EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Bentham**

Respondent: **Northern Lincolnshire & Goole NHS Foundation Trust**

Heard at: **Leeds by CVP**
On: **23-27 October 2023, 5 January and (deliberations only) 8 January 2024**

Before: **Employment Judge Maidment**
Members: **Ms H Brown**
Mr T Fox

Representation
Claimant: **Miss A Robinson, Counsel (23 October 2023) and thereafter in person**
Respondent: **Miss M Martin, Counsel**

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and disability discrimination fail and are dismissed.

REASONS

Issues

1. The claimant was employed by the respondent as a named safeguarding midwife. She firstly brings a complaint of unfair dismissal. There is no dispute that the reason for her dismissal was ill-health capability.

2. The claimant also brings a complaint of disability discrimination. The claimant relies on a physical impairment arising from the ongoing effects of a knee injury sustained in 2017. The respondent accepts that the claimant was, by reason of her knee injury, a disabled person, at least from August 2022.

3. She brings a complaint of discrimination arising from disability in respect of her dismissal. Her inability to attend work and perform the duties of her role in the workplace are said to have arisen in consequence of her disability. This is not accepted by the respondent.

4. There are then complaints of a failure to comply with the duty to make reasonable adjustments. As relevant provisions, criteria or practices ("PCPs"), the claimant relies firstly on a requirement for named safeguarding midwives to attend work and carry out their normal duties (the respondent accepted that it was appropriate to redraw the PCP from that identified during the case management process which had not focused on a practice of general application), secondly, the application by the respondent of its capability or attendance management policy or process and, thirdly, the application by the respondent of its sick pay policy or process. Those are said to have put the claimant at a substantial disadvantage when compared to a non-disabled person in that she was, respectively, unable to travel to work or work in the workplace, unable to perform her contracted duties at the workplace and, therefore, at risk of action under the capability process and, as a further consequence, faced a reduction in her pay under the sick pay policy/process. As reasonable adjustments, it is said that the respondent ought to have allowed her to perform her contractual role from home, redeployed her to a different role that she could perform from home, adjusted the trigger points under the capability or attendance management process and, finally, adjusted the sick pay process to enable the claimant to continue to be paid.

5. The respondent may seek to argue that any acts occurring before 25 November 2022 are out of time, although it is accepted certainly that the complaint of unfair dismissal and discrimination arising from dismissal are ones which the tribunal has jurisdiction to hear. Furthermore, the application of the PCPs relied upon in the reasonable adjustment complaints, appears certainly to extend to the point of the claimant's dismissal.

Evidence

6. Having identified the issues with the parties' counsel, the tribunal spent some time reading into the witness statements exchanged between the parties and relevant documentation. The tribunal had before it a bundle of documents numbering some 2121 pages. A limited number of additional documents were put before the tribunal during the course of the hearing without any objection from either party. They included some additional medical records disclosed by the claimant on 5 January 2024.

7. The claimant was then able to commence her evidence at 1:30pm on day 1. Towards the end of the first day of the hearing, at 3:46pm, the tribunal adjourned the cross-examination of the claimant until 4:01pm in circumstances where, it appeared to the tribunal, that the claimant was struggling and might be unwell. The claimant appeared not to be able to focus on the questions being asked, there appeared to be involuntary movements of her head and her speech was less clear. On reconvening, the tribunal expressed the view that the hearing ought to be adjourned for the day in circumstances where the tribunal intended to sit only until around 4:30pm in any event. The tribunal did not consider it to be fair for the cross

examination to proceed in the interests of justice - the tribunal did not feel that the claimant was well enough to be able to do her own case justice. Ms Robinson did not oppose such suggestion and it was clear that she had come to a similar view regarding the claimant's ability to participate. Prior to making that decision, the claimant had been given an opportunity to make any representations she wished. The claimant said that she wished to continue. She said that there were no problems with her mental health and she was not under any medication apart from for knee pain. She was passionate about her role and the way her employment had been terminated.

8. The tribunal clarified that whilst the claimant was in the middle of her cross-examination, Ms Robinson was in a position to speak to her overnight other than about the claimant's evidence and the answers she had given.

9. Prior to the commencement of the second day of the hearing, the tribunal received an email from Ms Robinson. She said that she had considered the position overnight. She had concluded that there was clear evidence which "we had all the witnessed", which indicated that the claimant was currently unfit to give evidence. She said that, because she was unable to take effective instructions, she was of the opinion that the claimant ought to be reviewed by a medical practitioner to confirm her fitness to give evidence and advise on what adjustments could be made, if any, to assist the claimant give evidence. Further, she had concluded that the case was currently not suitable for public access representation and required the instruction of a solicitor. She submitted that it was in the best interests of the claimant to adjourn and it would not be fair to proceed aware of the claimant being possibly medically unfit on the previous day. She said that, whilst she had not taken instructions on the foregoing, she could arguably be in breach of professional duties if she continued to act in the circumstances.

10. On reconvening on day 2 of the hearing, Ms Robinson explained that, where she thought there was a fitness or capacity issue, she had to let the tribunal know and also had to represent the claimant in the claimant's own best interests and request an adjournment even if the claimant did not want one. She explained that she did not feel she was receiving effective instructions from the claimant. She had to consider if a solicitor was required or if she had to withdraw and, for both reasons, she would now need to bow out of proceedings at this stage. The claimant had raised with her that she didn't agree with what Ms Robinson was saying, but her professional duty overrode what her client was telling her. She had given consideration to trying to get on with the evidence to see how it went, but felt, to do so, would be in breach of her profession duties and her client's interests in circumstances where the tribunal obviously had its own concerns. Therefore, she simply could not continue. If she did so and the situation repeated itself, it would reinforce the need to get medical advice. Even if the respondent's evidence was to be now interposed, she wouldn't be able to get instructions on how she should put the claimant's case to the respondent's witnesses.

11. The tribunal explored whether Ms Robinson could have an adjournment in which to speak further to the claimant, but she said that she was not in a position to take instructions and talk to her client. There was a breakdown in communication with the claimant which couldn't be resolved. Ms Robinson confirmed, in answer to a question from the tribunal, that she did want to withdraw as the claimant's representative with immediate effect. The tribunal confirmed such withdrawal, but on Ms Robinson's request clarified that she was able to remain present in what was otherwise a public hearing.

12. The tribunal then sought the claimant's own view. She said that she wanted to carry on and was quite shocked at what was being said about her. She referred to a lack of communication with Ms Robinson. She firstly said that she wanted to look at options regarding getting another barrister and adjourn briefly to see if one could be instructed that day. She reiterated that there were no capacity issues in terms of her mental health. There had been no diagnosis of any mental health impairment. The way she presented the previous day had nothing to do with anything medical and she could ask her GP to verify that. She only took painkillers for her injured leg and that did not limit her ability to concentrate. She said that, with apologies to the tribunal, she had become distracted towards the end of yesterday's proceedings being in her home and with her husband next to her in support having to locate documents from an electronic bundle. She understood what had occurred and believed it would not happen again.

13. Ms Martin, on behalf of the respondent, wished to take her own client's instructions as to their position regarding a possible adjournment, the tribunal having posed the possibility that, if fresh counsel was to be instructed, it might be appropriate to start the case afresh with a differently constituted tribunal.

14. There was a further adjournment from 10:32am until 11am. On reconvening, the tribunal explained to the claimant, for the sake of completeness, that there was no requirement that she be legally represented in an Employment Tribunal hearing. The claimant said that indeed she had decided that she would, from this point on, represent herself. She reiterated her fitness to continue. She said that she could complete her own evidence and, while she was not currently in a position to ask questions of the respondent's witnesses, a short adjournment then would allow her to prepare the questions she would wish to put to them.

15. The respondent's position was that they wished to proceed this week and Ms Martin suggested that, if the claimant wanted to represent herself, she could do so whilst having an opportunity to prepare, particularly given that we were listed until and including Friday of that week. In terms of whether it was achievable for the claimant to represent herself, it was noted that the claimant had only been legally represented from last week. The claimant had written her own witness statement without the benefit of legal advice and had been responsible for the compilation of the bundle. It was suggested that the claimant's husband might be of assistance in putting questions, albeit the tribunal was of the view that, if anyone knew her claim in sufficient detail, it was the claimant herself. Ms Martin maintained that if

there was an adjournment of the hearing this week there would be prejudice to the respondent in terms of delay, including the effect of a delay on the respondent's witnesses and the stress of having allegations of discrimination hanging over them in circumstances where their memories would fade. There was also the issue of costs.

16. The claimant said that she would like to have some brief time to get her head around everything and continue. The claimant's cross-examination could be completed and then time could be given for her to prepare the cross-examination of the respondent's witnesses. The claimant said she wished to continue today, understanding that the cross-examination of herself would probably not finish until, at the earliest, lunchtime the following day. The tribunal could then take stock in terms of the time she would need to prepare to cross-examine the respondent's witnesses. The claimant said that whilst the respondent was calling 4 witnesses, she had fewer questions for 2 of those witnesses. The tribunal allowed the claimant's husband to make his own representations and he said that he had a concern that a significant amount of time would need to be set aside to allow the claimant to prepare questions.

17. Following a further adjournment, the tribunal confirmed that it would continue to hear the claimant's evidence and then take stock to see if she could cross-examine the respondent's witnesses and/or how many of them in the time remaining. Both parties were content to proceed on that basis.

18. The cross examination of the claimant completed at 3:08pm on the Wednesday (day 3) and the tribunal adjourned until 3:10pm on the Thursday at which time the claimant confirmed that she was in a position to commence the cross examination of the respondent's witnesses in the order which had been advised by Ms Martin they would be called.

19. On day 4, the tribunal heard, on behalf of the respondent, from Lynn Benefer, who acted as head of safeguarding between July 2020 – March 2021. On day 5, the tribunal heard from Victoria Thersby, head of safeguarding from 8 March 2021 and Kate Truscott, associate non-executive director. The hearing was then adjourned part-heard to recommence on 5 January 2024. On that day the tribunal heard from Jennifer Hinchcliffe, deputy chief nurse. Ms Martin then made her submissions on behalf of the respondent followed by the claimant's submissions. The claimant had indicated before the commencement of the final day of hearing that, whilst she had prepared her cross-examination of Ms Hinchcliffe, she needed more time to complete her submissions and wondered whether they could be heard on the following Monday. That was, however, a day when the parties had been told that there was no need for them to attend and Ms Martin was appearing in a tribunal hearing elsewhere. The claimant explained that she had prepared submissions, but needed to perfect them. It was agreed that the tribunal would consider the time remaining at the end of Ms Hinchcliffe's cross-examination. In the event, the claimant confirmed then that she was in a position to give her submissions after time had been given to read Ms Martin's submissions, which she the supplemented orally. The claimant had had a significant amount of time to prepare for this hearing and it was certainly not in

accordance with the tribunal's overriding objective to cause further delay and additional costs. The tribunal met then privately on 8 January to deliberate.

20. Having considered all relevant evidence, the tribunal makes the factual findings set out below.

Facts

21. The claimant was employed by the respondent as a named safeguarding midwife, a position which the respondent was required to fulfil by statute. She agreed that her role was to be the designated lead on safeguarding issues for mothers and their recently born children. She reported to the head of safeguarding. She agreed that the focus of her role was to protect the safety of women and children. She recognised that, if that was not done properly, there was a risk of harm to them, albeit she maintained that the role could be carried out in different ways. The claimant accepted the accuracy of the main duties and responsibilities of the post set out in her job description. She was, however, at pains to point out that she was a strategic, rather than a clinical, midwife and, as such, did not carry out a number of physical tasks listed in a section detailing additional information for the named midwife. Rather than working clinically with women and babies, she was asked to support midwives in their care of women and babies. She was not expected to be present to take over from a midwife, but rather was expected to respond to a crisis by supporting a midwife which could be done over the phone.

22. The claimant accepted that she had a duty to keep up-to-date with training and keep written and other electronic records up-to-date.

23. The claimant had been redeployed into the named safeguarding midwife role in 2014. The role then became a job share when she reduced her hours from 38 to 28.

24. The claimant worked 3 and a half days a week responsible for the Scunthorpe General Hospital and a midwifery unit based at a hospital site in Goole. Her job share partner, Helen Ward, worked Fridays at Scunthorpe General Hospital with her other 2 working days (Monday and Tuesday) at Grimsby hospital. A third named safeguarding midwife worked on Wednesday, Thursday and Friday at the Grimsby hospital.

25. There were 4 other named safeguarding nurses in Scunthorpe responsible respectively for safeguarding children, adults, those lacking mental capacity or subject to deprivation of liberty orders and 1 (on a part-time arrangement) responsible for looked after children.

