EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104202/2023

Held in Glasgow on 29, 30 & 31 January, 1 & 2 February and 4 & 5 March 2024

Employment Judge: M Kearns
Members: Mr J McElwee
Mr A Matheson

Ms K Black	**Claimant** **Represented by:** **Ms E Campbell** **Solicitor**
NHS 24	**Respondent** **Represented by:** **Mr K McGuire -** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal was that:

(1) the claims under sections 20 and 21 Equality Act 2010 are well founded. The respondent failed to comply with its duty to make a reasonable adjustment. The respondent is ordered to pay to the claimant compensation including interest amounting to: **Twenty Two Thousand, Two Hundred and Seventy Seven Pounds (£22,277)**;

(2) The Tribunal makes a recommendation under section 124(2)(c) Equality Act 2010 that the respondent should allow the claimant to continue to work exclusively on night shifts without demotion.

REASONS

1. The claimant - who is aged 41 years - is a continuing employee of the respondent. On 4 August 2023, having complied with the early conciliation requirements, she presented an application to the Employment Tribunal in

which she claimed: (i) disability discrimination by breach of a duty to make reasonable adjustments and (ii) indirect disability discrimination. The indirect discrimination claim was withdrawn by the claimant on 15 November and dismissed on 20 November 2023. This judgment is accordingly concerned with the reasonable adjustments claim only. The respondent accepts that at the relevant time, the claimant was a disabled person as defined in section 6 Equality Act 2010 ("EqA") by reason of Crohn's disease and that it had knowledge of her disability.

2. The only adjustment sought by the claimant was that she be permitted to continue her night shift only working pattern following the respondent's Shift Review process. Following the Preliminary Hearing on 9 October 2023 the respondent was ordered to confirm the basis of its defence that the adjustment sought by the claimant is not reasonable. By email dated 20 November 2023, the respondent stated that it is not reasonable to give the claimant a nightshift only work pattern for the following reasons:

   a. "*A nightshift only work pattern does not meet the scheduling requirements for the SCN role due to:*

      - *the relatively minimal requirement for SCNs on nightshift on a local and national basis, as compared to other roles;*
      - *the standard requirement for all SCNs to work 5 out of 8 weekends, thereby preventing one SCN doing nights in place of other SCNs;*
      - *a nightshift only work pattern only being compatible with other rota types for 2 out of 8 weeks, resulting in over or under staffing on the remaining 6 weeks; and*

   b. *The Shift Review is a transformational change which seeks to change the Respondent's operating model and working practices. One of its aims is to be enable SCNs to fulfil all aspects of their role. SCNs on nightshift only work patterns are unable to undertake the full range of duties and responsibilities required of them as set out at paragraphs 22 and 23 of the GOR*."

Issues

3. The issues that remain in dispute are whether the claim is time barred; whether the adjustment sought is reasonable; and if the claim succeeds, the appropriate remedy.

Applicable Law

4. Section 20 Equality Act 2010 provides so far as relevant:

"(2) The duty comprises the following three requirements.

(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.

(4)……"

5. Section 21 Equality Act 2010 provides:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person...."

6. Section 123(3)(a) Equality Act 2010 provides:

"***123 Time limits***

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) ….

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

Evidence

7. The parties agreed a joint bundle of documents ("J") and referred to them by page number. The claimant gave evidence on her own behalf and called her two Clinical Services Managers, Tony Miller and Jacqueline Blair. The respondent called the following witnesses: Nicola Dawson, Head of Integrated Services Delivery and Shift Review Phase 2 Project Lead; Andrew Moore, Deputy Director of Nursing, who was on the Shift Review Project Working Group; Joan Main, Head of Clinical Services at Cardonald Contact Centre who heard the claimant's early resolution grievance – 'modified'; Alasdair Quinney, Associate Director of Operations, who heard the claimant's stage 1 grievance.

Findings in fact

8. The following material facts were admitted or found to be proved:

Background

9. The respondent is an integral part of the NHS. It delivers digital and telephone-based health advice across Scotland. During the Covid pandemic, the respondent took on and has retained the 111 Accident and Emergency triage service. Where a call is received, the respondent assesses the urgency of the situation. An ambulance may be dispatched if it is life threatening. If it is urgent but not life threatening, the person may be asked to wait at home until A&E can see them. Otherwise, they may be referred to the minor injuries centre, the mental health hub, their GP or the out of hours service.

The Cardonald Centre where the claimant works

10. The respondent operates from six contact centres: Cardonald, where the claimant is based; the East Contact Centre in South Queensferry, two North Contact Centres in Dundee and Aberdeen; the West Contact Centre in

Clydebank and the 'Lumina' Centre in Hillington. The Cardonald Centre - where the claimant works - is exclusively an out of hours centre. The Centre opens to 111 calls at 6pm (when most GPs close) and operates until 8am Monday to Friday. (There are call handlers who deal with urgent care who start at 4.30pm). It also opens and operates 24 hours on Saturdays and Sundays.

11. The Cardonald Centre is the largest of the respondent's six regional centres. It employs 250 call-handlers. Call-handlers are managed by Team Managers. The Centre also employs 55 Band 6 Nurse Practitioners (also called Clinical Supervisors) and 17 SCNs (not all full time equivalent "FTE"). The call-handlers answer calls, note symptoms and put the callers through a series of triage questions. Thereafter, a nurse practitioner goes through triage with the patient and decides where the patient is to go. The respondent aims to have a ratio of one SCN to every 5 nurse practitioners; one nurse practitioner to every 5 call handlers; and one SCN to every 15 call handlers. The respondent's busiest time in terms of call volumes is Saturday daytime. Average call volumes for the weekend are around 9,000 nationally. Average call volumes Monday to Friday are 3,000 nationally. By contrast on weeknights, call volumes are around 200. Whilst there is a minimal requirement for SCNs on nightshift on a local and national basis, the respondent's rotas reflect this. On a Saturday day shift at Cardonald, there would normally be 90 call handlers and 6 SCNs. On weekday nightshifts, Cardonald would normally have 15 call handlers and one SCN actually working the shift.

