she would feel that she was likely to be held responsible if there was a clinical incident that led to harm.

237. The claimant became increasingly stressed and anxious following the meeting on 8 September and felt unable to work safely (see her paragraph 125). She started a period of sickness absence on 9 September and remained on sick leave until her employment ended. She contrasts the respondent's response to her second period of sickness absence with that during May and June 2021. Mrs Miller was away for three weeks. Her deputy emailed in response to the initial notification of sickness absence, and, on 17 September 2021, asked if it was alright for her to telephone Dr Clark. The latter replied that she thought that would be too stressful. The Deputy Head of Healthcare also emailed on 22 September asking if she could be in touch once a week and received an updated medical certificate with Dr Clark telling her that she was not able to make firm plans regarding her return. That email was sent on the day that she resigned.

238. We look at the allegation in LOI 15(h) which is that the respondent made the claimant feel uneasy about her absence relating to mental health and failed to keep in contact with her. We do not think that that allegation is factually made out, certainly not up to the point of resignation. Mrs Miller appears to have made an error when asking about a return to work because she had forgotten that Dr Clark was herself due to be on leave in October and had pre-authorised annual leave. It appears to us that from the point of Mrs Miller's return the respondent was moving towards the end of the claimant's employment. To the extent that this was pursued in cross-examination, we do not consider the facts underlying this allegation to be made out.

239. When the claimant resigned on 24 September she describes the reasons in her paragraph 129 and 130. We find that her state of mind immediately prior to the meeting of 8 September is well described in the email to Dr McAllister at page 698 (see paragraph 204 above). She discussed starting to look around elsewhere in that email so it seems that the rudeness and the lack of proactive and positive response to the risks she had identified, as well as the change to her contract, the data protection breach and being "blamed for other people's dysfunction when all I'm trying to do is help them" were all matters that were causing her to review the tenability of her employment. She also refers in her paragraph 129 to the invitation to and conduct of the meeting on 8 September.

240. Although her resignation letter does not itself explain the reasons for her resignation (page 838) she gave oral evidence about the steady accumulation of matters. The interjection on 24 August 2021 which betrayed Mrs Miller's lack of trust of the claimant's judgment about what was a priority as a professional and clinician (para.201.8 above) was clearly something that had been extremely distressing for her. Her attempts to explain why this conflict was not just personally distressing but potentially having a detrimental impact on her ability to carry out her role, seem to have been perceived as a challenge to line management authority. She was aware of this and also to the mindset on the part of Mrs Miller that she, the claimant, was causing problems that meant she needed to be spoken to about the way she was carrying out her role. She explained in oral evidence that the email at page 790 confirmed her feelings about what the

meeting was about: “I escalated my concerns and was now told you mustn’t escalate you must come to me”. This caused her to think that she was not safe, that she was unsupported and that her needs were being perceived as difficulties or problems.

241. This causes us to conclude that the conduct of the meeting on 8 September and the email which followed it were significant parts of the reasons why the claimant decided to resign. Her reference to her needs being perceived as difficulties or problems we think clearly chimes with her evidence in paragraph 130(a) that she felt that the “approach to my being unable on medical grounds to work late evenings was unreasonable and discriminatory”. We think that Dr Clark expected the respondent to refuse to make adjustments to permit her to not work evening reception. Given that she had been told again on 8 September that it was a contractual expectation that she should do so, this was not unreasonable on her part. The respondent might have agreed had there been strong Occupational Health recommendations that forced them to make that change but she had a reasonable expectation that they would not and it would have been a decision for management and not OH. She had also had performance concerns unreasonably outlined to her at a meeting that while described as informal was not one which, in our experience, would normally be held without some warning to the employee that some matters of that kind were to be discussed. Her oral evidence was very much that they were criticising her for how she was doing her role when she was raising key concerns about the quality and safety of clinical care. The most important factors in her decision were that these clinical concerns were responded to by the respondent with performance criticism and the discriminatory attitude towards her request for removal of the evening reception on grounds of disability. The lack of auxiliary aids is not mentioned at all.