26. The vast majority of midwives in the respondent's area of operation were based at Scunthorpe General Hospital and Grimsby Hospital. Only 4 midwives worked from Goole (compared to 78 at Scunthorpe) concentrating on pre-and postnatal care. There was an attendance there by a consultant once a week with a baby scanning facility on site. Only 16 women had given birth at the Goole site since 2017. The claimant's employee staff record form completed on her change of role in 2014 referred simply to her working from

the Scunthorpe site. That reflected her primary place of work. When Ms Hinchliffe emailed Ms Warner, associate chief nurse – midwifery, gynaecology and breast services, on 9 May 2022 asking what type of maternity services were run from Goole, the reply she received was that there was a community midwifery centre and, once a week, a consultant clinic which the community midwives supported. That was accurate. The claimant believed nevertheless that the importance of Goole was not fully appreciated saying that there were a lot of women with complex safeguarding issues in the area, some of whom, for instance, might have given birth at a hospital outside the respondent.

27. The claimant agreed that her working days were flexible rather than fixed. She would have to attend the domestic violence team meetings on Wednesdays and on such weeks tended to have the Thursday off.

28. The claimant's full title was named midwife for safeguarding, child protection, substance misuse and domestic violence. This was a senior band 7 role which involved the coordination, management, communication and development of safeguarding children practices throughout midwifery, ensuring all statutory requirements were met. The statutory guidance made it a requirement that any hospital with a midwifery department should have a named safeguarding midwife. It was therefore a statutory requirement for the respondent to employ the claimant and the other named safeguarding midwives at Scunthorpe and Grimsby. There was no requirement to have a named safeguarding midwife at Goole as there was no midwifery department or the ward located there. The named safeguarding midwife had to provide support and advice, not only to women and their partners, but to colleagues. Where a mother had to be separated from her baby shortly after birth due to court order, she would be responsible for supporting the mother and other midwives, meeting with them if required, liaising with social workers, ensuring all relevant documentation was available to the midwifery team and ensuring that they understood the process. She also supported women and children suffering from domestic abuse, which required a strong relationship to build trust and identify any underlying issues by having honest and open conversations about what the concerns were and any actions to take if domestic abuse was disclosed or how that might be signposted to other agencies.

29. If done remotely, there might, the tribunal accepts, be a lack of certainty as to whether the woman was alone or in a safe place. Midwives and new mothers were encouraged to seek a confidential space away from the partner. During Covid, clinical appointments were still attended, but the women were asked to go on their own and the named safeguarding midwife would go across to the maternity department to speak to the women and support the clinical or ward-based midwives with any safeguarding issues requiring their support. It was, therefore, the tribunal again accepts, a front-line role and had always been regarded as an on-site role. During the pandemic, the respondent did seek to reduce physical attendance by employees at its premises and allow hybrid working where possible, but the named midwives and nurses, except for the claimant, continued working on site. Some named nurses had more scope to work from home to reduce footfall, as there was always another named nurse or specialist nurse on

site. However, that was not always the case with the respondent's named safeguarding midwives.

30. In terms of the claimant's working arrangements from 2014 – 2017, she described herself as working on a hybrid basis spending a lot of time based at Goole and also at Scunthorpe General Hospital. It was also, however, described by her as a remote position, not just involving her working from home but also at a health centre in Brigg as well as with other teams and local authorities. She was not expected ever to work at Grimsby. When asked to apportion the time she spent at Goole and Scunthorpe compared to in the community/at home she gave the split as being 50:50 but with the majority of the time spent away from the hospital sites being in health clinics and with local authorities. The role was not purely hospital-based. On days when she was not going out on visits, she said that she was based in one of the hospitals, either Scunthorpe or Goole, but the majority of time, she felt, was spent out in the community, the claimant saying that most of the midwives in this part of the respondent worked in the community.

31. As regards the period from 2017 – 2020, the claimant referred to fracturing her tibia plates in 2017 and then working remotely. She went to Scunthorpe, but to Goole more often because of the shorter driving distance. She attended clinics in Brigg and Barton. She was also working from home. In cross-examination she continued that, whilst she was estimating her time spent without reference to her diary, she would say that in a typical week she would work 2 days in Goole, 1 at Scunthorpe General Hospital and the rest of the time in the community. When put to her that the arrangement then did not seem all that different from how she worked from 2014 to 2017, the claimant said she knew she spent time at different locations, but then said that she worked increasingly remotely as her condition got worse. She said that it depended on how she was.

32. The claimant was referred to the sickness review process and a reference she made at a meeting in September 2022 to having worked remotely for 4 years. The claimant agreed that that was not right and, when she referred to remote working, she did not mean that she was working at home. She was working at different locations until she fell in the snow during the Covid pandemic and, thereafter, worked more from home.

33. It was put to the claimant that there had been a lot of internal discussion as to whether the role could be performed remotely and that the claimant had been saying that it had been fulfilled by her remotely. She clarified again that she meant that she worked from a variety of locations. That included working from home through Teams meetings and telephone contact – indeed, she said, Grimsby-based midwives used to phone her up. Strategy and pre-birth meetings for mothers could be done remotely, but what she meant was that she was away from the hospital site, away from Scunthorpe General Hospital and Goole. She agreed that she did not mean that she was working from home 100 per cent of the time. However, in 2022 she said that she had come to a position where she did mean that.

34. The claimant had provided in the bundle of documents a copy of her job description with her own annotations. On that, she noted that she accepted

the post on the basis that her base would be Scunthorpe and Goole, but that there would never be a requirement for her to go to Grimsby. She continued that, from 2014 to prior to her knee injury, she was able to drive to diverse destinations, but, after her injury, she began hybrid and remote working. However, in evidence before the tribunal, the claimant sought to maintain that that was not such a change in her working arrangement from 2017, referring to there having been a "slight difference" because of her knee injury as she had to pull back from driving long distances. She maintained that she had begun hybrid and remote working before 2017. She maintained ultimately that from 2017 she worked 50% of her time from home (although she was then unclear as to what she meant by home working saying that she meant working hybridly, which to her meant working from an office whether located in a hospital or anywhere else) and, from 2020, 100 per cent of her time from home, because of Covid. She met the criteria for homeworking during the pandemic given the distance between her home and work locations and the fact that she was caring for her parents in law who were in their 90s.

35. When reviewed by occupational health on 17 May 2021, the claimant referred to herself as having been working remotely from home since March 2020 due to the pandemic. The claimant told the tribunal that she couldn't recall saying that. She told the tribunal then that she started working from home in 2014, but also still at various health centres and hospitals – it had "always been the same".

36. The claimant emailed her line manager, Ms Benefer, on 10 September 2020 saying that she was working remotely away from SGH (Scunthorpe General Hospital) for a few reasons, the main one not being able to drive the 180 miles round trip due to neuralgia following a severe case of shingles on her neck, shoulder and upper arm. She said that at that time she could access a lift to Goole, which she said was offered to her as her base when she was redeployed to the safeguarding team and where she spent much of her time before the pandemic with the consent of Mr Ferris.

37. The tribunal has been taken to an email from Mr Ferris to Ms Hinchcliffe on 21 June 2022. He referred to the claimant working at SGH. He said that, at some point, the claimant had a leg injury, so to reduce her driving he agreed that she could also be based at Goole as well as SGH. He believed that her leg had got worse at one point so for a while they had agreed she could work from home until her leg improved and she could get back driving. He said that there was never a formal agreement for this and there were never any plans for this to be long term or permanent. She conceded that he was probably accurate as to the arrangement at the time of her knee injury but that she was dealing with something different over the last 3 years of her employment. The claimant said that Mr Ferris was wrong to think that her leg would heal.

38. On 28 May 2020, Mr Ferris emailed the claimant a working from home rota for June 2020 asking her to confirm which days she would be in the office at SGH as they needed a presence there 2 days per week. When put to the claimant that, if she had an agreement with Mr Ferris to stay from home from 2017 permanently, it made no sense from to send this email, the

claimant said that she was not saying that arrangement existed from 2017. Mr Ferris had given her all equipment she needed so that she did not need to be absent due to sickness. This was an email about working from home due to the pandemic, rather than due to her knee injury. It was then put that therefore in May 2020 the claimant was working from home because of the pandemic rather than her knee. She replied that both were relevant.

39. The first reference in the claimant's medical records to her knee injury was made on 16 May 2017. The claimant was said to be awaiting an MRI scan and was taking ibuprofen. The claimant wanted a stronger painkiller and was prescribed naproxen. The claimant told the tribunal that she injured her knee in April whilst on holiday in Cornwall. She did not know what was wrong with it, but had sought medical attention when she had returned home.

40. On 9 June 2017, her doctor noted an acute meniscal tear and advanced osteoarthritis with a suspected fracture. On 12 June 2017 the claimant reported concerns walking on the fracture and "getting worse". On 29 August, the claimant was recorded as requesting medication whilst recovering from a broken leg. Her GP received a letter from radiology on 6 November 2017. There were then no entries in the claimant's medical notes until May 2020. The claimant agreed that she probably had not gone to see her GP in that period. She felt that she was able to manage her knee by working remotely and avoiding straining it by driving long distances. She said that she was buying her own pain relief and seeing a private physiotherapist. She thought that she probably went back to the doctor in May 2020 because of the Covid pandemic.

41. On 22 May 2020, the claimant saw her GP, reporting that she still felt fatigue and pain after suffering from shingles. It was noted that the claimant was working mostly remotely, but her workplace was in Lincolnshire and she did not feel she could manage the drive there. She was also said to be worried about Covid. The doctor said that she could provide a fit note suggesting remote working. Whilst the claimant agreed that there was no mention of her knee, she said that that was a long term continuing chronic condition.

42. The claimant's GP noted on 8 July that the claimant worked as a safeguarding midwife working remotely and would like to continue as she would struggle to return to driving. Again, a supportive fit note was to be provided. The claimant thought that that consultation was to obtain advice about her shingles, but it was also about her knee because she needed to work remotely for both reasons.

43. The claimant had a telephone appointment with a doctor on 15 January 2021. She said that since the previous day she was feeling knee pain and believed that that was due to walking on the snow which had forced her knee a bit. She said that she had taken naproxen for similar knee pain and would like to take it again. A telephone consultation on 9 March related to her knee pain. The claimant said she was unable to drive but could work from home. She also mentioned issues of bullying at work and requested to speak to someone to discuss her mood. The ongoing knee injury was said to be stopping her driving for long periods. It was said that currently the

claimant was working remotely, but did not feel that she was able to drive to work to attend a meeting. It was recorded that there was no new injury, but her knee was locking if it was in the same position.

44. The claimant had a consultation on 30 April about her knee, with advice given regarding restoring strength in it. On 14 May her knee was reported as giving way regularly and clicking when walking, but not locking.

45. On 11 June 2021, it was recorded that the claimant was undergoing treatment with the physiotherapist at her local GP practice and had the support of a family member who was a physiotherapist.

46. On 24 August 2021, the claimant had an appointment regarding a stress-related problem. She reported struggling with the possible effects of long Covid, the death of a parent-in-law and her husband having a diagnosis of melanoma. The claimant maintained that, although it was not mentioned, her knee was still hurting and there was no need to repeat any issues relating to her knee as her GP was already aware of them. Similarly, the claimant did not refer to her knee during appointments on 21 and 23 September or 18 November. The focus of the last appointment was on the claimant suffering from a frozen shoulder.

47. There was no reference to the claimant's knee during consultations on 10 and 13 January and 2 February 2022. When speaking to her doctor on 16 March, the claimant reported knee pain and that work hadn't been so great about her not driving. She reported that occupational health said that she needed to work remotely, but that managers hadn't been nice, with lots of midwives short. She requested a further fit note saying that she was struggling to bend her knee properly.

48. Whilst the claimant had earlier suggested that she had injured her knee again in a fall at the beginning of the pandemic in January 2020, she agreed that this occurred rather around January 2021. In an occupational health report of 17 May 2021, it was recorded that the claimant had had a fall and injured her knee in January of that year. The same report also indicated that she had been working remotely from home since March 2020 due to the pandemic and during this time the claimant had suffered from Covid and then shingles. The claimant accepted that she was working from home due to Covid issues including caring for her parents-in-law. She had completed a form provided by Mr Ferris to see if she was entitled to work from home. Government guidelines had said that she could in circumstances of her living with elderly relatives. Nevertheless, the pain in her knee was chronic and present throughout the period. She said that even without the Covid related issues, she would probably still have asked the respondent to reduce her driving.