12. There is a national shortage of nurses across the NHS in Scotland with around 4,000 posts vacant. There should be 26 SCNs at Cardonald but there are currently only 17. 10 SCNs have left since January 2023. An attempt to recruit 7 SCNs in December 2023 yielded only one appointment. (These figures are numbers of staff but not FTEs). Generally, there would be one SCN on night duty on week nights at each regional centre (more at the weekend). However, some of the smaller centres have no SCN present on some nights. It is therefore important that the larger centres like Cardonald have an SCN on duty. The presence of an SCN on site is crucial, day and night to ensure a senior clinical presence. If a Centre does not have at least one SCN on night shift, the centre normally has to close and all the staff have to move to a centre with an SCN. Potentially an experienced Band 6 could step up as an alternative. However, Band 6s do not manage staff, liaise with other services

or do SPOC roles. In the event that there are 2 SCNs on the rota for nightshift at Cardonald, but the Live Planning System shows that one of the other West of Scotland centres does not have an SCN (e.g. because of a sick absence), then one of the SCNs from Cardonald will transfer across.

13. The late shift (also called the back shift) at the Cardonald Centre starts at 4.30pm or 5.30pm and finishes at 1.30am. The night shift starts at either 9.30pm or 10.00pm and finishes at 8am. The Centre does not operate on weekdays between 8am and 4.30pm. The weekend early shift at the Cardonald Centre starts around 7.30am and finishes at 3.30, 4.30 or 5.30pm (depending on whether the person working the shift is full time or part time). Adjustments are sometimes made to the rota where required for staff with underlying medical conditions. Night shift is hard on family life and it is difficult to go between night and day shifts. Night shifts are generally unpopular shifts among the SCNs at the Cardonald Centre and people often swap them or take annual leave to avoid doing them. Although two SCNs may appear on the rota on a night shift, in practice there is often only one working, with the other being on leave.

14. Following the respondent's Shift Review appeals, 2 of the SCNs at Cardonald were taken off night shift for health reasons. A further 6 Cardonald SCNs either do not work nights or regularly swap out of them. The claimant frequently does additional hours on night shift to plug gaps. Post Shift Review, the claimant's Clinical Service Managers ("CSMs") have found that the claimant working night shift only and taking on additional night shifts when asked addresses a need in respect of shifts that other SCNs cannot or will not work. Thus, in practice, far from nightshifts being overstaffed, without the claimant there would be understaffing on nightshift.

The claimant's disability

15. The claimant qualified as a nurse in 2006. Before joining the respondent, she worked variously in haematology, oncology and paediatrics. In 2009, the claimant was diagnosed with Crohn's disease. The claimant spent two weeks in hospital in or around February 2009 undergoing investigations. She was very sick and required blood transfusions and electrolyte replacement fluids. Her condition presented with a mixture of gastrointestinal symptoms such as bloating, pain, diarrhoea and bleeding. She also had erythema nodosum on

her legs, which was so bad that she was temporarily unable to walk. The claimant was told by the doctor treating her that the inflammation of her bowel was as serious as he had ever seen. He recommended a stoma. The claimant was horrified and said that she would try everything else first. She was treated initially with steroids, fasting and blood transfusions. The claimant was absent from work from January until May 2009.

16. The medication the claimant takes is Mesalazine, Omeprazole, Amitriptyline and Alverine Citrate. The purpose of the medication is to prevent her symptoms from worsening. The claimant is very strict with her diet and medications. She was on steroids for a long time and had to be weaned off them. By a combination of strict diet, medication and regular routine, the claimant was able to keep her Crohn's in remission for a time and she has avoided a stoma.

17. The claimant has mostly worked a night shift only rota since she qualified. When the claimant returned to work after her sick absence in 2009, she went back on a night shift only rota.

18. The claimant has been employed by the respondent since 30 November 2020, initially as a Band 6 Nurse Practitioner. On 3 May 2021, the claimant was promoted to a Band 7, Senior Charge Nurse (SCN). The claimant is contracted to work basic hours with the respondent which average 37.5 per week over an eight-week rota. She works 5 out of 8 weekends. She regularly works overtime shifts.

19. When the claimant started with the respondent in 2020, she initially worked a standard rota, which comprised a mix of weekend day shifts ("early shifts"), late shifts and night shifts. However, when she did this, she experienced severe symptoms of Crohn's disease, including extreme abdominal pain and swelling that was so bad she felt as though her stomach was 'going to explode' and she had to rip the seams of her tunic to fit it over her belly. The pain and swelling led to chest pain due to pectus excavatum and resulted in a flare up of her C-spine and thoracic spondylosis, before multiple episodes of diarrhoea and bleeding which continued for a number of days. She had not experienced such severe symptoms since her Crohn's was first diagnosed. The claimant's calprotectin markers for bowel inflammation went from 30 to 1800 and she was forced to increase her medication dosage to treat the inflammation. The claimant's medication causes her to become immunocompromised.

When taking the higher dose in 2020, the Claimant suffered a chest infection which developed into pneumonia. The medication is also very harmful to the liver and can cause unpleasant side effects, such as a dry mouth and upper back pain. A flare up of the claimant's Crohn's disease has a harmful effect on her bowel and she has been told that this could result in her requiring a stoma, which would be extremely distressing for her. Accordingly, it is of paramount importance to the claimant that she manages her symptoms

20. From the summer of 2021, the claimant began working permanently on night shift in order to manage her Crohn's disease. The claimant would use annual leave to cover the odd early shift she was put on, then she would engineer a swap to a night shift and cancel her annual leave. This was supported by her line managers (Jackie Blair and Tony Miller, Clinical Services Managers) who recognised that a night shift only rota was required for her health. Working a night shift only ("NSO") rota significantly improved the claimant's symptoms. Her calprotectin inflammation marker levels went back to around 30 and she was able to reduce her medication and stop taking the immunosuppressants. The claimant has learned from past experiences at work that night shift only working significantly improves her symptoms, which is why she now exclusively works night shifts.

21. The rota the claimant is currently working is as set out below (J139). This rota was agreed formally with her CSMs in around September or early October 2022 as a reasonable adjustment for her disability. The rota fulfils the respondent's parameters of working 5 out of 8 weekends and not working more than 5 shifts consecutively. The rota has not, in practice given rise to over or understaffing because of the number of SCNs who cannot or will not work night shift at Cardonald as set out in paragraph 14 above. The rota also aligns with the rotas of the claimant's team more closely than those of other SCNs for the reasons given below. The claimant's team alignment is between 80 and 90%.

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
22:00-8:00	22:00-8:00			21:30-8:00	21:30-8:00	21:30-8:00
		22:00-8:00	22:00-8:00	22:00-8:00		
21:30-8:00	21:30-8:00	21:30-8:00			22:00-8:00	22:00-8:00

21:30-8:00	21:30-8:00			22:00-8:00	22:00-8:00	22:00-8:00
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22:00-8:00	22:00-8:00	22:00-8:00			22:00-8:00	22:00-8:00
22:00-8:00	22:00-8:00	22:00-8:00			22:00-8:00	22:00-8:00
22:00-8:00	22:00-8:00					

Shift Review

22. Throughout 2018 and 2019 the Respondent implemented Phase One of a Shift Review during which it consolidated and standardised the working patterns of over 900 Nurse Practitioners and Call Handlers.