Conclusions

242. We now set out our conclusion on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts her since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

<u>Protected disclosure detriment and dismissal.</u>

243. The one remaining allegation of protected disclosure detriment is LOI 4(b), the allegation that Mrs Miller’s behaviour towards the claimant worsened and it must follow from that that the allegation of automatic constructive unfair dismissal contrary to s.103A ERA is also dependent solely on the claimant having resigned in response to those actions.

244. The extent to which we have found proved that Mrs Miller’s behaviour worsened is set out in paragraph 201.11 above and we accept that it was an effective cause of the claimant resigning.

245. Mrs Miller accepted that she was aware of the complaint of data breach in about mid-April but she did not have input into the investigation. The fact

that the claimant raised that concern caused Mrs Miller no inconvenience. It never comes up in correspondence involving Mrs Miller and there is no evidence that it ever intruded upon her mind as a concern. As a whole, the respondent investigated appropriately if taking an excessively long time to do so. We have no reason to think that Mr Burfoot was not genuine in his apology that it had happened and concerned about the circumstances. The outline chronology of the investigation suggests delay but we do not accept that there is any substantive criticism to be levelled at the investigator for the investigation quality. This allegation is only made against Mrs Miller and all of the worsening behaviour is also relied on as a discrimination detriment.

246. We do not consider there is any basis for thinking that Mrs Miller was concerned at all about the data breach or the fact of the claimant's report about it and therefore we reject the allegation that the clamant suffered a detriment on grounds of protected disclosure. For the same reason the allegation that her resignation was an automatically unfair constructive dismissal under s.103A ERA is not made out and is dismissed.

Unfair dismissal

247. For reasons explained in paragraphs 73 to 83 above we have concluded that the claimant was not employed on a contract of employment between 18 November 2019 and 30 August 2020. Her continuous employment with the respondent therefore started on 31 August 2020. She therefore does not have qualifying service under s.108 ERA and does not have standing to bring a claim of unfair dismissal under s.94 and her claim of 'ordinary' unfair dismissal is dismissed.

248. This means that the surviving claim is disability discrimination since the unauthorised deduction from wages claim has been dismissed on withdrawal.

Direct disability discrimination

249. The sole allegation of direct disability discrimination contrary to s.13 EQA is that the claimant asked to stop working late shifts and the respondent refused the request (LOI 10(a)). The claimant did ask to stop working late shifts but we consider that this underlying factual allegation is not made out because as at the time the claimant had resigned the respondent had not made a final decision to refuse her request. The respondent made it very clear that they did not want to agree to it.

250. The way this is argued in CSK 1 paragraph 14, in particular 14(b), is that the respondent's evidence that it agreed to drop the evening reception work temporarily contrasted with its position in the litigation that an adjustment to do so was not reasonable; this means, it is argued, that their position is internally contradictory and demonstrates that the respondent did not intend to implement the adjustment. That is a specious argument that seeks to impute thought processes to Mrs Miller as at July – September 2021 based on her employer's position in the litigation.

251. We have found evidence that Mrs Miller did approach this issue with a closed mind and asked ourselves whether she had decided in effect that she was not going to agree to it regardless of the evidence before her at the point she was faced with the decision. We also remind ourselves that the allegation is that they had decided they were not going to permit Dr Clark to stop doing evening reception work. Despite our findings about Mrs Miller's approach she did take Occupational Health advice on how to proceed (page 632 and 640 as analysed in paragraph 187 & 188 above). The respondent did not communicate to the claimant that they had decided not to agree to her request to avoid evening reception on Mondays although they repeated the mantra that it was a contractual requirement. This did not, in Mrs Miller's mind, completely preclude a reasonable adjustment. The core facts underlying this allegation are not made out.

252. In any event, the respondent's concern was evidently that of having a Medical Lead do the evening reception work and not that of the disability itself.