49. In terms of statements of fitness to work, the claimant was signed off as unfit because of complications following a shingles infection from 21 April 2020 to 4 May 2020. She was then signed off until 17 May due to fatigue following the shingles infection. From 22 May to 4 June 2020 the claimant was said to be fit with amended duties due to fatigue and pain after her shingles. Remote working was suggested and to avoid travel to work as

driving was difficult for her at present. The claimant could not say what the relevance at that point of her knee may have been, but repeated that she had chronic knee pain which have not been resolved since 2017. When asked why, if she had been working from home fully from March 2020, she was asking her GP to request amended duties to stay at home, the claimant said that she felt she needed more support and felt pressurised. She said that she had completed a form to allow her to work from home, but felt that she needed another reason because of issues in the workplace.

50. As already referred to. on 28 May the claimant emailed Mr Ferris in response to him sending the working from home rota for June, saying that she was unable to clarify when she would be able to return to the office. She attached her GP note. She said that she could understand that all team members had their own needs and perceptions of fairness in sharing the workload, but that she felt that she could support the team working remotely as adequately as in person. Three hours or more of driving in a day was currently too much for her.

51. Mr Ferris responded that day saying that he fully appreciated the situation now he had seen her doctor's note and was happy to approve her working from home until 4 June. He said: "I do however need you to keep in touch and keep you up-to-date as I didn't realise that you are having problems with pain." Again, it was put to the claimant that from this correspondence there did not appear to be any general agreement that she could work from home. She disagreed. The tribunal considers that the correspondence is indicative that there was no general agreement at all.

52. On 7 July 2020, Mr Ferris emailed the claimant checking if she was okay, asking if she had any further GP notes or whether she was now fit to work from the office if necessary. She responded on 8 July saying that following a consultation with the GP, she had been advised to have a further period of remote working due to the continuing physical problems she was experiencing following the initial shingles virus. She said that she would forward a medical note to him. She did not refer to there being any homeworking agreement. There was none.

53. On 7 July, Jane Lundy, clinical skills and patient safety midwife had emailed Mr Ferris and others asking if the claimant remained shielding as she had contacted her to see if she would be able to attend a study day. Mr Ferris responded on 8 July saying that the claimant was "not shielding as such, she has had a health problem for which the GP recommended working from home (the last doctor's note has expired, therefore I could see no reason why she could not attend).

54. Mr Ferris left the respondent's employment in July 2020. The claimant then reported to Ms Benefer, as acting head of safeguarding, on an interim basis. She identified in a meeting with Ms Melanie Sharp, assistant chief nurse, that one of her objectives was to facilitate the claimant back to onsite working. They viewed the claimant's role as one which required high visibility to provide specialist knowledge, advice on clinical expertise to all staff in maternity services and in all areas of safeguarding children and adults associated with pregnancy and childbirth. Another key objective for

Ms Benefer was to encourage united team working and they considered that the best way to achieve this was for the named safeguarding midwives to be on site. The claimant had not mention her knee injury to Ms Benefer, who was unaware of how it affected her. Mr Ferris did not on handover make her aware of the claimant's condition or any arrangement in place regarding the claimant working from home. Ms Benefer genuinely thought, from discussions that the claimant's issues arose out of complications following shingles and anxiety about the coronavirus pandemic.

55. On 3 September Ms Benefer emailed all of her team explaining that they needed to "tighten up" awareness of where and when people were working. The claimant responded suggesting that "employers should provide flexible ways of working and reduce footfall into offices."

56. Ms Benefer emailed the claimant on 10 September 2020. Mr Ferris had not shared with her the date the claimant returned from sick leave and how she would be working on her return, for example, whether from home or on a phased return back to the office. She asked that if the claimant was working from home, whether she had completed the homeworking risk assessment and the Covid personal circumstances and risk assessment. She apologised, but said that she needed to certify that all the team had completed those assessments.

57. The claimant replied that she was working away from SGH for a few reasons, the main one being not able to drive the 180 mile round trip due to neuralgia following a severe case of shingles on her neck, shoulder and upper arm. She said at the time she could access a lift to Goole which originally was her base in her previous role and where she had spent much of her time before the pandemic with Mr Ferris' consent. She said that she had completed the working from home assessment, but needed to complete the Covid one. She referred to all of the meetings with midwifery and other agencies being carried out electronically, yet she felt pressurised into travelling a great distance to attend an electronic meeting. She said that she was in contact with midwifery every working day and gynaecology when they needed support and advice. She said that she did not feel she should add her footfall from a high-risk area into the relatively low risk area of the hospital.

58. The claimant accepted that there had been no fit note submitted since the one which expired on 17 June. We claimant said that she was under the impression that there was an agreement to work from home, so that she did not need to put in fit note all of the time. The claimant again referred to there being an awareness within the respondent of her knee issue from performance reviews and occupational health reviews, the claimant being unwilling to accept that there was no reference from occupational health to problems with her knee until October 2021.

59. Ms Benefer wrote to Ms Mosley, HR business partner, and Ms Sharp on 11 September 2020 to try to understand the claimant's home working arrangement. She said that she was conscious that the claimant could get upset when challenged on her working patterns and that she couldn't find any evidence of what the claimant was suggesting that Mr Ferris had

agreed. Ms Sharp explained that a visible presence was needed by the claimant and that staff had raised concerns about this previously. She also flagged a need to obtain occupational health advice about the claimant's ability to work on site as the adjustments agreed by Mr Ferris had been temporary and, she understood, related to the claimant's episode of shingles.

60. On 16 September Ms Benefer emailed the claimant regarding the sharing of calendars and saying that she was trying to get her head round who was working where and if they had completed the correct risk assessments. She said: "I am unable to find if Craig completed the "working from home" form for you so I'm submitting this today. The claimant responded saying that she had completed the form for homeworking in April/May. Ms Benefer asked the claimant later that day if she could have her electronic Covid risk assessment to complete. The claimant told the tribunal that she believed that she had provided Mr Ferris with both types of form.

61. On 22 October 2020, Ms Benefer wrote to Ms Mosley and Ms Sharp requested a meeting to discuss the claimant as she was not willing to return to on-site working, had expressed issues about using Web V and was starting to challenge any work Ms Ward picked up. She referred to needing advice "how to manage this tricky member of staff". Ms Benefer apologised before the tribunal for that reference to the claimant which she said came out of her frustration. She regarded the claimant as a difficult person to manage. She told the tribunal that she had been told that the claimant was "difficult to challenge". Ms Sharp responded that the respondent's clinical commissioning group colleagues had raised concerns around the lack of visibility of the claimant, but other midwives were raising concerns and that Jane Warner, divisional head of nursing and midwifery, had also been contacted with concerns.

62. The claimant when working from home did not always have full access to Web V, the electronic system midwives used to complete and store the electronic family file. Midwives used Web V to record concerns and issues to look out for such as domestic or substance abuse. As well as Web V, the respondent used SystmOne, a community system which ward based midwives did not have access to and CMIS which recorded appointments and where there was only a limited ability to record large amounts of patient information due to word count limits. Unlike SystmOne, Web V this could be accessed by all midwives and ensured that each staff member caring for the patient would be kept up to date following shift handover, multiagency meetings, updates or pre-birth plans. The respondent actually did not have full electronic patient records and relied heavily still on paper records which meant that information regarding safeguarding concerns were not being effectively communicated to all staff including Ms Ward. It also meant that the claimant was asking colleagues to scan paper medical records to her which could be time consuming and created concerns regarding the security of information.

63. On 4 November Ms Benefer emailed the claimant saying that she was hoping to have a telephone call with her. She said that there was nothing to worry about, but "I do need to look at how we can support you in coming

back into the office to work. This would not be every day but as a phased return. I understand that you will be anxious about this but can assure you we have reduced footfall in the office and everyone adheres to infection control guidance."

64. The claimant responded that day saying that she was disappointed at the contents of the email. She said that, in relation to working from home, her recent covid assessment had not changed and in fact the need for homeworking had increased due to the rise in Covid cases. She expressed the view that a phased return would be implemented due to illness or reduced capability - situations that did not currently apply to herself. She said that Ms Benefer was aware that she had covered all sites effectively the previous week which she described as "testimony to the efficiency of my current working practice." The claimant's reply was forwarded to Ms Sharp who emailed Ms Benefer saying that she did not understand why the claimant was asking what her recent Covid risk assessment score was and why she was saying that she still needed to work from home. She said that she understood the claimant to have to work from home because of her GP's recommendations due to the after-effects of shingles, but that this was back in June. The claimant was said to have been working from home "well longer than Covid". Ms Sharp said: "we know she is trying it on here."

65. Ms Benefer emailed Ms Sharp recognising that her telephone call with the claimant was going to be tricky and that the claimant was going to say that she was working extremely well from home. However, she said that she had evidence that the claimant had given incorrect information due to not being able to access Web V. Ms Benefer said: "She is not communicating and sharing information… A risk assessment was low the only thing she had elderly relatives and a son who has previously had cancer." In an email of 5 November Ms Benefer told Ms Mosley that the claimant scored 3-5 on the risk assessment for the reasons stated above, referring to the email from the claimant as "actually quite tame from what we normally get back from her…. She really does believe that she is doing a good job." She then referred to the aforementioned issues about accessing and sharing information. The claimant told the tribunal that she had no memory of the risk assessment and score she was given. She did say that she had not been asked about her mobility and that the concentration had been on what she couldn't do, not what she could. The earlier assessments about home working with Mr Ferris predated covid, though she then told the tribunal that she was assessed then as needing to work from home because of the Covid risk. Since she was working remotely anyway, she didn't have to worry about that.

66. Ms Mosley said that her understanding was that the claimant was not considered "extremely vulnerable" so that she was able to return to work. She referred to current guidance that shielding would therefore only apply to those who were extremely vulnerable, but did encourage working from home where possible for those in the "living with" categories. She said that she was sure that many staff could argue that they lived with someone in that group, so it was important that they shared the responsibility of office cover with all staff. The claimant told the tribunal that she had to be careful

in terms of her living with elderly relatives. She said that it was the discomfort from her knee that was stopping her driving.

67. The claimant said to Ms Benefer that she could not come back to work because of Covid concerns and had not referred to her knee. The claimant said that she probably thought that Ms Benefer was aware of the knee issue. She said that Ms Benefer was obviously "trying to make me feel rubbish". The claimant was disappointed because she needed her line manager to be kind. She said that she did not realise that Ms Benefer was unaware of the claimant's knee condition and assumed that she would have been told by Mr Ferris during a handover, saying that everyone knew as she had been walking on crutches. On further questioning before the tribunal, that use of crutches appeared to relate to the end of 2017/early 2018, albeit the claimant said that she hadn't stopped using crutches – it depended on what she was doing.

68. The claimant did speak to Ms Benefer on 3 December 2020. Ms Benefer emailed Ms Mosley and Ms Sharp that evening with a summary of the conversation. She said that she felt that the meeting had not gone well. The claimant would not put her camera on and she heard a male voice in the background giving her prompts. The claimant had made it clear that she was not prepared to work from the office "until Peter Reading [the respondent's CEO] or the Government tell me to come back into the office I am working from home." The claimant was reported as saying: "I have a right to work from home and not put myself at risk." She said the claimant kept asking why she had to return to the office and that Ms Benefer had stated that they all needed to be visible and the team would be able to provide support to her. The claimant had said that she didn't see why she should put herself at risk just to be visible. Ms Benefer said that the claimant became very defensive when challenged about sharing information and using Web V. She said that the claimant did admit that she did not use Web V, as she updated SystmOne and CMIS and sent information to the midwife to input onto SystmOne. Ms Benefer said that she had tried to reassure the claimant that the working environment was Covid safe and that they were all working with the risk, but the claimant had rejected that, saying that they didn't all live 150 miles away and she was at increased risk due to her age. Ms Benefer had felt that she could not take the conversation any further.

69. The claimant said that she had no idea who Peter Reading was and couldn't say if she had said the things attributed to her. She said that she was concerned still "about the environment, my in-laws and myself… and couldn't guarantee I could drive to Scunthorpe because my knee kept locking." When put to her that she had not mentioned her knee during the conversation, she said that was because she presumed they knew about her condition and that it would not repair itself – arthritis was degenerative.

70. The claimant wrote to Ms Benefer on 7 March 2021 referencing, amongst other things, the December conversation. She referred to new modelling including age as a significant factor in shielding or working from home. She said that she did not deliver direct patient care and could see why Ms Benefer had accentuated patient care as an issue to support Ms Benefer's argument against home working. The claimant said that she planned to

work remotely until the evidence showed that it was safe to travel the 160 miles daily and work in a high-risk area. When she returned to work, she would like to be based at Goole. The claimant told the tribunal that Ms Benefer was emphasising Covid issues and not referring to the claimant's disability. She said that she probably didn't mention her knee issue as she did not think that Ms Benefer would be interested.