23. On or about 29 September 2021, the respondent prepared a project brief for Phase 2 of its Shift Review (J64). This phase principally concerned Team Managers and SCNs. The brief was prepared by Fiona Millar, Senior Project Manager and Nicola Dawson, Head of Integrated Services Delivery and Shift Review Phase 2 Project Lead. The project objectives (J66) were stated to be: "*The main objective of this project is complete the shift review for all appropriate members of staff that were not involved in Phase 1. This will result in a workforce which is aligned to teams which in turn in should enhance operational performance improvements. Phase 2 is going to include looking at several of the management groups of staff therefore another objective is to change the culture within NHS 24 and increases manager's awareness of their role and ability to improve the operational performance through informal and formal approaches. The cultural change to build up more of a sense of team working and support for staff is also critical*." The main benefit of completing the shift review was said to be (J72): "*to have a workforce whose base schedules are both aligned in teams, and aligned to best meet patient need. In addition to supporting the delivery of the current operating model, this will enable a culture which allows managers to work more closely with their team to provide support, guidance and leadership.*"

24. On or about 1 July 2022, the respondent prepared a Strategic Business Case for phase 2 of its Shift Review. The Document was entitled 'Shift Review – Investing in Frontline Leadership' (J86 - 138). The document proposed a number

of shift review options for SCNs and Team Managers. The business case for shift review in relation to SCNs was expressed as follows (J104):

"*4.2.2. Senior Charge Nurses*

The operational role of the Senior Charge Nurse should be a non-caseload holding role which meets the workforce standards as set out by the RCN: 'Nursing Workforce Standards: Supporting a safe and effective nursing workforce', Publication 009 681, May 2021; and the Staffing Guidance as set out by the Health and Care Staffing Legislation Act [sic] *which states:*

In complying with the duty imposed by section 12IA, every Health Board and the Agency must ensure that all individuals with lead clinical professional responsibility for a team of staff receive sufficient time and resources to discharge that responsibility and their other professional duties, including, in particular, time—

(a) to supervise the meeting of the clinical needs of the patients in their care,

(b) to manage, and support the development of, the staff for whom they are responsible,

and

(c) to lead the delivery of safe, high-quality and person-centred health care

Current frontline organisational Senior Charge Nurse capacity does not include sufficient time for these responsibilities to be fulfilled, and therefore change is necessary in order to meet these standard requirements, which are key enablers in ensuring NHS 24 will deliver 24/7 accessible high quality, clinically safe and effective services. Currently, senior charge nurses are frequently required to utilise time out with their contracted working hours, to manage and support the staff for whom they are responsible, in addition to achieving their own personal development and mandatory training. This restricts development, leads to burn out and a high level of frustration which ultimately leads to increased absence levels and reduced morale….."

25. Appendix 1 to the Shift Review Strategic Business Case sets out tables of 'concurrent and non-concurrent activities' for frontline managers and proposed SCN activities as a result of the Shift Review process (J135) as follows:

Senior Charge Nurses - Concurrent Activities (undertaken within the clinical supervision time)

Concurrent Role Summary	**SPOC / Individual Role**	**Time**	**Daily / Weekly / Monthly / Ad Hoc**
Host daily briefings	SPOC – local	Whole shift	Daily
Sign Timesheets	Individual	Whole shift	Daily
Real Time Clinical Supervision Support	Individual	Whole shift	Daily
Holding Area Prioritisation	SPOC – National	Whole shift	Daily
Partner Engagement	SPOC - Local	Whole shift	Daily
Absence Updates eESS/WFM	Individual	Whole shift	Daily
Adherence Monitoring	Individual	Whole shift	Daily
Complaint Handling	Individual	Whole shift	Daily
Technical Support	Individual	Whole shift	Daily
COVID-19 – Management of cases in centre	Individual	Whole shift	Daily
Deputise for CSM	SPOC - National	Whole shift	Sun – Thurs Nightshift
Management Planned/Unplanned Downtime	Individual	Ad Hoc	Ad Hoc
Protected Pod Support	Individual	Ad Hoc	Ad Hoc

26. The claimant already fulfils all the above concurrent activities on her NSO rota.

27. The respondent's aspiration for non-concurrent activities for SCNs post Shift Review was expressed in the second table in Appendix 1 (J136) to the Strategic Business Case (J86 – 138). These non-concurrent activities are things SCNs would require 'protected time' in order to do:

Senior Charge Nurses Non-concurrent Activities

Additional Non Concurrent Role Summary	**SPOC / Individual Role**	**Time (Hours)**	**Daily / Weekly / Monthly / Ad Hoc**
Daily Planning Meetings	SPOC – local	1	Daily (Mon - Fri)
Recruitment	SPOC (s) – Local	30	Weekly (HOCS advised dedicated offline requirement at times)

Team Management (121, Call Reviews etc.)	Individual	2(0.5 hours per person per week)	Monthly
Link Roles (SAS, KRG, Falls etc.)	SPOC – Local	2	Monthly
Personal Development	Individual	1.5	Monthly
Revalidation support	Individual	1 (per case)	Monthly
Public Protection	Individual – As allocated	0.5 (per case)	Ad Hoc
Clinical Investigations	Individual – As allocated	2	Ad Hoc
Team Management (Attendance Management)	Individual	1 (per case)	Ad Hoc
Respond feedback	Individual	1 (per case)	Ad Hoc
HR related activity (e.g. resignations)	Individual	1 (per case)	Ad Hoc
Adverse Events (SAERs)	Individual – As allocated	1 (per case)	Ad Hoc
Other Ad Hoc work (e.g. review BWBC calls)	Individual – As allocated	As required	Ad Hoc

The claimant's job description

28. The claimant's job description (J48) sets out her job purpose as follows:

"• Provide clinical and professional leadership to the multi disciplinary team

• Operationally manage the multi disciplinary team

• Ensure clinical governance processes are implemented in accordance with NHS 24 policy.

• Effective leadership and management to the multidisciplinary team to support delivery against NHS 24 organisational performance indicators

• Assume delegated responsibility for the management of the virtual NHS 24 service and monitoring of the operational environment in the absence of a Clinical Services Manager (CSM), taking advice from the on-call CSM where required

Responsible for the delivery of safe, effective and person centred care, providing clinical and managerial leadership to facilitate the delivery of the Leading Better Care (LBC) ambitions:

• Ensure safe and effective clinical practice

• Enhance the patients' experience of care

• Manage and develop the performance of the team

• Contribute to the delivery of the organisation's objectives".