Discrimination arising in consequence of disability.

253. The underlying factual allegation that is the subject of LOI 15(a) is the same as LOI 10 and fails for the same reason. The allegation of the facts said to amount to discrimination is not made out.

254. The next allegation we need to consider is LOI 15(c) and our finding is that there were no acts of removing management responsibility from the claimant that can be regarded as genuinely distinct to the instances that fall within the allegation of negative treatment and the conduct of the meeting of 8 September in particular. As we say in para.198 to 200 and 201.6 above, any specific allegations of removal of management responsibility were either not put to Mrs Miller in cross-examination (and cannot be relied on) or were clearly a short term response to ensure tasks were covered during the claimant's sick leave. Chairing the MPCCC Meetings was to revert to the claimant so either this was not a detriment to her or it was a short term measure proportionate to the legitimate aim of running the service. Therefore, no separate allegation that falls under this head is made out.

255. LOI 15(d) succeeds. We accept that in the conduct set out in paragraph 201.11 above and, in particular, in the conduct of the meeting of 8 September 2021, Mrs Miller treated the claimant negatively. This could also be described as worsening behaviour. The description as such is not unfairly imprecise since the matters set out in paragraph 201.11 above were all expressly put to Mrs Miller for her to respond to.

256. The mindset of Mrs Miller included an unjustified perception that Dr Clark had used her bipolar disorder and the newly prescribed medication to ask for an adjustment to her hours and duties that she wanted for non-medical reasons. This was against a background about the mindset of the respondent's managers that the claimant was seeking to take advantage of the terms of a contract based on an incorrect template. No allegation based on withdrawal of the contract is set out in the list of issues as being unlawful

discrimination. LOI.4.a. was based on this factual allegation but has been withdrawn. It is not among those matters included as a reason for resignation in the constructive dismissal claim as explained in the comment on LOI.6.a.ii in the Appendix to this Reserved Judgment.

257. It may be, as argued in CSK paragraph 7, that the impression that Dr Clark was challenging and difficult may have been formed for a variety of reasons some of which were non-discriminatory. However, some of their mindset was, we think, materially influenced by the claimant's request that she should not work evening reception. Although it is argued in CSK paragraph 45 that when the claimant withdraws the allegation that the respondent retracted the agreed terms and condition and proposed alternative terms that were less favourable "these are pursued solely as discrimination claims" that does not in fact appear on the list of alleged acts of s.15 discrimination as explained in the Appendix. Furthermore, the claimant's sickness absence at that time was connected with the disability of the neck condition and not with her bipolar disorder. No part of the s.15 EQA claim is based on a "something arising" from the physical impairment. So, the respondent's attitude towards the claimant, although we deprecate it, is part of the background to our findings about those matters which are alleged to be s.15 EQA discrimination.

258. The specific "something" argued by the claimant to be the reason for the respondent's negative treatment is her inability to work long and/or irregular shift patterns. We accept that there is evidence that she was unable to work those patterns and it was because of medication she was taking to control depression as someone with bipolar disorder. That inability to work long and/or irregular shift patterns therefore arose in consequence of her disability. Evidence supporting that conclusion is found in OH report 3 which, although it was not before the respondent prior to the claimant's resignation, is relevant objective evidence that we can take into account in concluding that, as a matter of fact, this connection was made out. We do not think that one can realistically separate the claimant's inability to work long and/or irregular shift patters from her request not to do evening reception duties until 10 or 11pm at night.

259. It is clear from our findings above (paragraph 192 and 202) that Mrs Miller believed that the claimant was not genuinely asking for something that was required and was irritated with the claimant for her request which was operationally inconvenient. This irritation consciously or subconsciously was part of the reason that she treated the claimant negatively and approached a number of interactions with her presuming that the claimant was in the wrong. It seems to us to be part of a pattern where Mrs Miller has taken a negative view of the claimant's intentions and that is materially influenced by the claimant's inability, due to medication she is taking for a disability, to work hours which Mrs Miller thinks she is contractually obliged to work. In those circumstances we are satisfied that the reasons why the respondent, through Mrs Miller, behaved as they did in the actions that are set out in paragraph 201.11 above included the claimant's disability related restrictions on the hours she could work.