71. The claimant confirmed that she would be okay to work at Goole, albeit hybridly. She was going to depend on her husband for a lift, but that was, she told the tribunal, before he was diagnosed with melanoma.

72. Shortly after Ms Thersby had taken on the role of head of safeguarding from Ms Benefer, the claimant emailed her on 10 March 2021, following an invitation to meet, saying that she was currently unable to drive from Harrogate to Scunthorpe and had been working remotely. She said that her GP was supportive of that situation and she would be forwarding a medical note clarifying the situation. She said that she had a further appointment with her GP and physiotherapist the following week. When the claimant was asked why she did not refer to her knee, she said that she had had an earlier telephone conversation with Ms Thersby during which the claimant had told her about her knee and Ms Thersby had said that there might be more deserving cases than her to work from home. There is no evidence of this being said by Ms Thersby. She pointed out that her reference to a physiotherapist would suggest a musculoskeletal injury and then said that she "thought" that she had already spoken to Ms Thersby.

73. The claimant emailed Ms Benefer on 10 March saying she had sent an email to Ms Thersby with information from her GP. She said that she had previously fractured her knee and she had further damaged it in a more recent fall requiring medical treatment. As her knee locked and she believed she could work from home effectively she did not mention this at the last meeting and she was following government lockdown rules on travelling and working from home. However, she had contacted her GP due to recent communications insisting she attend for a face-to-face meeting. She said that obviously her GP was aware of her knee injury and the ramifications of driving long distances, saying that, in addition, she had a severe case of shingles on her neck and shoulder. At this time, she had covered her absence from the office with annual leave and sick leave with a fit note saying she should refrain from driving. However, she was fit for work. She said that she would be seeing her GP and physiotherapist the following week, not just about her injury, but also her severe work-related anxieties about travelling. The claimant was challenged that this was in fact the first time she had told Ms Benefer about her knee injury. The claimant said that this might be the first email, but she had spoken to her about this several times. Ms Benefer had, however, told Ms Thersby as part of her handover that she had been unaware that the claimant had a knee injury until the claimant's email of 10 March 2021. That was an accurate statement on the evidence. She was only aware that the claimant had suffered a knee injury in 2017, but she was unaware of anything else about it, including ant continuing affects or impact on her ability to return to the workplace. She had not read her personnel file and they had been based at different hospitals – Ms Benefer had been based at Grimsby. Most meetings with

the claimant had therefore been remote ones. She recalled meeting her in Scunthorpe on one occasion around 2017/2018. The claimant was not on crutches then and she had never seen her using crutches. No one had told her that they had seen the claimant using crutches.

74. As already referred to, there has been a lack of clarity about the date of the claimant's fall. On 15 January 2021 her GP record recorded that since the previous day the claimant was feeling knee pain believing this was due to walking on the snow which forced her knee a little, but with no trauma recorded. The claimant said that this was the appointment after her fall and that her GP had not taken her history accurately. On 9 March 2021 her GP the record compiled by a nurse practitioner recorded no new injury. One week of knee pain was recorded with the claimant unable to drive, but able to work from home. The claimant had mentioned issues of bullying at work. The claimant said that the reference to there being no new injury was because there had been no further x-ray or examination.

75. Ms Thersby conducted her first meeting with the claimant over Teams on 26 March 2021. The claimant told her that she couldn't drive to Scunthorpe as her knee locked, but that she could get a lift to Goole twice a week. She suggested that she would have to go off sick if she was required to come into work. It was agreed that an appointment would be made for the claimant to see occupational health.

76. They next spoke on 14 April about a confusion as to whether or not the claimant had been on leave the previous day. During the call, the claimant said that Mr Ferris had told her that her role was strategic and that she did not need to be on site. Ms Thersby doubted this as she had always viewed the role as operational.

77. The claimant was examined by Mr Foster, physiotherapist, on 30 April. The claimant was recorded as driving "but sore after long journeys" and walking with dogs using Nordic poles for periods of 60 minutes. The claimant accepted that she was driving "occasionally".

78. On 14 May 2021, the claimant was assessed by the respondent's physiotherapy department. The report produced said that at present the claimant was unable to drive due to knee pain and the knee giving way. She was currently unable to walk from the car park at Scunthorpe to her office or walk around the site. She found stairs painful and would be unable to go up and down them regularly to access the toilet in her office space. It was said that the claimant had shown that she could complete her duties working from home since August 2020 and therefore there was no indication for alternative duties or changes in her hours. The claimant had stated that, if necessary, she could organise a lift to Goole hospital. There was a lift at Goole so that she would not have to negotiate the stairs. The claimant explained to the tribunal again that at this time the lift was going to be from her husband, but the situation changed. She said that she was trying to be reasonable and that she could perhaps sit in a car as a passenger to Goole, but not on a daily basis.

79. The claimant did not accept that this painted a much more serious picture than her GP notes. She said that she said different things at different times depending on when her knee was hurting. She said that Mr Foster was trying to encourage her to mobilise. She had said to her GP that occasionally she would walk her dogs for an hour though she told the tribunal she would probably sit on a wall during part of this. One day she could be good and on another not so good. On the day she answered her doctor's questions she was trying to be positive.

80. The claimant had a telephone appointment with occupational health on 17 May 2021. The nurse adviser recorded her understanding that the claimant had been working remotely from home since March 2020 due to the Covid pandemic. In January 2021 the claimant had had a fall and injured her knee having previously fractured the knee 4 years ago. The claimant was said to be currently unable to drive long distances on her GP's advice. The claimant was also said to have considerable anxiety about her knee giving way or seizing up whilst she was driving. She had also expressed concerns about returning to work at Scunthorpe due to issues mobilising around building. She would be able to work at Goole, however, once she had sufficiently recovered from her knee injury. The claimant was said to be currently carrying out the full remit of her role remotely as she had been doing successfully since March 2020. The opinion was expressed that there was no reason why the claimant would not be able to continue doing this until her knee was sufficiently healed to allow for her to travel into the workplace. Return to the workplace was not likely to occur until her knee had healed enough to allow her either to be a passenger in a car or to drive long distances. It was recommended that the respondent facilitated the claimant's request to continue remote working for as long as necessary. When the claimant was able to sit in a car for long periods without excessive pain, she might be able to work at Goole, but this was unlikely to be in the immediate future. If the claimant was unable to work from home, it was likely that she would have to take time off work as she was physically unable to travel the distance required to attend in person.

81. The claimant was cross-examined on the basis of a lack of evidence in the GP records of the advice said to have been given. The claimant said that once she had had her knee operation she could work at Goole and agreed that until then she couldn't.

82. In early August 2021, an incident occurred where a young mother and her partner were arguing on the ward prompting safeguarding concerns. The midwives present needed advice and support from a named safeguarding midwife. There was none available on site at Scunthorpe and, when they tried to call the claimant, she did not answer the phone on a day she was believed to be working. The midwives therefore took advice from the named nurse for safeguarding children instead. When the claimant responded on the next working day, which was in fact a day she was not expected to be working, her advice was different. The claimant did not believe the patient required a referral to children's social services. There was also conflicting information on the electronic records.

83. As a result, a root cause analysis was undertaken. It was found that, as there were a number of different individuals providing differing advice, this because communication issues presented a safeguarding risk. The differing advice was not helped by the fact that the claimant was not able to access the full medical records from home and didn't, therefore, have a full picture of the incident.

84. On 1 September 2021, the claimant notified Ms Thersby of the loss of her father-in-law and commenced a period of bereavement and sick leave. The claimant submitted a one-month fit note backdated to 24 August 2021 saying that she was not fit for work and giving stress, bereavement and knee pain as the cause. Ms Thersby spoke to the claimant on 2 September when they agreed to have fortnightly telephone calls to support the claimant and facilitate a return to work. A referral was also made to occupational health on 4 October 2021.

85. When they spoke on 21 September, the claimant told Ms Thersby that she was intending on submitting a further fit note explaining that she was suffering from Covid and pain from shingles and that she was not driving long distances as she was waiting to see her consultant. A fit note was provided the following day stating stress, bereavement and knee pains.

86. On 30 September 2021, the respondent determined to set up a long-term sickness absence meeting with the claimant.

87. Ms Benefer, in Ms Thersby's absence, contacted the claimant by telephone on 8 of October 2021 as a keeping in touch day. The claimant said that she was still very emotional and grieving due to her father-in-law's death. She was also having an ultrasound scan as she had jarred her shoulder.

88. The claimant made a self-referral to the MSK physiotherapy service on 19 October. This related to her shoulder injury and she reported that she could only lift her arm to waist height. The claimant said that even without her knee injury, she could not drive because of her shoulder.

89. A further occupational health report was produced on 19 October recording the claimant as off on long-term sickness since 28 August due to bereavement/knee pain/shoulder injury and stress. Once the shoulder issue had been treated and resolved there was no reason, it was reported, why the claimant could not continue to work remotely from home. The claimant was said to still struggle with any long-distance driving because of her ongoing knee issue and the nurse adviser did not see the claimant returning to on-site working at Scunthorpe General Hospital in the near future. Once the shoulder issue had been treated, she might be able to attend Goole in the future, but the frequency would depend on how her pain could be managed. The claimant perceived that she was being pushed out of her role at work.

90. The claimant told the tribunal that in October 2021 she might have been able to travel to Goole as a passenger on limited occasions if she had the right sort of transport, where she was able to have a break, get out of the car and stretch. The problem at that stage was both the limited the extent

to which he could be a passenger in a car and the lack of availability of someone to drive her. She said that she would only have gone to Goole once a week.

91. On 29 October 2021, the claimant was invited to a long-term sickness absence review meeting scheduled for 2 November. Within the meeting it was agreed that no reasonable adjustments could be considered "due to ongoing pain levels with shoulder and limitations this presents". The claimant advised that she had been referred for MSK therapy for her knee. Redeployment options were raised, but the claimant's husband insisted that "the issue should be resolved first".

92. On 22 November 2021, Ms Thersby called the claimant, who explained that she was not well following her Covid booster vaccine and was not well enough to return to work due to her shoulder.

93. An absence review meeting took place on 1 December 2021. The claimant said that she might be able to return to work at the end of her current fit note after having had private physiotherapy and counselling. It was agreed that a further referral would be made to occupational health for advice on a phased return to work and to explore adjustments. It was agreed to request a case conference with the occupational health consultant, Dr Quinlan, to assess the claimant's absence and ability to return to work on site. Further ongoing fit notes were in fact provided stating that the claimant was not fit for work due to stress, bereavement, knee pains and shoulder injury.

94. On 29 December 2021, Ms Mosley confirmed that she had requested a case conference to discuss the claimant's "complex case". It was classified as "complex" due to the number of different conditions affecting the claimant. In addition, occupational health advice was that the claimant could remain working from home, but the respondent wished to return her to the workplace.

95. The claimant took part in a long-term sickness review meeting with Ms Thersby on 21 January 2022. The claimant had been absent for 219 calendar days. A current fit note was due to end on 31 January. Redeployment was ruled out as an option as the claimant was still presently unable to drive. A phased return to work was to be considered following a case conference with Dr Quinlan. The claimant reported that she tried to drive saying "it is not the pain it is the lack of flexibility". Her shoulder was identified as the main problem in handling the steering wheel and then she said that her knee "clicked in" so that it was not safe to drive. The claimant described to the tribunal her shoulder issue as of a short-term nature, whereas her knee issue was a chronic long-term problem.

96. The claimant was assessed over Teams by Dr Quinlan, consultant occupational health physician, on 11 March 2022. The claimant said that OH had by now seen an MRI scan of her knee. This resulted in an outcome report from Dr Quinlan (which was copied to the claimant) advising that there was a foreseeable likelihood that the claimant would not be able to tolerate or safely manage her commute to and from her home in Harrogate. It advised that certain aspects of her role would be largely untenable and

very difficult to safely adjust. There was no foreseeable date for a return to the substantive remit of her role as work-related anxiety seem to be contributing to her continuing absence. A stress risk assessment was recommended. The barrier to a return was identified as a significant and ongoing MSK issue. The claimant was said to have a complex left knee presentation that significantly impacted on normal function. Other than physiotherapy there was no definite intervention planned and as such a foreseeable likelihood that the claimant would not be able to tolerate or safely manage her commute. In addition, a requirement to visit wards would be largely untenable and very difficult to safely adjust for based on the claimant's reported symptoms. An ongoing right shoulder presentation would also inevitably impact on her ability to work although the primary barrier was the left knee. The claimant told the tribunal that she had been unable to see a consultant regarding a knee operation and the waiting time was 2 years.