Whether the claimant is able to fulfil the requirements of her job description and whether she undertakes/ will be able to undertake the 'non-concurrent activities' set out in paragraph 27 above on an NSO rota.

29. The claimant is a valued member of staff at Cardonald. She is regarded by her CSMs, Tony Miller and Jacqueline Blair as demonstrating all the markers of good clinical governance. The claimant's line managers regard her as clinically sound, up to date and delivering safe treatment with the right outcomes. They consider that she is good at managing her shifts and reports and that she fulfils all the requirements of her job description.

30. With the exception of the claimant, all other SCNs at Cardonald moved onto their new 'post Shift Review' rotas on or around 6 February 2023. The claimant has remained on her October 2022 NSO rota (J139), though she has been informed that a decision has been taken that she should not continue working NSO. The claimant's NSO rota has not – in fact - resulted in overstaffing on the night shift. As explained in paragraph 14 above, around 8 SCNs at Cardonald (almost half the cohort) do not work night shift at all. The situation at the Cardonald Centre is that the claimant needed a night shift only rota and a number of other SCNs could not or did not want to work night shift, so the balance is struck fairly well. Although there is one other SCN at Cardonald who prefers night shift, most staff do not like working night shifts and some staff swap shifts or take annual leave to avoid them. The claimant is the only SCN at Cardonald working a NSO rota. However, on the nights she works, she is normally the only SCN on the rota who is actually present for the night shift. Out of the month of January 2024, the claimant was only on with another SCN on three night shifts owing to colleagues swapping shifts or being switched to cover other shifts. By way of an illustration, were the claimant to be taken off the rota altogether for the 12 weeks following 2 February 2024, there would be 47 night shifts with one SCN on the rota and 18 nights shifts with none. The claimant's CSMs regard her as the mainstay of the Cardonald Centre night shift.

31. The Claimant is capable of fulfilling her full role as detailed below, even when working exclusively on night shift. Because the Cardonald Centre operates out of hours only, meetings which occur between 9am and 5pm Monday to Friday do not occur during the normal working hours of any Cardonald SCNs. Thus, all SCNs asked to attend such meetings require to do so outside their normal rota

hours. They normally attend in return for time off or time back, though in appropriate circumstances an SCN may choose to slide a shift into the day time. Unless she has been unwell, he claimant has always agreed to attend meetings outside her normal shift hours when requested or when she has identified a need to do so. She comes in during the day and does meetings as required.

Leadership

32. Because she works NSO, the claimant is often the clinical lead on site. She is seen by her CSMs as a bastion of good practice. The claimant is frequently asked by CSMs to take on the SPOC (single point of contact) role nationally. On week nights, there is no CSM present in any centre after 11pm. One CSM will be on call nationally. The SPOC has the sole responsibility of deciding whether to escalate an issue that arises on the nightshift to the on call CSM. The claimant is frequently asked to take on the SPOC role by duty CSMs from other centres. This is a mark of confidence in her by other CSMs in addition to her own. She is effectively an acting CSM when on shift.

Team alignment

33. The claimant's team alignment varies between 80 and 90%. She has better team alignment than other SCNs, partly because certain members of her team also work night shift only. In practice, post Shift Review, most SCNs are in line with their teams only 50% of the time. (The target for the Shift Review is 75%). The claimant has 5 nurse practitioners in her team of whom 2 or 3 are nightshift only. The claimant also has a nightshift only team manager and a number of the call handlers in her team are night shift only. The claimant has other team members who are late shift only. The claimant has cross over time of up to four hours per shift with team members working late shift only, as their shifts overlap between 9.30pm or 10.00pm and 1.00am or 1.30am. The claimant can use the cross over time with the late shift SCNs to conduct mentoring of her team, teams 1:1s and other similar activities. Thus, in terms of her NSO rota, the claimant exceeds the Shift Review key goal of increased team alignment.

Daily planning meetings

34. The national daily planning meetings last an hour and take place daily Monday to Friday (J136). They are mostly attended by the Central Resource Team and Team Managers with a view to preparing a national plan. SCNs may take it in turns to attend but they do not routinely do so, being more involved with the planning for their own centres. Planning for each day starts at 8am. The daily planning meetings occur at either 8am or 2.30 pm. In either case, they occur outside the normal working hours of any Cardonald SCN. When it is the turn of a Cardonald SCN to take on planning, their shift is either changed or slid to accommodate attendance at the meeting. The claimant has slid her nightshifts to attend 8am planning meetings. She has also attended 2.30 planning meetings when required.

Recruitment

35. This is a SPOC local role which takes the SCN who volunteers or is chosen to undertake it approximately 30 minutes per week (J136). The respondent does not require all its SCNs to be involved in this at once. It is a rotational task. One SCN might be asked to help with interviews every six to eight weeks. The Claimant is one of only four SCNs currently involved in recruitment. Initially, this involves her reviewing application forms during her night shifts and shortlisting candidates for interview. This can be done online at any time, including during a night shift and is sometimes done during monthly management shifts. Interviews themselves are scheduled for the convenience of the interviewers and candidate. As Cardonald is an out of hours centre, interviews are held anytime up to 10pm. If the interview is daytime on a weekday, it would be outside the normal working hours of any Cardonald SCN. Generally, an SCN puts their name down for an interview if they can do it. The claimant makes herself available to attend if required. Interviews are sometimes done by MS Teams.

Team management/ HR related activity

36. This is an individual duty which takes up approximately two hours a month (J136). The claimant does 1:1s with her team, conducts call reviews; deals with complaints and sorts out the rotas routinely on night shift. Some of her team members are also NSO. She engages with all members of her team on a regular basis. If necessary, she conducts meetings outside her working hours and claims either overtime or time off in lieu ("TOIL"). The claimant has done so on the following dates (J199): 3/2/22 Long Term Sick meeting 15.00pm; 11/11/22

Stage 2 Long Term Sick meeting 11am; 8/12/22 Final Stage 2 meeting 11am; 12/10/22 Interim meeting; Stage 2 Absence meeting 12/1/23 11.00am. The claimant has conducted the following well-being catch ups outside her night shift hours: 4/4/22 – 16.00pm telephone; 8/4/22- 09.00am telephone; 22/4/22 – 16.00pm telephone; 4/5/22 1-2-1 10pm; 11/5/22 1-2-1 10pm; 21/5/22 1-2-1 07.30am.