260. The burden therefore transfer to the respondent to show that the actions were a proportionate means of achieving the legitimate aim of safely running a health service in a prison setting. This they are not able to do. It would be difficult to justify negative and worsening behaviour by someone who unreasonably presumes that the Medial Lead is in the wrong and abusing the protection of disability rather than making enquiries about the situation in a temperate way. Furthermore, the respondent has been unable to explain the purpose of the meeting of 8 September and why they held what was, in effect, a performance meeting on an avowedly informal basis without providing any warning to Dr Clark about the matters to be discussed. This means that even if individually some of the interactions can be said to have been done with the aim of ensuring the service provided in the prison setting was safely run, one cannot say these actions were reasonably necessary in pursuit of that aim. Viewed objectively, the intemperate criticism characterised as negative was not reasonably necessary.

261. The allegation at LOI 15(f) is not made out. The respondent was reluctant to follow the second Occupational Health report advice but they did, as already explained.

262. Similarly, the allegation at LOI 15(h) fails. We do not consider the underlying facts are made out. Our findings about the facts alleged in support of the allegation of less favourable treatment during the claimant's sickness absence related to her mental health, compared with that related to her physical health are set out in paras.237 & 238. We refer to them but do not repeat them here.

263. We return to the question of whether there was a discriminatory constructive dismissal. We have found that part of the reason why the claimant resigned was the actions that we have found to be disability discrimination contrary to s.15 EQA. We have to consider whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory: De Lacey v Wechseln Ltd.

264. Our findings about the reason for resignation are in paras.239 to 241 above. We take account of the fact that, prior to the meeting of 8 September, the claimant was thinking about looking around elsewhere. However, the rudeness and lack of proactive and positive response to the risks she had identified included those specific acts in para.201.11 above which we have found to be discriminatory. In particular, the interjection on 24 August 2021 was extremely distressing to her and she described that vividly in oral evidence.

265. The meeting of 8 September was of central importance to the claimant's decision to resign; she became unfit to work the following day and resigned less than three weeks' later. Although there were other reasons for her dissatisfaction, such as her anticipation that the respondent would fail to comply with what we find was a duty to make reasonable adjustments (see below), the withdrawal of the original contract, and the data protection breach (for which she had not received the investigation report),

discriminatory matters were a sufficient part of the reason why the claimant resigned that qualitatively we can say the constructive dismissal was discriminatory. The meeting of 8 September was not merely a last straw or tipping point, the fear that she would be held accountable were risks she warned about to lead to harm was created by the dressing down she received in that meeting which was materially influenced by Mrs Miller's irritation at the claimant's need to avoid late evening working for disability related reasons. It was that which caused her to feel unsafe.

Duty to make reasonable adjustments.

266. We accept that the respondent had a PCP of requiring the claimant to work late shifts on Mondays and/or generally in that they did take the view there was a contractual requirement for her to do at least one evening reception duty. The fact that we have found that they put that requirement on hold and did not exclude the possibility of a permanent adjustment does not mean that they did not have that PCP.