97. In the light of this case conference, the claimant's case was progressed to an ill-health capability case review meeting. The claimant was advised that she would be placed on the "at risk" register and was provided with a weekly vacancy bulletin. The claimant was asked to complete a skills assessment to allow the respondent to better identify any alternative suitable roles. The claimant was also provided with the respondent's flexible working policy as she had indicated that she might want to request a reduction in hours. The claimant did not complete this.

98. The claimant accepted that she had been sent all vacancies available within the respondent. This had come through to her typically, she thought, on a monthly basis with one exception. The claimant was unhappy that she was sent details of vacancies which were not related to her own skills and background. She now understood that she was being given the entire vacancy list.

99. On 15 March 2022 the claimant submitted a grievance and, after an attempt to resolve that informally, an investigation took place which led to an outcome on 14 November 2022 rejecting her grievance.

100. Ms Thersby wrote to the claimant on 6 April following a review meeting on 1 April to discuss the opinion of Dr Quinlan. It was noted that the claimant had submitted a grievance which would be managed under a separate process. Ms Thersby referred to their discussion covering the role and expectations of a named safeguarding midwife and the need to have a presence on site. Whilst Dr Quinlan had recommended the claimant sought support, the claimant said that she did not want anyone from the respondent, was not in the union and felt she could represent herself at any future meetings. The claimant expressed the view that there was someone waiting to step into her role, which Ms Thersby denied. Ms Mosley had advised that the claimant would be placed on the at risk register and would receive the vacancy bulletin to review on a weekly basis. Any role identified as potentially suitable within one banding of the claimant's would be explored. The claimant would be progressed to a case review due to ill-health capability and a management report would be prepared. An impartial panel would hear her case. The claimant had said that she had been

exploring roles outside the respondent and suggested a reduction in hours. Ms Mosley had said that the claimant could submit a request for that to be considered and forwarded by email the relevant policy and application form. The claimant was formally advised that the respondent would progress to a case review meeting due to ill-health capability to consider her continued employment.

101. Ms Thersby prepared a management statement of case for that meeting. This was sent to the claimant on 14 April. Ms Thersby stated within it that the role could not be fulfilled in its entirety remotely if the respondent was to discharge its obligations. For her, the role was an operational one, supporting vulnerable women. To build a strong and robust safeguarding team which supported patients and colleagues in providing best practice advice, it was important that all team members worked together maintaining a visible presence. The respondent was below its target in terms of training staff on safeguarding. Working remotely presented barriers to this as well as contributing to a breakdown in communication and handover problems at times to Ms Ward. The need, at times, to scan patient records over to the claimant took midwives away from their own frontline duties at a time when the service was already under significant pressure. Ms Thersby had concerns regarding the claimant's record keeping and ability to access all paper and electronic records. The claimant working remotely created a risk of information being missed and poor communication was a factor repeatedly identified as an issue in children serious practice reviews. Ms Thersby agreed that elements of the role could be completed from home, such as attending virtual meetings, taking advice calls and writing reports, but she considered that this took up only a small fraction of the claimant's role.

102. On 26 April the claimant provided a further fit note and also confirmed that she was interested in the role of research nurse as she felt it may have been undertaken remotely. Ms Mosley responded on 5 May confirming that she had spoken with the recruiting manager, but the post was a patient facing role requiring the assessment of patients and prescribing of drugs for trials. The team was also moving to community-based trials, which would require all three hospital sites to be covered. She said that if the claimant felt she was now in a position she could drive and visit sites within the respondent she could looked to arrange an informal chat for her. The claimant accepted before the tribunal that explanation of the research nurse role.

103. On 5 May the claimant provided a response to the management case in which she suggested that she wished to return to work with agreed adjustments including remote/hybrid working.

104. The case review meeting took place by video on 6 May 2022 before Ms Hinchliffe, deputy chief nurse and Mr Jackson, HR business Partner. Ms Hinchcliffe had had no prior dealings with the claimant. Ms Thersby and Ms Mosley attended to present the management case. The notes reflect a lengthy discussion. The claimant was asked about the likelihood of her knee improving. The claimant said that she did not know and had an appointment in July/August to see whether it she needed some kind of surgery. She didn't

know what they would say regarding the effectiveness of a knee replacement. She said that "it's not about driving, it's about driving long distance really. It's like 140 miles per day for 3 days." The claimant told the tribunal that she could drive around Harrogate, but not long distances. The claimant felt that she could undertake all the requirements of the role remotely and that Mr Ferris had been supportive of her working from home.

105. The claimant said that she couldn't drive to Scunthorpe due to her physical impairment. She said that other issues were given as reasons why she had been off sick. The claimant did refer to being able to get a lift to Goole. She told the tribunal that she still thought this would be available from her husband, but that he had then undergone treatment for his own illness and at the time was not working regular hours. She considered the respondent wanted her at Goole at specific times, rather than previously having been flexible, and she could not rely on her husband to give her lifts. However, also within the meeting, when the claimant was asked if she could attend every day, she said that she could get a lift there and could probably work 20 of her hours at Goole and the remainder remotely. She subsequently clarified that she woud be able to work 2 full days at Goole with the rest being probably hybrid – under her contract she worked 3 full days and 1 half day. When put to the claimant that the issue was the availability of a lift and not her ability to be a passenger in a vehicle, she said that she could not travel every day because of her knee and she needed the right driver. That would not be a taxi. On the tribunal seeking clarification, the claimant said that 2 days at Goole and the remainder of her time working on a hybrid basis is what she wanted.

106. The claimant also referred at the meeting to the possibility of getting a lift to Goole from her brother who worked at Drax, albeit that he had since retired. He had in the past sometimes given her a lift to Goole.

107. After the meeting, Ms Hinchliffe wrote to Ms Thersby asking whether Access to Work had been considered, as this could have allowed funding for a taxi from the claimant's home or the conversion of her vehicle controls to hand controls. She agreed that the claimant was able to make a referral and Ms Hinchliffe would delay any decision to allow this to be considered.

108. Ms Hinchcliffe also wrote to Jane Warner, associate chief nurse – midwifery, gynaecology and breast services, on 9 May 2022 asking whether they named safeguarding midwife role could be conducted remotely and what type of maternity services were run from Goole. She considered that Ms Warner was independent and would have a good insight. Ms Warner's view was that the role was vital in supporting the maternity service and key to ensuring that safeguarding cases were not missed. She advised that high-risk cases were often led by the named midwife for safeguarding who also had a close link with safeguarding training and supervision. She did not consider the role could be undertaken remotely due to the known risks with safeguarding concerns going under the radar and the inability to provide full support for midwives, nurses and women and families at risk whilst working remotely.

109. The meeting was reconvened on 13 May for the purposes of providing an outcome. Ms Hinchliffe considered that the respondent operated 2 maternity services at Scunthorpe and Grimsby but no inpatient maternity service was offered at Goole, only a community midwifery service with a consultant clinic once a week. Since January 2017 up to the end of March 2023, there had been 16 births in Goole. She was concerned about the inequity in the service they offered without an on-site presence at Scunthorpe, given that the claimant's job share partner, Ms Ward, only worked on-site at Scunthorpe one day each week. She did not feel that that was sufficient to provide the on-site service required. Although some elements of the role could be conducted from home, she concluded that there was a potential risk of missed opportunities to safeguard women and children without an on-site presence as well as delays in contemporaneous record keeping and communication. She considered that an on-site presence on wards and departments was crucial and enabled support mechanisms between midwives as well as women and their families. The named safeguarding midwife role, with a presence at the maternity unit in Scunthorpe, was essential and she hoped she could support the claimant in a return to Scunthorpe. She therefore recommended a phased return to work over 8 weeks by which time she hoped an assessment by Access to Work could be completed, before determining what further adjustments could be offered. Whilst the claimant had suggested that she was able to work from Goole, she was employed to work at Scunthorpe and that was where the service was required to employ the named safeguarding midwife. The respondent would have provided her with parking provision close to the entrance as well as ensuring that she was located in a downstairs office close to the toilets and clinical areas - a similar setup to Goole. The claimant having asked whether she could consider reducing her days of work, it was confirmed that she was able to make a flexible working request if she wished. However, she did not.

110. It was raised that the claimant herself suggested a reduction in hours and had been told that she would be sent a form to apply for amended hours. The claimant said that she did not get such a form. The claimant was referred to the email of 8 April to her from Ms Mosley which attached, amongst other things, an application for flexible working. The claimant couldn't recall getting it, but said that she was familiar with the form having filled one in before. It was put that the respondent at the case review on 6 May was willing to consider such an application, but the claimant said that she thought the form was disingenuous and that the respondent said nothing to help her. She believed that the respondent would not be able to accommodate her in the team on reduced hours. She didn't think the offer was genuine. At the reconvened case review on 13 May 2022, the claimant had asked if there was a possibility to reduce her days, so that Ms Ward might take on another day. Again, Ms Hinchcliffe had responded that the claimant was able to submit a request for flexible working. She had not said no to the claimant's request. The claimant was still of the view that she had been told that requests would not be accommodated and that they had no budget to have her and also Ms Ward working extra hours in the team.

111. The respondent put together a proposed phased return to work plan based on the claimant working 8 hours on Monday Wednesday and

Thursday and 4 hours on Tuesday. The claimant's proposed hours could increase from 8 hours in week 1 gradually to the 28 hours in week 7. Again, there was a gradual build-up of hours worked on site with 4 hours worked at Scunthorpe in week 1 and 4 hours at Goole also that week. Thereafter, time was to be spent as the Scunthorpe and Goole sites on 3 days each week with 3 working days at Scunthorpe from week 7. The respondent clarified that it would fund a return taxi from Goole to Scunthorpe until an assessment had been completed by Access to Work.

112. The claimant provided a response to the proposed phased return to work plan on 16 May, noting that the expectation would be after 8 weeks to work 24 hours on site and 4 hours remotely. On that basis the plan was said to be unworkable for her situation. She said that he was able to return to work remotely. She said that the presumption that she would be able to obtain a lift to Goole was not correct. She said that she had mentioned that a relative may be able to offer her a lift to Goole on occasions, but that should not have been regarded as a given. Assistance from Access to Work was doubtful in her circumstances although she said that she had made an initial application whilst liaising with their helpline. The claimant said that her mobility remained impaired, not only with driving but also with sitting for long periods. She expressed the view that the plan did not meet the requirement of reasonable adjustments specific to her current health needs in order to facilitate a return to work. The claimant's view was that a phased return to work plan should only have come after her knee operation. The plan was flawed as it involved working at Scunthorpe rather than Goole.

113. The claimant emailed Mr Jackson and Ms Hinchcliffe on 27 May saying that the phased return to work did not address her inability to travel to Scunthorpe and there were many parts of her role which could be fulfilled by working remotely. She said that, whilst she appreciated the operational needs of the service, the plan should be focused on her current health status and not introducing barriers which would prevent her from returning to work. The statement regarding "visibility" was unrealistic in her current health situation. She would, however, commit to her role remotely using available technology. She questioned the relevance of issues relating to documentation in the medical notes. She explained that she had remote access to the maternity system, CMIS, and SystmOne, described as the health visitor platform. Therefore, she felt there was no barrier to her being able to document and share relevant information contemporaneously. The suggestion that she could obtain a lift to Goole was on an ad hoc basis and not a firm commitment to a daily commute. The offer of a taxi to Scunthorpe had the potential to be unreliable thus causing her to miss the return lift to Harrogate. She would need to break her journey to and from Scunthorpe to elevate and extend her injured joint. The claimant told the tribunal that she had never said that she could go to Scunthorpe.

114. On 10 June 2023, the claimant submitted a further fit note saying that she was not fit to return with no indication of any ability to return with adjustments.

115. On 20 June 2023, Ms Hinchcliffe wrote to Mr Ferris asking about any agreement he had had with the claimant to work remotely. He confirmed

that, following a leg injury, he agreed that she could initially work from Goole as well as Scunthorpe and could latterly work from home whilst her leg improved following an operation. The tribunal notes that the claimant had no operation planned. He stated that there was never any formal agreement or intention for this to be a permanent arrangement.

116. Ms Hinchliffe telephoned the claimant on 7 July to discuss the option of a face-to-face consultation with Dr Quinlan. She felt it would be beneficial to have a fuller assessment and understanding of the claimant's mobility. It was proposed that this take place at Scunthorpe with the respondent funding a taxi for the claimant from her home address. The claimant advised that she was unable to travel to Scunthorpe, whether driving or in a taxi. Ms Hinchcliffe, therefore, agreed to make a referral for a further virtual consultation.