37. The respondent's HR staff mostly work Monday to Friday 9am to 5pm. On weekdays, there is a member of HR staff available until 10pm to give advice. HR has a 'ticketing system'. SCNs can register a request for advice 24 hours a day and someone from HR will get back to them when available. Given that the Cardonald Centre is out of hours only, it can be difficult to schedule e.g. attendance meetings, which require the employee, the manager and HR. However, most meetings of this sort take place on MS Teams and all SCNs have laptops. The claimant also signs time sheets for staff.

Link roles

38. These are SPOC local roles occurring monthly, where one SCN from the cohort will attend as a single point of contact from Cardonald (J136). The person whose turn it is to be that SPOC that month attends the meeting. The claimant is involved in link roles with the Scottish Ambulance Service and the Falls Team. It makes no difference to this which shift the SCN is on.

Personal development

39. CPD takes place during an SCN's personal time anyway. There is no specific work time allocated. The Claimant manages to take part in the same learning and development as colleagues. Most of the learning required is eLearning and working NSO does not present any difficulty with this. The claimant's CPD record is good (J156). In 2023 she completed 12 courses; 7 assessments and 18 eLearning modules. SCNs have management shifts once a month. The claimant will often carry out online CPD on a management shift. Some training and development is also delivered through MS Teams. The claimant is often the single point of contact (SPOC) at night time, increasing her responsibility which is positive for her career development. The claimant is Centre training lead for the Respondent's Cancer Treatment Helpline. (See below). The Claimant is able to do these extra duties within her night shift hours, as there is cross over

with other shifts at the beginning and end of her shift, which starts at 9.30 or 10pm and finishes at 8am. In fact, were she to move to working late shifts or a mixed shift pattern, it would have a detrimental impact on her career because she would be unwell and be likely to have a number of days absent from work as a result.

40. Face to face training that takes place on weekdays between the hours of 9am and 5pm is normally in the form of an all-day course. For these courses, SCNs require to be taken off whichever shift they would normally be on in order to release them to attend. Since the Cardonald Centre is an out of hours centre, these courses do not occur during the regular shifts of any staff member. If an SCN wants to attend a training course, cover will be sought to release them from their shift to attend. It makes no difference which shift they were on. The claimant has nevertheless attended the following training courses outside her nightshift hours (J199): 4/7/22 SCN training 16.00-22.00pm; 5/7/22 SCN training 16.00-22.00pm; 19/7/22 fire training 14.30pm; Management Essential training - 7/2/23 09.30-16.30pm; 8/2/23 09.30-16.30pm; 14/2/23 09.30-16.30pm; 16/2/23 09.30-16.30pm; 22/2/23 09.30-16.30pm; 23/2/23 09.30-16.30pm.

Revalidation support

41. This is an individual task which takes one hour per case per month (J136). It is no longer necessary that it be done by an SCN or manager. Any registered nurse can do it.

Public protection

42. This is an ad hoc potential individual task which an SCN may be allocated to. If allocated, the time commitment would be 0.5 hours per case per month. If a public protection issue arises, police or social work are contacted right away. The role of the SCN on duty is to flag up that referral. The public protection team rarely require any follow up from the respondent.

Patient complaints/ Clinical investigations/ Response to feedback

43. These are individual ad hoc tasks to which an SCN might be allocated. If allocated, the time commitment is approximately two hours per month (J136). Only a few SCNs have access log ins for the online complaints system. The claimant has not yet been granted access. Patient complaints come in at all

hours as the respondent runs a 24 hour service and the Cardonald Centre is an out of hours only service. There are two processes for handling complaints; Stage 1 and stage 2. A stage 1 complaint normally arises where someone makes a verbal complaint. The CSMs may deal with it themselves or they may delegate it to an SCN to investigate. All the respondent's calls are recorded and the investigator would listen to the recording and then give the person complaining a telephone outcome. The only aspect of the process that would be affected by the claimant working NSO is the ability to deliver an outcome call back for a stage 1 complaint. The claimant is happy to call a patient back regarding a complaint during the day if required. A stage 2 complaint is a written complaint. The caller or patient is asked to complete a form, which is then sent over to the complaints team who decide how to handle it. The complaint would be investigated but instead of a call back, the complaints team would send a written response. Working NSO has no impact on involvement in a stage 2 complaint. On average, the Cardonald Centre receives around one stage 1 complaint per week and around one stage 2 complaint a month.

Adverse events

44. Adverse events are currently handled by CSMs and staff are only required to attend if they are involved in the adverse event. The claimant has never had an adverse event. If she was involved in one, it would be dealt with by her CSM and she would attend a meeting whenever required to. The respondent has an aspiration that SCNs will be involved in staff adverse events going forward either alongside or in place of CSMs. If that happens, it would be an individual duty that would be allocated to an SCN ad hoc. The time commitment would be one hour per case (J136). The claimant has, in the past supported members of her team in relation to adverse events. It would be more difficult for an SCN to attend an adverse event meeting relating to a peer purely for development purposes as that might raise issues of confidentiality or data protection. If the claimant needed to attend a Teams meeting or go into the centre during the day for an adverse event meeting, she would do so and then revert to her normal routine.

Clinical governance meetings

45. The respondent's Clinical Governance meetings are monthly and are also currently attended by CSMs. They discuss complaints, adverse events, public protection and reviews of adverse events. Ideally all staff would be present, but

currently, none of the respondent's SCNs at any of the sites can get to these meetings if they are on shift because they are needed on the frontline. Thus, the CSMs attend the meetings and are responsible for ensuring their SCN cohort is informed of what was discussed. The respondent's Cardonald Centre performs an out of hours only service, so that no SCN would be on shift Monday to Friday 9 – 5pm when these meetings take place. The aspiration of the Shift Review Team is that SCNs on late shift may be willing and able to slide their shift backward into the day to attend these meetings when required. Even if working a late shift, such meetings would not necessarily be scheduled during a shift that the relevant SCN is on the rota to work. It is not possible for an SCN to attend these meetings even if they occur during their shift if they are short staffed or required for clinical duties (which is normally the case when on shift). When an SCN is clinical supervisor on the floor, it is not possible to leave and attend meetings even if they are scheduled to take place during their shift.

Team meetings/ Section team meetings

46. Working NSO has no effect on the claimant's ability to attend Section Team meetings, either in person or on MSTeams. Section team meetings occur every two months and are fixed at a time convenient to those in the section. The claimant's manager has told her that she goes above and beyond in delivering her role. The claimant attends the workplace for team meetings during the day-time every few months as required, as long as she is not experiencing a flare up in her condition. As the meetings are only an hour or so and infrequent, they are manageable for the claimant, whereas working an entire day shift is not. The claimant has attended the following team meetings outside her night shift (J199): SCN meeting 3/2/22 – 2PM attended; 9/8/22 SCN meeting 14.00-16.00pm; Team building 15.30pm 27/9/23. Some team meetings take place at 10pm.