267. We accept that that did put the claimant to a substantial disadvantage in that she was taking quetiapine for a relapse of depression and that is recommended for people with Type 2 Bipolar Disorder such as the claimant. We are able in reaching this conclusion to consider the evidence in the 3rd Occupational Health report. In any event, we accept the claimant's own evidence that the medication is most effective if taken at approximately the same time every day and that her experience was that she needed to take it early enough in the evening to enable her to be effective in her role the following day. We find that to be reliable evidence of fact which explains how this particular medication worked on her. She was therefore faced with the prospect of either taking the medication while at work (which was clearly inappropriate both for her and for her patients) taking it later on one day in the week. That would have more than trivial disadvantages. It interrupted her medication regime and caused excessive somnolence and the potential inability to function the following morning. If she adopted Mrs Miller's suggestion of changing the day scheduled for leadership duties she would not have to travel to WWS the morning after taking quetiapine late at night, but would still potentially be unable to function by 9AM meaning she either lost some of her leadership time or had to work outside working hours of 9 AM to 5 PM. All of these would be disadvantages. The disadvantages described in LOI.23 of having to take quetiapine at a particular time early enough in the evening to avoid causing a 'hangover' effect which medication caused tiredness, drowsiness, unsteadiness and sometimes slurred speech are made out. The other challenges we refer to are relevant to whether alternatives to the claimant not working the evening reception duty would have been reasonable solutions.

268. When considering LOI 24, whether the respondent knew or ought reasonably to have known about that substantial disadvantage, we exclude the 3rd Occupational Health report because that was not available until after the claimant's resignation. Notwithstanding that, we accept that the respondent either knew or ought to have known that the claimant would have been put to the disadvantage shown. The basis of the

recommendation in the 2nd Occupational Health report was that she would be tired at night and it would be unsafe for her to drive when she had taken the medication. In addition, the claimant was telling Mrs Miller and Dr McAllister about these challenges (see paragraph 177 and 183 above) and the latter's perspective provides some support to the claimant's opinion that medication is best taken at the same time every day and that she should not work when she had taken the medication. The claimant explained it herself to Mrs Miller on 16 July 2021. Our experience as a panel is that it is not uncommon that medication which causes drowsiness may have a 'hangover' effect if taken late at night and, given the expertise of those managing the claimant, that prospect ought to have occurred to them. Indeed, it seems to have been behind the suggestion that the claimant would not have to drive to work the day after an evening reception. We consider that for these reasons the respondent knew or ought to have known that both alleged substantial disadvantages were experienced by the claimant or would be experienced by her compared with people who did not have bipolar disorder in general. Not all people with bipolar disorder do take that medication. That does not mean that the comparison is not fairly made out.

269. Turning to the adjustment sought at LOI 25(a) of allowing the claimant to work remotely, we do not consider that this would have been a reasonable adjustment because the difficulty for the claimant was posed by the time of day at which she was having to work. There was no problem with the claimant working on site and therefore this adjustment would not have alleviated the disadvantage relied upon. Working remotely the following morning would have caused a different disadvantage as we have explained.

270. When considering whether it would have been a reasonable step for the respondent to have to take to allow the claimant not to undertake late shifts on a permanent basis we need to consider when the duty to make reasonable adjustments arose and what the respondent did. We then consider whether there were other steps they ought reasonably to have taken at that time.

271. The evidence about the actual impact on the service of the Medical Lead not doing the evening reception has been scant. The claimant herself accepted that providing cover only for the evening reception hours would be difficult and we accept that. However, she put forward an alternative which would have meant that cover, such as was in fact provided by another GP temporarily in August 2021 for the whole of Monday, would have been a more attractive recruitment possibility. Recruitment seems to us to have been a practical problem which could potentially have been overcome and indeed was overcome on a temporary basis.

272. The argument put forward by the respondent is that the Medical Lead specifically needs to do one such session and we are not convinced by their assertion that this was necessary. The respondent's managers say that the Medical Lead needed to see what was happening operationally in an evening session in order to satisfy the tasks that she is required to do under the job description of providing leadership to the clinicians. We do not