117. On 11 July, Ms Hinchcliffe wrote to the claimant an update of the situation since the case review meeting of 6 May. This referred to the further meeting on 13 May when the claimant had been informed of Ms Warner's opinion regarding the nature of the role and the communication received from Mr Ferris. The possibility of assistance from Access to Work was noted - Ms Hinchcliffe was unaware that the claimant had contacted them and been told that no application could be progressed. The claimant agreed that Ms Hinchcliffe had suggested to her that she could make an application to Access to Work regarding a modified car. She told the tribunal that she had contacted Access to Work and they had said that they would get back to her. but that never happened. She then said that she thought she had been told that any application would not be considered because of the distance from her home to her place of work. Access to Work, she said, had not offered to carry out any assessment and had just told her that she wouldn't be a suitable case. They had said that they couldn't offer her a car without standard gears.

118. There had then been a recommendation of a phased return to work at over an extended period of 8 weeks. The respondent would fund return taxis from Goole to Scunthorpe until the Access to Work assessment had been completed. The claimant had subsequently declined the proposed return. The claimant had indicated then that she would be on sick leave until the middle of August. In all the circumstances, it was considered that there was currently no indication of a return to work within the next 3 months. However, it was appropriate to allow for a further occupational health assessment as "a final line of support and guidance". Should there be no indication from occupational health of how her return to work could be supported and an agreed return to work date and plan not be in place, it was likely that the respondent would consider the termination of her employment on the grounds of capability due to ill health.

119. The claimant's next occupational health consultation with Dr Quinlan was on 22 August. The claimant then described a further deterioration in her condition such that she could now only walk around 15 yards outdoors with the support of Nordic poles. She then needed to rest before moving again. She reported that coming downstairs or get into a sitting position could cause considerable worsening of her pain and, in fact, any

manoeuvring such as getting in and out of a car had almost become impossible due to the pain caused. Activities of daily living were effectively confined to the house. She reported no longer driving and now no longer being able to undertake car journeys because of the extreme difficulty in getting in and out of the car seat. She also reported finding it impossible to get into a comfortable position or one she could sustain for any length of time. Dr Quinlan reported that there remained no foreseeable date for the claimant's return to work, including on the basis of the proposed phased return. The only remaining possibility at this time would be entirely remote working. His opinion was that this would remain the case pending her orthopaedic evaluation and any definitive and successful intervention which that might result in.

120. The claimant told the tribunal that that is what she had been saying the whole of the time. She felt that Dr Quinlan had to remind the respondent of its obligations under the Equality Act. Whilst the respondent was saying that it was 24 midwives down, the claimant had not been a clinical midwife herself for years. She believed that, when she was absent due to sickness, her job description had changed and that there was a drive to use specialist midwives to work on the unit because of them being short staffed. The tribunal is clear that the respondent never had in mind that the claimant was required to undertake any aspects of the role of a clinical midwife.

121. In the light of Dr Quinlan's report, Ms Hinchcliffe considered that she had to make a final decision on the claimant's continuing employment given that it had been 4 months since their initial meeting and the situation had only deteriorated. On 31 August, she invited the claimant to an outcome meeting on 13 September at which she delivered the decision that, as there was no realistic expectation of the claimant returning to work in the foreseeable future, she had no option but to terminate her employment on the grounds of ill-health capability. Ms Hinchcliffe considered delaying her decision, but there was no indication of any timescale for the claimant being able to return to the workplace. The reasonable adjustment requested of working from home could not be accommodated to allow the claimant to carry out the essential elements of her role. She disregarded any gaps in the claimant's mandatory training on the basis that, if the claimant could return to the workplace, steps could be taken for that training to be updated. She did not consider any issues of the claimant's competence or previous levels of performance. She would have been happy to consider a reduction in the claimant's hours but that was not requested by the claimant ultimately. However, going down to a small fraction of full-time working would mean that a significant proportion of time would be spent on training and not on service delivery. Aspects of the role required an on-site presence – in safeguarding there was a need to observe behaviours. Some meetings and training could be done remotely, but not all. Midwives were more likely to learn working alongside an expert and were more likely to raise there concerns with someone they physically saw. The role could not be compartmentalised – all postholders needed to be up to date in their practical skills in all aspects of the role. Any alternative roles had been considered and Ms Hinchcliffe undertook to continue looking until the termination date of 6 December 2022. Ms Hinchcliffe did not agree with the claimant's position that she was being pushed out and treated unfairly.

122. At the 13 September meeting, Ms Hinchcliffe reiterated that all employees had access to the flexible working policy if they wished to reduce the hours. The claimant responded that "it would have been the same" even if she went down to 10 hours as she would have been required to drive to Scunthorpe. The respondent would not have let her do anything remotely, she said. The claimant was adamant that Ms Benefer, Ms Hinchcliffe and Mr Jackson had said there was no scope for her to work flexibly. They had chosen what to write down and what not to admit in any notes. It was noted that the claimant had not said in her witness statement that she had suggested a reduction in hours and had been told that there was no budget for that. It was put that, if Ms Ward had picked up hours of the claimant, there would have been no additional cost to the respondent.

123. Other roles were discussed at the 13 September outcome meeting. One was a lower band 6 midwife position. The claimant in fact confirmed before the tribunal that she had not identified any specific role, but was simply saying that she would accept a regrading to band 6, if that would help preserve her employment. The claimant also said that she was interested in a triage post she had found (see below).

124. The decision was confirmed in writing by letter of 20 September 2022.

125. On 13 October 2022, Ms Hinchcliffe emailed the claimant. As regards the aforementioned maternity triage role, she said that Jane Warner had advised that, in time, it might be possible to undertake the telephone element of the triage system remotely, but in the initial stages of the project, the decision had been made that staff would need to be physically on site until the new system and processes were embedded. The current plan was that the triage process would become integrated into the maternity service and the midwifery team would work within the telephone element and also provide clinical care to those women invited into the unit. Ms Thersby had advised her that she didn't have any band 6 vacancies at present and none of the safeguarding roles would facilitate working from home. These were roles that required a physical presence on site and the ability to visit wards, support staff and complete medical notes.

126. The claimant appealed and on 19 December was invited to a hearing on 16 January 2023. She chose not to attend an appeal meeting on the basis that she had been told she could send any information and she thought that the respondent was being "disingenuous" in any event.

127. The claimant said that after this letter of invitation she had spoken to someone who had said that if she couldn't make it, she was just to send relevant information. She emailed the respondent on the evening of 15 January attaching some information and saying that she would not be attending "your group discussion tomorrow". She said that she could not access Teams. Ms Crowther, senior HR business partner, wrote to the claimant on 19 January setting out her understanding. She explained that an appeal hearing would be chaired by an independent more senior manager with no prior involvement. The purpose of the hearing was to

explore the points of appeal and to consider if the decision of the case manager was appropriate or not. She enclosed a copy of a document setting out the procedure. The decision had been made to reschedule the appeal to a future date, confirmed as being 10 February 2023.

128. Ms Crowther noted that, on 16 January, the claimant had sent to the appeal panel members a letter of grievance including concerns relating to a lack of support, a failure to make reasonable adjustments and loss of pay. She said that the appeal panel would also listen to her points of grievance as part of the hearing on 10 February. The grievance would be shared with Ms Hinchcliffe and Mr Jackson to allow management to respond.

129. Ms Hinchcliffe wrote to Ms Thersby on 30 December seeking further information regarding the claimant's role. Ms Thersby confirmed that whilst the claimant had been on sick leave, Ms Ward had picked up an additional 7.5 hours of work, training and supervision and development of new pre-birth meetings. The respondent had continued with around 20 hours not being covered and no on-site presence in Scunthorpe when Ms Ward was not at work. The safeguarding children team nurses had also supported with calls and meetings. Speaking more generally, Ms Thersby explained that the named safeguarding midwives did not have their own caseloads, but had an oversight of all pregnant women who had safeguarding concerns and should communicate those concerns to their job share partner at the end of their shifts as well as update records on Web V, share diaries and emails. Ms Thersby believed that a lack of physical presence created a risk that not all staff would receive supervision in a planned and structured way. Ms Benefer separately advised that Ms Ward had been working on cases from Scunthorpe, whilst working at Grimsby, due to the demands of the role whilst claimant had been absent.

130. On 12 January 2023 Ms Hinchcliffe wrote again to Mr Ferris regarding the tasks the claimant undertook remotely from home and whether it had any impact on service. He confirmed that she was able to provide advice to staff and supervise safeguarding cases, but that there were advantages in meeting face-to-face. He also reiterated that the homeworking arrangement was not intended to be long term, but to support the claimant in working whilst her knee was recovering following an operation.

131. Also on 12 January, Ms Crowther asked for Ms Hinchcliffe's responses to a number of questions to be considered as part of the appeal.

132. The claimant responded on 1 February saying that she would like to be able to contribute to a further appeal hearing. However, on 8 February she emailed, declining the meeting arranged for 10 February due to her having received a consultant appointment. Ms Crowther responded asking the claimant to confirm whether she would like the appeal hearing to go ahead without her direct participation or if she would like it to be rescheduled for a later date when she could attend. She said that if she did not hear from the claimant by 5pm on 9 February they would go ahead with the scheduled hearing and she would receive a letter confirming the outcome. The claimant did not reply to this.

133. Ms Crowther wrote to the claimant again on 10 February. She said that, as the claimant had initially confirmed her intention to attend, the decision had been taken to adjourn and reschedule the hearing. The claimant was asked to provide any inconvenient dates by 20 February. The claimant had then sought a date for the appeal before 6 March, but this was not possible. As the claimant had not identified any other inconvenient dates, the hearing was arranged to take place on 15 March. The claimant did not attend.

134. The appeal panel was chaired by Ms Truscott, associate non-executive director. They considered that the claimant's role was one which required an on-site presence, for her to be available and accessible to support colleagues and women and children. It was not one which could be effectively completed from home on a full-time basis and they considered it was a reasonable expectation to require the claimant to return to on-site working as contractually required. They felt it unreasonable to require the other 2 named safeguarding midwives to take on the operational and clinical face-to-face aspects of the role as those tasks constituted the majority of her contracted hours and, without them, she would be unable to fulfil the contractual requirements of her role. They did not consider that there had been any changes in the requirement for the claimant to work on site or any barriers put in place. They did note that the role had increased in complexity since the start of the coronavirus pandemic and further visibility, support and mentoring was required to support midwives. The role, however, had never been a remote role. They believed that the respondent had considered alternatives to avoid dismissal, a phased return to work, paying for a taxi to facilitate on site working, giving the claimant an opportunity to request flexible working and putting her on the redeployment register. Despite all efforts, the claimant was unable to return to work on site. They considered that the respondent had no other option, but to terminate her employment on the grounds of ill-health capability.

135. An outcome was provided by Ms Crowther by letter of 16 March. It was explained that the hearing had gone ahead in the claimant's absence. Whilst the panel felt able to hear the case, they wished to give her an opportunity to answer a number of questions which would have been asked of the claimant had she been in attendance. Those questions were listed.

136. The claimant provided responses. The panel, nevertheless, upheld the decision to terminate her employment.

137. The claimant's position was that her job, as it had been before her dismissal, could have been done completely from home. She referred to wanting to continue working remotely, sharing tasks with colleagues and them pocking up tasks that she was unable to do.

138. The claimant maintained that she could still support midwives and do everything else without being present on any maternity unit. The safeguarding midwives were not present out of hours or weekends in any event. There had been no requirement, she believed, for anyone in her position to be at any physical unit until Ms Benefer made it part of the role.

139. It was put that at Scunthorpe, other than on Fridays, she was the only named safeguarding midwife. The claimant did not accept that saying that the safeguarding midwives covered for each other just as they covered for each other during periods of sickness.

140. The claimant believed that the respondent was a bit behind on moving to fully electronic records. She said that she made use of the CMIS and SystmOne records. Web V, she said, was "hit and miss". In any event, whether the records were paper or electronic, she believed her own work was up to date. She did not accept that there was not a full electronic patient record. When put that the claimant had been asking colleagues to scan paper records to her, she said that there was one occasion when that was done but there was nothing wrong with this and consultants scanned records to everyone. A number of examples were put to the claimant of safeguarding nurses needing to access paper records. The claimant's view was that they worked as a team and, if she could not view a paper record, someone else could instead.