Partner engagement

47. High level (strategic) partner engagement meetings are monthly and are currently attended by Heads of Service and CSMs who meet with GPs and other out of hours services during the day, between the hours of 9am and 6pm, Monday to Friday when the senior managers/ professionals in the agencies normally work. SCNs could choose to go to these meetings but no SCNs currently attend. As Cardonald is an Out of Hours only service, no SCNs are on day shifts during the week, so that late shift SCNs are also not on shift, except

perhaps from 4.30pm. Thus the respondent is reliant on the goodwill of SCNs wishing to attend these meetings outside their normal working hours, whichever shift they are on. The Claimant is in regular operational contact with numerous partner agencies during her night shifts, including GP surgeries out of hours services, hospitals, police and social services. Although an amendment is underway to enable all SCNs to login to the partner feedback program, only a very small number of SCNs nationally can get into it at present. Generally feedback from partner agencies goes to CSMs who attend the daytime meetings with the agencies and cascade anything relevant to colleagues by email.

Service delivery meetings

48. Local and national service delivery meetings are currently attended by CSMs only, although there is an aspiration for SCNs to attend as part of their development. The meetings take place at 12.30pm on a Tuesday. They are held to discuss issues such as what may be coming in and/or going out of service or ratios of call handlers to nurses. CSMs currently cascade all important information from these meetings to their SCNs. Since Covid, these meetings take place on MS Teams. The claimant attends the national midnight dial-in on every night shift. Safe space meetings are attended by CSMs and not currently attended by SCNs. Although there is an aspiration that SCNs should attend, this and some other aspirations are dependent upon the SCN cohort reaching better staffing levels. There currently is not enough resource to allow them to attend. If there was a meeting the claimant required to attend during the day, she would do so, either by Teams or in person.

Cancer Treatment Helpline

49. A national review of oncology services identified that patients receiving cancer treatment felt vulnerable as when presenting unwell they were often passed from one department to another. The respondent set up a pilot cancer treatment helpline to demonstrate that they could manage these calls on behalf of health boards. Each centre has a clinical lead for this and the claimant was chosen as the clinical lead at Cardonald because she has had training and experience in haematology, oncology and chemotherapy. The Cancer Treatment Helpline is a national service with a separate telephone number. It follows a different triage system which factors in cancer treatment regimes and potential symptoms of

toxicity. On triaging the patient, clinical input may be required, so all supporting clinicians must be familiar with the tool and potential outcomes. The respondent has a different triage tool for this embedded within the 'Sugar CRM' and all trained call handlers have access to this system. The call handlers in Cardonald are not trained in or operating the Sugar system at present. However, the Cardonald nurse practitioners still have to deal with cancer, without being able to see the Sugar system. The claimant therefore attends CTH meetings and ensures that the Cardonald nurse practitioners are trained so that they know how to deal with cancer patients (J224). The claimant does this work throughout her shift and whenever required. She has attended or delivered Cancer Treatment Helpline meetings and training as CTH Clinical Lead for Cardonald on the following dates (J199): 28/6/23 09.00am post nightshift; 5/7/23 09.00am post nightshift; 1/8/23 09.00am post nightshift; Another CTH 15.00pm (J199); Acute CA Care 18/10/23 13.00-14.00pm.

Grievance process

50. On 14 October 2022 (J140), the respondent wrote to the claimant saying "*we are now able to match you to a rota*". The letter referred her to: "*your current rota as provided by your local management team which was used as a baseline for matching and your new rotas to select from*." The rota given as her current rota was wrong. The letter offered five rotas for her to choose from; four of them involved mixed shifts and one was a late shift only rota. The letter was not imposing a specific rota. Instead, the letter stated: "*We aim to communicate the new team lists mid November, once everyone has accepted a rota*." The letter went on: "*Of note, we understand that you have recently been given a nightshift only working pattern. Nightshift only rota's are not desirable for managers for a number of reasons, including role development opportunities being greater on mixed shift patterns. In recognition of these considerations, we have provided standard rota matches rather than nightshift only options, in addition to a single shift pattern of late shift only, to support your health.*" Having gone through a number of sample rotas, the letter asked the claimant to review the information and confirm which rota she accepted by 24 October 2022. The letter then stated: "*If you feel that this rota does not match your current working pattern, please speak to your Clinical Services Manager (CSM) in the first instance to discuss your concerns. After this, if you still feel it does not match your working pattern*

you have the right to request a review panel meeting within 14 days of this letter (Stage 1 of the Grievance Process-modified). Please email ShiftReview2@nhs24.scot.nhs.uk detailing the reasons for your request."

51. As directed in the letter, the Claimant spoke to her CSM, Tony Miller, who wrote to the Respondent's Shift Review team on 18 October 2022 (J144) to express his concern about the rotas she had been offered as part of the shift review process. Mr Miller stated that the Claimant's "*experience on early, mid and late shifts in the past has caused significant issues with her health and I am in full support of securing her a night-shift only rota*." He explained that the situation was one of medical need and was likely to be covered by disability legislation.

52. On 21 October 2022 the claimant emailed (J145) the Shift Review team in response to the letter of 14 October 2022 and advised that she was unable to accept any of the rotas she had been matched to. She stated: "*A mixed or backshift only rota is no way manageable with my condition and has resulted in my well controlled management requiring medications to be increased and new medication started, PR bleeding and deranged bloods and significant rise in calprotectin markers that I'm now requiring further investigations……My current medication can't be increased further and the next step is medication that will cause me to be immunocompromised…..I do not feel that working my nightshift only rota restricts my ability to progress and develop, I currently manage to take part in the same learning and development as other, if not more as I get to be clinical lead more carry out dial in's and be SPOC which you currently do not get to carry out on any other shifts…"*

53. On 12 December 2022, the Respondent's "Shift Review Team" emailed all SCNs, thanking them for their engagement with the Shift Review process so far and explaining: "*There are a number of people at different stages of the process however, and we are continuing to support these staff as they move forward in agreeing a working pattern*." The email indicated the intention that all shift changes would be agreed and would commence on 6 February 2023. The claimant did not accept any of the rotas offered and expressed her concerns. She experienced significant stress and anxiety on being told that she would be starting on a rota she had not agreed to on 6 February 2023. The stress and

anxiety affected her Crohn's disease and she experienced a return of diarrhoea and PR bleeding.