understand why it was necessary for her to do that every week if there were good clinical staff on the ground and an effective method of handover and reporting. We do not understand why some other means of communicating challenges could not be found: if a bank or SEMP GP could not be asked to provide that level of communication then perhaps a different salaried GP not in a Medical Lead role or the ANP. The impact on the claimant at an early stage when taking new medication of changing the time of day at which she took that medication only on one day was unknown. The claimant had a reasonable concern that doing so would have had a detrimental impact on her ability to carry out duties at other times in the week in particular the following morning. Mrs Miller appears to have taken no thought to whether that itself would adversely affect the provision of the service and we strongly suspect that her perception that the claimant was using her disabling condition to obtain a benefit she wanted for non-medical reasons meant that she was unable to balance what the impact on the service would be of these two different disadvantages. All in all, the respondent has not shown a service-based reason why the Medical Lead had to do an evening session and there were risks to the claimant's health and ability to function in other aspects of her role if she were to do so. On the basis of the evidence we have before us we consider it would have been a reasonable adjustment for them to have to take to allow the claimant not to undertake late shifts but to make some alternative arrangements for them on a permanent basis.

273. We then compare this with what they did. The claimant accepted in cross-examination that, at the time, she was asking for the adjustment temporarily while the medication regime became established. The longer term recommendation was set out in the 3rd Occupational Health report. We accept that as at the 2nd Occupational Health report there were a number of questions that needed to be asked and answered to enable a judgment to be made about whether it was a reasonable step for the respondents to have to take balancing the competing advantages and disadvantages. It is not that the respondent has not shown that there were consequences – for recruitment, for the rota, potentially for reducing the hours worked by the Medical Lead. To balance those against the impact on the claimant more information was needed.

274. For example, the 2nd Occupational Health report only said that the challenge to the claimant was that it was unsafe to drive. The medical evidence about excessive somnolence the following day which potentially impacted on the business in other ways did not come until the 3rd Occupational Health report which also set out knock on adjustments which might be needed – such as a late start to the following working day. Temporarily the evening sessions were on hold pending the 3rd Occupational Health report. So, although the duty to make reasonable adjustments arose, the respondents, having put in place temporarily the adjustment that we think it would have been reasonable for them to put in place, were not in breach of it pending that clarification.

275. On 15 September 2021 HR Business Partner forwarded the 3rd Occupational Health report to Mr Burfoot having herself received it on 10

September 2021. Mrs Miller was on holiday as at that date. They decided not to communicate with the claimant while she was on sick leave.

276. We consider that making the 3rd Occupational Health referral was a reasonable step to take. We do not think that making permanent adjustments was a reasonable step for them to have to take until they had more detailed medical evidence about the impact upon the claimant so that they could balance the needs of the business with her needs. So, viewed objectively, we consider that the earliest time at which a permanent adjustment was a step which it was reasonable for them to have to take would have been within a reasonable time of receiving the 3rd Occupational Health report.

277. As a matter of fact, by this time the sick note dated 20 September 2021 had been sent to them on 20 September (page 832 to 835) which is also the day on which the claimant resigned. We have considered whether it was a reasonable step for them to have to take while she was on sick leave and remind ourselves about our findings in para.237 above which indicated that the claimant was not willing to communicate directly with the respondent during her sickness absence although wanted them to communicate through her representative. We conclude that the respondents were not in breach of the duty to make reasonable adjustments at the time the claimant resigned because the time at which it was reasonable for them to have to take the step had not yet arisen. Furthermore, Dr Clark's oral evidence as set out in RSK 2 paragraph 7 was that she was concerned with her immediate needs being on relatively new medication and herself was not requesting a permanent adjustment.

278. It is argued on behalf of the claimant (CSK 2 paragraph 32) that the respondent's argument that they did not know until the 3rd Occupational Health report that it would be reasonable to make a permanent change is contrary to the principle that actual or constructive knowledge has to be shown only of the disability and the disadvantage caused by the PCP – not that there is a reasonable adjustment. It is argued on behalf of the claimant that once the respondent had the requisite knowledge the duty to make the adjustment arose immediately. That is true, but a breach of that duty occurs when the respondent fails to take a step which it would have been reasonable for them to have to take. Our conclusion is that it would not have been reasonable for them to have to agree to a permanent adjustment until after the claimant's resignation. They agreed to temporary adjustments in the meantime, albeit with bad grace. That does not affect our conclusion that the s.20 claim based on the PCP fails.