141. The claimant believed that it was not very often that a safeguarding midwife had to assist a midwife on the wards. The claimant felt that midwives were so busy on the unit, they sometimes did not want the safeguarding midwives with them and they could instead arrange a video call or take part in a group meeting in their protected time. When put that there was a need for someone to be there and visible, she agreed, but said that she could not do it – it was a part of the job she could not do because of her disability. When put to the claimant that there might be emergency situations, she did not accept that as being significant and repeated that she was there to empower midwives to do their own safeguarding because, when the named safeguarding midwives were not there, that is what the midwives had to do. If they felt they needed assistance they were advised to call children's services or the police.

142. Patients were more commonly seen by safeguarding midwife as an antenatal or postnatal appointment. The claimant chose to see midwives in the community - the practice was different in Grimsby, because those midwives are based in the hospital. She said that her role was to empower the midwife. She accepted that there might be a need to be physically present to support a woman who had just had her baby removed, but said that there were 3 named safeguarding midwives and she would support the patients in the community. It was up to the other safeguarding midwives to do the things she couldn't do, otherwise, she queried, what the point was of the protection of disabled workers. The claimant thought it was a reasonable adjustment for others to pick up the physical elements of her role. This was not forever, as she hoped she would have a future knee replacement.

143. The claimant did not agree that she would become de-skilled if she did not carry out the full range of relevant tasks. Again, she maintained that role was more strategic than operational.

144. Training, she said, was a shared responsibility and, if she couldn't deliver it, then another member of the team could have covered for her. Sometimes community based midwives provided the training and the named safeguarding midwife simply provided the PowerPoint presentation and training materials. The claimant would have conducted face to face training if she had been able. However, there were different ways of delivering training and it did not always have to be face-to-face. The claimant did not accept that she needed to do her own professional training over four days each year face-to-face. This could have been done remotely as it had been during Covid.

145. The claimant told the tribunal that she was ultimately seen by a consultant in June 2023 and it had not being envisaged, prior to her employment terminating, that it was likely for her to be seen until the earlier part of 2023.

146. The claimant has alleged that Miss Ward took her job and that this situation was engineered. In cross-examination, the claimant said this was a presumption she had made herself.

147. The claimant was absent from work from September 2021 until her employment ended in December 2022. On 3 March 2022 her contractual sick pay had reduced from full pay to half pay. She was told that half pay would cease on 2 September 2022. After the claimant received her notice of dismissal on 30 September 2022, her pay increased to full pay for the duration of the notice period. The claimant wasn't fit to work during her period of notice.

Applicable law

148. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability pursuant to Section 98(2)(a). This is the reason relied upon by the respondent. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the Employment Rights Act 1996 ("ERA"), which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
> *depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *shall be determined in accordance with equity and the substantial merits of the case".*

149. Classically in cases of long-term ill health a tribunal will consider whether reasonable medical evidence was obtained, the degree of consultation with the employee and the possibility of alternative employment or changes to the employee's role. The tribunal refers to the case of **East**

Lindsey Disrtrict Council v Daubney [1977] IRLR 181. The tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached. In long-term ill health cases it is essential to consider whether the employer can be expected to wait longer for the employee to return – see **Spencer v Paragon Wallpapers Ltd 1977 ICR 301**. In **McAdie v Royal Bank of Scotland [2007] EWCA Civ 806** the Court of Appeal confirmed that an employer could fairly dismiss an employee for ill health capability even if the employee's illness was attributable to the conduct of the employer. The key issue is whether the employer acted reasonably in dismissing at the time of dismissal.

150. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

151. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

152. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if –*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim.*

153. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability – this involves an objective question in respect of whether "the something" arises from the disability which is not dependent on the thought processes of the alleged discriminator. Lack of knowledge that a known disability caused the "something" in response to which the employer subjected the employee to unfavourable treatment provides the

employer with no defence – see **City of York Council v Grosset 2018 ICR 1492 CA**.

154. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability". It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of "something". The second is that the claimant was treated unfavourably because of that "something". In **Pnaiser v NHS England 2016 IRLR 170 EAT** it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious for process of that person, but keep in mind that the actual motive in acting as the discriminator did is irrelevant.

155. Disability needs only be an effective cause of unfavourable treatment - see **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893**. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. On the other hand, any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation. If an employee's disability-related absence, for instance, merely provided the circumstances in which the employer identified a genuine non-discriminatory reason for dismissal, then the requisite causative link between the unfavourable treatment and the disability would be lacking. The authorities are clear that a claimant can succeed even where there is more than one reason for the unfavourable treatment. As per Simler J in the **Pnaiser** case: "The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it". Further, there may be more than one link in a chain of consequences.

156. The duty to make reasonable adjustments arises under Section 20 of the Equality 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage….."*

157. The tribunal must identify the provision, criterion or practice applied the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

158. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

159. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

160. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

161. In **Doran v Department for Work and Pensions EAT 0017/14** approval was given to a proposition that, in the context of a long-term ill health absence, the duty to make reasonable adjustments is not triggered unless and until the claimant indicated an intention or wish to return to work.

162. It is not permissible for the Tribunal to seek to come up with its own solution in terms of a reasonable adjustment without giving the parties an opportunity to deal with the matter (**Newcastle City Council –v- Spires 2011 EAT**).

163. If the duty arises, it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an

employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

164. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment. The tribunal has an ability to extend time if it is just and equitable to do so, but time limits are strict. The person seeking an extension should provide an explanation for the delay and there will be a balance to be conducted between the parties in terms of the interests of justice and the risk of prejudice.

165. The Court of Appeal considered the question further in **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA**. It noted that, in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point. The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Lord Justices Lloyd and Sedley both acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice which may be caused, could be alleviated, to a certain extent, by the tribunal's discretion to extend the time limit where it is just and equitable to do so.

166. Applying the legal principles to the facts, the tribunal reaches the conclusions set out below.

Conclusions

167. The tribunal considers firstly the claimant's complaint of unfair dismissal, mindful of a potential need to revisit the question of reasonableness in the light of any relevant findings in her complaints of disability discrimination.

168. The claimant's employment was terminated by reason of capability in the sense of her being absent from work in circumstances where the respondent did not believe there was any foreseeable return to the workplace. The tribunal has noted background email correspondence which suggests a negative view of the claimant and a belief that she was difficult to manage. The tribunal is clear, however, that the decision to terminate her employment by Ms Hinchcliffe and it being upheld on appeal by Ms Truscott was not influenced by any such view or concern. The sole issue for them was whether the claimant would be fit to return to work and against what timescale. Whilst the claimant maintained that her role could be carried out remotely with her working from home, they did not agree and their focus was, therefore, on the claimant's ability to be able to return to the respondent's hospital sites for at least part of her working week.

169. By the date of her dismissal, the claimant had been absent from work due to sickness for in excess of 12 months. Whilst previously there had been a suggestion that the claimant might be able to return to a hospital site, the most up-to-date medical evidence was in fact of a deterioration of the claimant's knee condition such that there was no foreseeable date for the claimant returning to work other than entirely remotely. Whilst the claimant maintains that the decision ought to have been delayed to enable her to see a consultant, in circumstances of lengthy waiting times arising not least out of the Covid pandemic, the likely date she might be able to see a consultant was uncertain with no clear pathway from the date of any such consultation. It was not known whether the claimant would require an operation, what type, what period of convalescence would be required and what level of recovery might be attained and in what timescale.

170. The respondent reasonably concluded that the claimant's role as named safeguarding midwife required on site working. It was a statutory requirement that the respondent had such role covering in particular the Scunthorpe and Grimsby hospitals and with the clear aim of protecting children and expectant/new mothers from potential harm and abuse. The role was for a person expert in the safeguarding issues arising in maternity situations. The lack of any statutory need for such a role in Goole, where there was no maternity unit/ward is indicative of the importance of a physical presence where births were happening.

171. The tribunal has accepted the genuine reasons why Ms Hinchcliffe considered an on-site presence was required. Her conclusion was reasonable and consistent with the view of the respondent's head of safeguarding, deputy head of safeguarding and the associate chief nurse for midwifery, gynaecology and breast services.

172. The role could in theory have been conducted to a significant extent remotely. However, Ms Hinchcliffe reasonably considered that a lack of

visibility of someone in the claimant's role would represent an unacceptable compromise to the detriment of patient care and the development of midwives who the named safeguarding midwife was expected to support. The claimant's role was never purely strategic in the sense of the development of policies and guidelines requiring simply attendance at meetings with other professionals, including those outside the respondent. The role involved leading in terms of safeguarding requiring a level of visibility with the clinical midwives who could learn from the claimant's practice and who would have significantly easier access to her if she was present in their working environment on a regular basis. Ms Hinchcliffe reasonably considered that a midwife was much more likely to raise concerns if they saw the claimant, than if some form of remote contact was required. She fully appreciated that even if the claimant worked on site for the majority of her hours, there would be significant periods of the working week when the named safeguarding midwife would not be immediately present and available to staff working 24/7. Nevertheless, she reasonably concluded that the claimant having no visible presence in a healthcare setting would have a detrimental impact on safeguarding. It is noted that the claimant was the only named safeguarding midwife at the Scunthorpe hospital other than on Fridays, with no ability on the respondent's part to fully cover the claimant's role while she was on long-term sickness absence.

173. Again, whilst remote meetings were possible in many circumstances, she reasonably concluded that someone in the claimant's role would have a significantly enhanced ability of identifying potential concerns about, for example, possible domestic abuse by being able to "read the room". The context was of the potentially serious consequences of the signs of abuse being missed. The claimant might be required to assist in circumstances of the traumatic removal of a baby from a new mother which could not be effectively accomplished without the claimant's on-site presence. The claimant has recognised that part of her role was to physically see women and babies. Her position was that she often saw them in community rather than hospital settings, but that still required an amount of travel which the claimant was simply unable to undertake given her knee impairment.

174. The respondent's records were not by any means fully electronic, with the digitalisation of all records an aim which was unlikely to be achieved in the short to medium term. Whilst there was some evidence of the risk of the unavailability of medical records around the incident described which took place in August 2021, it was in any event clear that without access to full records there was an increased risk of something being missed and of an incomplete picture being given and assessed. The claimant accepted that there had been the need for records to be scanned to her and that when she was based at Goole she would ask for records to be sent over to her. This was, however, a time-consuming task for midwives which took them away from their frontline clinical duties. Consultants may have from time to time placed similar burdens on staff, but this was far from desirable.

175. The claimant argues effectively that she had been working from home already, indeed since 2017, with favourable appraisals and no

question raised as to any inadequacy in the performance of her duties. The tribunal has concluded, predominately on the claimant's own evidence, albeit not wholly consistent, that during the period from 2017-2020 she was performing her duties with a mixture of attendance at Goole, Scunthorpe and working within the community as well as some time working from home – a hybrid arrangement. There was certainly no agreement reached with her previous line manager, Mr Ferris, that the claimant could simply work from home. If there had been a permanent home working arrangement, rather than an understanding of a temporary change in working arrangements immediately after the claimant injured her knee in 2017, Mr Ferris would not have been asking the claimant in 2020 which days she would be working at Scunthorpe hospital or for the claimant to present a GP fit note stating that she required amended duties to be allowed to work from home.

176. No named safeguarding nurse worked from home and it was reasonably considered as detrimental to the team of named safeguarding midwives to carve out particular duties which might be conducted from home and concentrate them in one person. It was reasonably considered that this would be significantly detrimental to the claimant's practice in that she would be de-skilled in essential areas of the work of a named safeguarding midwife. Similarly, other safeguarding midwives would not undertake the full range of job responsibilities within the role.

177. The decision to terminate the claimant's employment was made only after significant consultation with her through the various attendance review meetings. Furthermore, occupational health advice was received with, in particular, a case conference set up attended by both the claimant and the relevant occupational health physician. The respondent ensured that it was as reasonably informed as practicable as to the claimant's current health situation and the prognosis for the future.

178. The respondent did seek to explore ways of assisting the claimant in travelling to any hospital site. The proposal of a phased return to work was reasonable and open to negotiation in circumstances where there appeared to be a potential ability of the claimant to be brought to Goole as a vehicle passenger. As it turned out, the claimant's options were more limited than she had initially indicated. The claimant was dismissive of the practicability of her being brought to any of the sites by taxi in circumstances where she might have to ask the vehicle to stop on occasions for her to adjust her position or to exercise her knee. The claimant was reasonably encouraged to explore options through Access to Work which required her direct approach and the respondent made its decision to terminate employment only after the claimant had made clear that no assistance would be forthcoming. Ms Hinchcliffe and Ms Truscott showed a willingness to seek further information and clarification during the process to ensure that the nature of the claimant's role and her performance of it in the light of her physical impairment were properly and accurately understood.