Early Resolution

54. The respondent's grievance policy had been modified to deal with issues arising from the shift review. The first stage is called 'Early Resolution'. The claimant attended an Early Resolution meeting on 13 December 2022, following her email to the shift review team dated 21 October 2022. The meeting was chaired by Joan Main, Head of Clinical Services at the Cardonald Centre. No minutes were taken. At this meeting, the claimant explained that she could only work night shifts, as her health deteriorates when working any other type of shift pattern. She had been offered a late shift only rota previously and rejected it, as she needed to stay on her NSO rota. She explained that she had experienced some anxiety and a flare up of her condition.

55. On 18 January 2023, in order to inform the respondent's decision making, the claimant was referred by the respondent to Occupational Health (J149). The OH report was issued on 2 February 2023 (J150). The report contained the following statements:

"*SECTION 2 - FITNESS FOR WORK / CAPABILITY*

2a Is the above named employee currently fit to carry out their full range of duties? Fit with adjustments

2b Are there any factors which would prevent the above named employee providing regular and effective service in the future? Yes. In the event that it is not operationally feasible to provided Kimberley with a nightshift only rota, it is highly likely that her health condition will flare, as has happened in the past. This may affect her ability to provide regular and effective service in the future."

.....

"Q1.What impact is there on your condition of working a mixed/late shift only rota?

A1.Working mixed/late shifts has been problematic for Kimberley since diagnosis of her Crohn's in 2009.She advises me that her symptoms are exacerbated if she is required to work any shift other than nights. She advises

me that she experiences symptoms of abdominal pain, abdominal swelling, acute diarrhoea, chest/back pain and fatigue when she has worked shifts other than nights. Exacerbation of her Crohn's is confirmed in a letter from Kimberley's IBD Nurse Specialist where it is detailed that serology and symptom development, in the recent past, have indicated that nightshift appears to work better for the control of Kimberley's Crohn's disease, with a strong recommendation that working nights only, is crucial to controlling her disease.

Q2 What impact is there on your condition if you are working a nightshift only rota?

A2.Kimberely advises me that working nightshift only does not impact on the control of her Crohn's symptoms in any way. Having, read the correspondence from her IBD Nurse as referred to above and, taken a full clinical history from Kimberley, it is clear that working non nightshift hours, triggers a flare affecting the control of her Crohn's disease.

Q3 ……

Q4 What are the recommended adjustments for Kimberley?

A4.I note from the background that you provided in this report, that permanent nightshift working has not been offered to Kimberley as part of the ongoing rota/shift review. With this in mind, and given all of the above, I have considered the issue of Kimberley not being provided with a nightshift only rota and how this would affect the control of her Crohn's symptoms, detailed at A1 above. Unfortunately, I am unable to identify any adjustments to enable Kimberley to manage her Crohn's disease, other than being restricted to working permanent nightshifts. I would ask that you consider this as a permanent adjustment, if operationally feasible."

56. The claimant provided the respondent with medical evidence dated 27 January 2023 (J166) from her specialist IBD nurse, Louise Martin, which states: "*In April 2022, her faecal calprotectin was below 30, which shows no inflammation within her bowel, and she was keeping well at this time. Her faecal calprotectin in November jumped to greater than 1800, showing that there was ongoing inflammation, and we had to increase her tablets at this time…….I do strongly*

agree that her night shift pattern seems to work better with her Crohn's disease".

57. Before making her ER decision, Ms Main liaised with Nicola Dawson to see if any other rotas were available or if there was another adjustment she could offer. There was not. Ms Main's Early Resolution outcome was sent to the Claimant on 28 February 2023 (J158). It stated: "*Upon reviewing your occupational health report dated 2nd February 2023, I note that it recommends that you would benefit from working predominantly night shift. I acknowledge that night shifts have been working well for you from a health and well-being perspective. When liaising with Shift Review, I have noted that nights only is your preference. // I can confirm that I understood your challenges, however, unfortunately, whilst I fully appreciate your individual requirements, I was unable to find a resolution for you that met with both your requirements and the shift review parameters. As it stands, we are unable to offer you a night shift only rota*". It went on to invite the claimant to accept the original rota offered, with mixed shifts.

Grievance

58. The Claimant submitted a grievance under Stage 1 of the Grievance Policy on 7 March 2023. In the covering email (J160), she stated that the proposed rotas would be detrimental to her chronic condition and mental well-being, causing short and long term damage to her health. "The claimant also stated: "*A nightshift only rota is not my preference, its being dictated by my chronic illness…"* In the grievance form (J163) the claimant stated:

"*NHS24 wishes to change my current shift pattern. My current rota has reasonable adjustments that have been made following Occupational Health assessments, and discussions with my line managers. The adjustments are in response to a condition that I have which is covered under the disability as defined at section 6(1) of the Equality Act 2010. This condition is Crohns which can manifest in various ways which are detailed in this letter. A pattern of working is essential in managing this condition effectively.*

I have in the past worked a mixed rota which had early shifts and back shifts. These shifts aggravated my chronic condition resulting in deterioration of my health and wellbeing. Prior to my full time all nightshift rota been allocated I was swapping my shifts of days and backshifts with other staff member's or taking

annual leave when available. This resulted in increased stress and anxiety regarding potential swaps and on the occasions when this wasn't facilitated, it resulted in a physical deterioration in my condition.

The proposed rota's have increased days of working shift's that are detrimental to my chronic conditions and mental wellbeing. A mixture of shifts or backshift only rota will not allow me to manage my condition effectively. This is supported by my consultant and OH.

Variance in shifts patterns have resulted in increased medications along with new medications and physical decline in symptoms such as PR bleeding, deranged bloods and significant rise in calprotectin markers which have resulted in further invasive investigations.

These symptoms also include extreme abdominal pain, excessive swelling which leads to chest pain due to pectus excavatum. This then results in a flare up of my C-spine and thoracic spondylosis before the multiple episodes of diarrhoea and PR bleeding to follow with numerous days till symptoms subside.

My current medication causes me to be immunocompromised and when working lates and day shift's requires increasing dosage. Having swapped my shifts to nightshift's and then the nightshift only rota my symptoms have improved my bloods and samples are returning to normal range and I have more energy and improved mental wellbeing."