279. However, the claim of breach of a duty to make reasonable adjustments succeeds in relation to the failure to provide auxiliary aids which should have been ordered by the second week in August and probably would have arrived two weeks after that. We cross-refer to our findings in paras.154 to 162.

<u>Indirect discrimination</u>

280. The allegation set out in LOI 18 relies upon the same alleged PCP of requiring employees to work late shifts. Certainly there was a requirement that GPs and the Medical Lead in particular should work late shifts, that PCP is established.

281. The argument of group disadvantage is put on the basis that persons who share the claimant's alleged disability of bipolar disorder are at a particular disadvantage in that by reason of taking the medication the likelihood of experiencing a hangover type effects the next day and the likelihood of increased tiredness are a consequence of medication.

282. We do not have evidence about how prevalent the use of quetiapine amongst people with Type 2 Bipolar Disorder is. The only evidence we have is that the claimant did not previously use this particular medication and one other employee of the respondent with a diagnosis of Type 2 bipolar disorder does not. This is not evidence that satisfies us that people generally with bipolar disorder either are taking this particular medication or medication generally which causes them to experience the particular disadvantage as set out in LOI 19.

283. Furthermore, we do not have evidence about the extent to which this disadvantage is not experienced by people who do not sharing the claimant's disabling condition. We do not have evidence about whether use of quetiapine among people with Type 2 Bipolar Disorder is greater than in the general population or if people with that disabling condition are more likely to be taking medication that affects their wakefulness. We do not consider the group disadvantage is made out.

284. The way the allegation is put in the claimant's skeleton argument in CSK 1 paragraph 33, is that "Others who shared her disability would inevitably experience the same disadvantage." Although we are aware that the wording 'particular disadvantage' is intended to do away with the need for statistical comparisons and statistical information is not necessary to show group disadvantage, there does, in our view, need to be some evidence beyond the experience of the individual claimant particularly in cases such as this which are disability indirect discrimination cases. What is needed is a causal link between the requirement that employees work late shifts and the disadvantage of experiencing hangover type effects the next day or the likelihood of increased tiredness as a consequence of taking medication. We do not think in the circumstances of the present case that it is right simply to extrapolate from the claimant's experience that this is an experience shared by a group. Therefore, the claim of indirect discrimination fails.

285. Furthermore, as a matter of fact, the temporary adjustments mean it was not a disadvantage to which the claimant was actually put.

Preparation for a remedy hearing

286. We note that in preparation of this case there has been no order for a schedule of loss. Case management orders for one to be prepared will now

be made. It is also possible that the parties will wish to make representations about whether the remedy issues set out at LOI 32 to 37 (not replicated in the Appendix) remain the issues which it is necessary for the tribunal to have to decide at a remedy hearing.

287. In particular, given our finding that the claimant experienced a discriminatory dismissal, the tribunal will need to make findings about the length of time she would have remined in employment had that discriminatory dismissal not taken place. We have decided that the permanent removal of the evening reception duty would have been a reasonable adjustment. The reason the claim under s.20/21 fails is because the respondent was not yet in breach of that requirement. However, it will not be open to them to argue at a remedy hearing on the basis of different evidence that this would not have been a reasonable adjustment to make. Issues about how long the claimant would have remained in employment as a consequence will need further to be clarified after the parties have had time to reflect on this reserved judgment and on what evidence (potentially including medical evidence) will be needed at a remedy hearing.

288. Consequently, the claim will be listed for a case management preliminary hearing by CVP with a schedule of loss and counter-schedule of loss to be prepared in advance of that hearing. Our provisional view is that two days will be needed for remedy (to include deliberation and judgment) so that parties will be asked to provide dates to avoid for a two day hearing between 1 April 2024 and 31 July 2024 which should leave sufficient time to prepare any necessary evidence.

_____
Employment Judge George

Date: …23 October 2023……..

Sent to the parties on: 24 October 2023

For the Tribunal Office