179. The respondent showed a willingness to explore any possible alternative employment. The claimant was provided with a list of all vacancies and asked to complete a skills assessment so that she might be more easily matched to any available position. Particular positions raised by the claimant were discussed with her and investigations undertaken into whether they were roles which could be performed remotely. There were no available positions which could be carried out on that basis. The claimant was and still is unable to identify any specific role she could have fulfilled. To preserve her in employment would have required the creation of a role which did not exist within the respondent's structure and was not budgeted for. However, again the specific identification of such role is still, at this stage, lacking.

180. The claimant was not fit as at the point of her dismissal to perform her role which could reasonably not be restructured as one which could be fulfilled purely remotely. Any such structure, if practicable, would not, in any event, have been reasonable for more than a short or defined period. There was, at the point of the claimant's dismissal, no foreseeable possibility of a return to work, no indication of a potential timescale or the likely level of her capability after any potential treatment on her knee.

181. The claimant was fairly dismissed.

182. The tribunal now turns to the claimant's complaints of disability discrimination. The respondent accepts that the claimant was a disabled person from August 2022 by reason of her knee condition and that it had knowledge of her disability from that date. Any argument as to the date disability status was attained is ultimately sterile in circumstances where the tribunal is being asked to consider all of the disability discrimination complaints with reference to the claimant's dismissal which post-dates August 2022. Whilst it might be argued that, if a duty to make reasonable adjustments arose at an earlier stage, any time limit in respect of such complaint ran from a date significantly prior to dismissal, the tribunal is clear that a distinct duty to make reasonable adjustments arose or was revived at the point of dismissal and in any event it would be just and equitable to extend time to allow the claimant's complaint to be determined. The respondent has raised no issue of prejudice to it in terms of any delay in bringing the tribunal complaint. In any event, the key issue for the tribunal is whether the claimant ought reasonably to have been allowed to work entirely remotely and its conclusion in this regard is the same at all points during the claimant's employment up to her dismissal being upheld on appeal.

183. Saying that, the tribunal considers that the claimant is likely to have been a disabled person at an earlier date. Whilst the claimant's fracture in 2017 was the root of her subsequent knee issues, there is insufficient evidence to conclude that this produced a substantial adverse effect on her ability to carry out normal day-to-day activities up to and beyond the

commencement of the coronavirus pandemic. Certainly, up to March 2020 the claimant was travelling to Scunthorpe hospital, Goole hospital and other sites.

184. There is, however, reference to knee pain in May 2021. The claimant expressed concerns over issues of mobilising around the Scunthorpe hospital to occupational health on 17 May 2021. There is a lack of consistency as to the effects of the claimant's knee on her ability to carry out normal day-to-day activities, albeit in circumstances when the claimant has clearly explained to the tribunal that the pain caused by her knee was not consistent. The claimant had told her GP that she was able to walk for 60 minutes with her dogs with the assistance of Nordic poles, albeit the claimant explained in circumstances where she would need to take time to rest. Sometimes the claimant could express herself more positively than others in terms of how she was feeling. Certainly, two weeks later, in May 2021 she informed the respondent's physiotherapy department that she was unable to walk from the car park to the office. Whilst she was saying that she could attend and carry out her work at Goole in May 2022, she was explaining that she had an inability to drive and her ability to get to Goole was dependent on her receiving a lift and from someone who would allow her to stop and adjust her position or exercise. The claimant's length of drive to work was unusually long and not the type of journey which would be undertaken by most people on a daily basis. It was not however an exceptional type of activity and the evidence suggests that anything beyond short journeys might be problematical to the claimant. Again, it would depend on exactly how her knee was affecting her on a particular given day. The claimant's concerns from March 2020 were predominantly around the Covid pandemic and her living with two nonagenarians as well as the inadvisability of people travelling into neighbouring areas during the pandemic. Her prime focus was then on her shoulder and the after-effects of a bout of shingles. As she frequently explained to the tribunal, her knee condition was a chronic one which nevertheless existed continually in the background and was not simply going to heal. The tribunal accepts that evidence.

185. Whilst the claimant was at times prone to construct barriers to a return to work, that arose primarily out of her own view that she was being viewed unfairly and that her role could be carried out remotely. This was not inconsistent with her suffering substantial, in the sense of more than minor, impairments on her ability to carry out day-to-day activities due to her knee condition. Had Covid and the shingles not intervened, then the claimant, in all likelihood, would have continued in a hybrid form of working, but sooner or later would have faced the same issues in terms of both an increased adverse effect due to the progressive nature of her knee impairment and the respondent's management seeking to ensure that the claimant spent more of her time working from its hospital sites.

186. In terms of the claimant's complaint of a failure to make reasonable adjustments, the respondent did apply the practice of requiring the claimant

to attend work and carry out the duties of her contractual role, apply its attendance management policy when addressing the claimant's long-term ill-health absence and apply its sick pay policy in reducing and ending the claimant's salary entitlement after prescribed periods of absence.

187. The tribunal accepts that the claimant was disadvantaged in relation to each PCP when compared to non-disabled person. Whilst, as discussed, there were at times a number of differing bars to her working in the respondent's hospital sites, throughout the period certainly from early 2021 the claimant's knee pain and impairment put her at a disadvantage. The pain fluctuated and at times within the period the claimant might have managed on site working, but would have been likely to encounter pain and discomfort. During a significant proportion of the period, she would have been unable to make the journey due to the pain or genuine perceived risk of danger if she was adversely affected by her knee whilst driving. Her inability to work at the respondent's hospital sites meant that she was unable to fulfil all of the contractual duties and therefore put her at risk of action under the respondent's capability process up to obviously the point of dismissal which was ultimately reached. Again, there was a causative link between her knee impairment and her period of absence. The fact that there were other causes of the absence does not remove the knee impairment as a material contributing cause. She was, in such circumstances, more likely to exhaust the respondent's sick pay provisions than a non-disabled employee.

188. Again, it is recognised that the claimant's evidence was not at all times clear and consistent. Nevertheless, when she suggested an ability to travel to Goole this was in circumstances where someone was available to drive her who would be willing to break the journey as already described. Her ability to drive on some occasions and some distances on occasions does not undermine that being at other times not possible or possible without pain or potential risk. Again, whilst her reason for working fully from home from March 2020 was related certainly up to 9 March 2021 to concerns about her Covid risk, overlapping with a concern from 22 April 2020 to 10 September 2020 arising out of her shoulder and shingles complications, her knee pain was a factor throughout and indeed most clearly from 10 March 2021 and thereafter despite, again additional causes of absence such as stress and bereavement as well as continued shoulder pain.

189. The duty to make reasonable adjustments certainly arose and certainly in the period of her long-term sickness absence which led to her dismissal. The fundamental reasonable adjustment sought by the claimant, to avoid her need to travel to hospital sites and to adjust her contractual duties, was for her to be allowed to work wholly remotely. Anything short of that was not an option and the claimant ultimately gave the respondent little indication to the contrary even in terms of possible physical attendance at meetings to discuss her situation. For the reasons set out with reference to the claimant's complaint of unfair dismissal, it was reasonable to not allow

her to work remotely in terms of the provision of an effective service by a named safeguarding midwife. Whilst the claimant maintains that the respondent prioritised the needs of the service over herself, the reality of the situation was that it was necessary to conduct a form of balancing exercise to determine what the claimant would be able to do and whether that would be sustainable in terms of her own performance of the role of a named safeguarding midwife and the consequential effects on colleagues. The tribunal agrees with the respondent's conclusions and considers the claimant's viewpoint that a role of this nature, with its statutory status and, regardless of that, its importance in contributing to the maintenance of patient safety, could be performed remotely to be unrealistic. This was not a purely strategic role involving the writing of policies or guidance. Nor was it one which could be adequately fulfilled by the claimant's attendance remotely at meetings. The role was much more far-reaching. If undertaken indefinitely remotely, any incumbent would become certainly less skilled and familiar with practice on the ground. The claimant working remotely would have necessitated a significant change in job role which would have concentrated certain functions performed by all named safeguarding midwives in the claimant, which would have then had a detrimental effect on their own development as rounded safeguarding professionals.

190. Nor was there a failure to make a reasonable adjustment in failing to redeploy the claimant to a role which could be carried out remotely. The respondent looked for such a role and gave the claimant every opportunity to set out her preferences or to identify a role she could have carried out. The claimant, before the tribunal, is unable to identify any such role but rather is forced simply to assert, in the context of a large employer with a range of activities, that there must have been some role which could have been found for someone with her significant skills and experience. The tribunal agrees that a failure to do so was effectively a loss of the claimant's skills and experience which is significantly regrettable. Nevertheless, no role has been identified which might have allowed the claimant to return to work.

191. The research nurse possibility was genuinely considered, but was a patient facing role requiring an assessment of patients in the community and the prescribing of drugs for trials. The requirement was across the Scunthorpe, Goole and Grimsby sites, so that the claimant would still have had to inevitably travel.

192. A role in maternity triage was also considered, but the project was in its initial stages with an anticipation that for the foreseeable future the midwives would provide both a telephone triage service and clinical care to women invited to the maternity unit. There was no position at the time the claimant was dismissed which would have allowed her to carry out simply telephone triage work remotely. By the time of the claimant's appeal there were midwives who could have been based at home providing telephone advice only but the respondent's plan was by February 2023 for the triage system to become fully integrated so that midwives would also work shifts on site providing care to the women admitted through triage. Again, the

requirement for an onsite presence rendered the role unsuitable for the claimant.

193. Any alternative safeguarding roles, including on the basis of the claimant's willingness to drop a grade, involved a physical presence on site.

194. The claimant's reasonable adjustment complaint relating to trigger points in the attendance management policy is misconceived. No trigger point which ought to have been adjusted has been identified by the claimant. Essentially, the claimant's case is that the respondent ought not to have progressed to dismissal or a case review meeting which would result in dismissal. However, it would not have been reasonable to allow the claimant's absence to continue beyond a particular identifiable point or indefinitely in circumstances where there was no foreseeable return to work, no clarity as to any timescales and the treatment the claimant might receive or the likely recovery time or what level of recovery the claimant was likely to achieve. Such assessment is not made with the benefit of hindsight in circumstances where the claimant only saw her consultant in June 2023 and still awaits surgical intervention. At the time of dismissal, it was foreseeable that there would be no short to medium term resolution.

195. The tribunal also rejects the extension of sick pay entitlement as a potential reasonable adjustment. The claimant was entitled to 6 months on full pay and 6 months of half pay with a discretion to extend the period of sick pay where the expectation is of a return to work in the short term and to materially support a return to work. The claimant was paid full pay until 3 March 2022 and half pay until 2 September 2022. On 13 September 2022, when she was given notice of dismissal, she was in fact placed back on full pay for the duration of her 3 month notice period. The tribunal has no basis for concluding that the extension of sick pay would have had any material effect in returning the claimant to the workplace and thus alleviating or removing the disadvantage caused by her knee impairment.

196. The final complaint of discrimination is of discrimination arising from disability. This claim relates to the claimant's dismissal. It is accepted that her dismissal constituted unfavourable treatment and that there was a causal connection between her dismissal and her inability to attend work which arose to a material extent from her knee impairment. However, such claim can be defended if the respondent can show that it acted proportionately as a means of achieving a legitimate aim. The tribunal is clear that the respondent a legitimate aim of ensuring the efficient running of the service in line with guidelines, being able to effectively manage staff, being able to provide safe and efficient patient care, supporting staff and enforcing the respondent's managing attendance policy. The tribunal agrees that the need for safe and efficient patient care was particularly important given the nature of the claimant's role.

197. Justification of discriminatory treatment requires there to be a balance struck between the discriminatory effect of the treatment on the employee and the reasonable needs of the employer. This is a decision for the tribunal. The tribunal, in undertaking the balancing exercise. appreciates that dismissal was the ultimate unfavourable sanction and constituted a devastating blow to the claimant. On the other hand, there were no reasonable adjustments which could be put in place to assist the claimant returning to work and no alternative roles into which she could be deployed. The claimant was unable to perform her contracted role to a fundamental extent and in circumstances where the situation was likely to endure for a substantial period without improvement in the claimant's condition and inability in particular to work at the respondent's hospital sites. There was an overriding imperative, to provide a necessary and secure system of safeguarding to expectant and new mothers and their babies, for the claimant to have a visible presence on the hospital site and the respondent did, in all the circumstances, act proportionately. There was no unlawful discrimination arising from disability.

Employment Judge Maidment

Date 17 January 2024