59. A Stage 1 Grievance Meeting took place on 6 April 2023. The meeting was chaired by Alasdair Quinney, Associate Director of Operations. Pauline Docherty, Head of Employee Relations also sat on the panel whilst Nicola Dawson, Head of Integrated Service Delivery attended as a subject matter expert. The Claimant was represented by her union representative, Ricky Sherriff-Short. No minutes were taken. The claimant received the grievance outcome letter on 8 June 2023 (J180). The letter stated that the respondent was unable to support a NSO work pattern for SCNs. It stated:

"*Following our meeting, I asked the shift review team to determine what a nightshift only rota for a SCN would mean for our staffing levels across the 8 - week window of scheduling. Unlike other frontline skill sets, such as Call Handlers or Clinical Supervisors, in respect of which a nightshift only work pattern can be supported, nightshift only working patterns for SCNs do not meet*

the scheduling requirements for the role. This is due to a number of factors including:

- *the minimal requirement for SCNs on nightshift, on a local and national basis (as compared to other roles),*
- *the standard requirement that all SCNs work a 5/8 weekend pattern prevents 1 SCN doing nights in place of one / a number of colleagues,*
- *a nightshift only working pattern for a SCN is only compatible with other rota types for 2 weeks out of 8. During the other 6 weeks a nightshift only working pattern results in either over or understaffing or would necessitate a rota which involved an unpalatable run of consecutive shifts.*

Additionally, it is important to remember that Shift Review Phase 2 is a programme of transformational organisational change within the 111 service. Team alignment is central to what we are trying to achieve. However, crucially, as we explained throughout the engagement process, we are also seeking to change our operating model and working practices in the interests of our managers, staff, and the patients we serve.

….

It became very clear, especially for our SCNs on nightshift, that management effort was being concentrated predominantly on shift management and clinical supervision. Although clearly an important aspect of the role, it was clear this had consumed most of the SCN role and diminished other important aspects, including crucial personal development and playing a key part in a culture of continuous quality improvement and development of the service.

In order to address this, it was agreed in Partnership, and signed off by our Shift Review Governance Group, that NHS 24 would no longer offer nightshift only rotas to SCNs. It was determined that such rotas were not conducive to a SCN being able to undertake the full range of duties and responsibilities, as outlined in the job description, as will be required moving forwards.

There is a requirement for specific aspects of the Band 7 SCN role to be carried out consistently, ensuring staff are working to grade and competence. Some of the areas negatively impacted by working nightshift only are outlined below:

• ***Responsible for the delivery of safe, effective and person-centred care, providing clinical and managerial leadership to facilitate the delivery of the Leading Better Care (LBC) ambitions****. You would not be able to consistently engage in patient complaints/AE/Partner feedback meetings as investigations and interactions of this kind take place in- hours.*

• ***Manage and develop the performance of the team.*** *To support the understanding of the performance of the team, regular attendance at the local and national Service Delivery meetings is required. This would not be possible on nightshift only, [as these meetings take place in-hours].*

• ***Build and maintain relationships with colleagues to ensure effective communication across NHS 24 sites and externally with Partner Agencies (e.g., Out of Hours (OOH) Services, Ambulance Services, and Accident & Emergency (A&E) Units, GPs, Social Services).*** *To maintain such relationships would be impossible working nightshift only and would give limited scope for any relationships to develop as all Safe Space and partner engagement meetings predominantly take place in-hours.*

Additional activities that you would consistently be excluded from include project participation, for example, Adverse Event review meetings, clinical governance, team development, CPD and recruitment, all of which happen across the hours of 0800-2000hrs. Single shift working patterns such as late shift only, and early shift only, still enable SCN to attend such meetings and carry out the full remit of their role.

As a result of the issues outlined above, and after careful consideration I am unable to support a nightshift only work pattern."

Grievance Appeal

60. The claimant appealed the Stage 2 Grievance Appeal outcome and attended a Stage 2 grievance meeting on 13 July 2023 chaired by Pauline Howie, Director of Service Delivery. The claimant was represented by her RCN representative. No minutes were taken. The outcome of the Claimant's grievance appeal was sent to her by way of letter on 4 December 2023 (J203).

The outcome letter stated that the decision remained unchanged and that the respondent could not allow the claimant to work on a night shift only work pattern. The claimant was offered five rotas to choose between; none of which were night shift only rotas. The letter advised that it was expected that the new rota system would commence from February 2024. In most respects the letter reiterated the points of the Stage 1 outcome.

61. Joan Main, the respondent's Head of Clinical Services at its Cardonald Centre wrote to the claimant a letter dated 24 January 2024 (J299). The letter stated that if the claimant did not feel able to accept any of the rotas offered to her redeployment would be considered with her. The letter stated that the respondent was able to offer the claimant a nightshift only role at Cardonald as a clinical supervisor at Band 6 with her salary protected at its current Band 7 level. Three possible night shift only rotas were offered to choose from. The claimant was effectively being offered a demotion.

Substantial disadvantage of PCP

62. The Claimant is disabled as defined in section 6 of the Equality Act 2010 by reason of Crohn's disease. This is a lifelong uncurable condition. The Claimant can only use treatment, a strictly controlled diet and day/ nighttime routines to control her symptoms. The condition has a long-term adverse effect on her ability to carry out day-to-day activities as described above. Being awake and working at night time as opposed to during the day, reduces the claimant's Crohn's disease symptoms. As such, the Claimant has had to adapt her lifestyle. Variance in the claimant's shift patterns have previously resulted in increased and or new medications having to be prescribed, as well as physical decline. At all relevant times, the respondent has had knowledge of the claimant's disability and knowledge that the imposition of non-nightshift only working patterns or rotas are likely to produce the deleterious effects described above on the claimant's health and in particular on her Crohn's disease. As a result of this, the claimant's line managers, Tony Miller and Jacqueline Blair made a reasonable adjustment that she work a permanent NSO rota. They remain fully supportive of her remaining on an NSO rota. The claimant currently remains on her NSO shift pattern meantime. She has not moved onto a new rota as yet. However, the decision by Joan Main and the other grievance hearers to remove this adjustment has caused the claimant to experience stress and

anxiety about her shift pattern changing to an unsuitable working pattern. This is causing an exacerbation of her Crohn's disease symptoms and inflammation. The claimant's calprotectin levels rose from below 30 in April 2022 to more than 1800 in November 2022 with a consequent increase in her medication resulting in her becoming immunosuppressed. The effect of that has been further chest infections and abscesses on her face over the course of the last year. The claimant also experienced anxiety and fear that a stoma may be required, of absence from work and of consequent job insecurity.

Observations on the evidence

63. The claimant's former and current CSMs both gave evidence on her behalf. Both spoke extremely highly of her and were clearly concerned at the prospect of losing her. Mr Miller stated that the claimant is good at her job, clinically sound and contemporary. He testified that she practises safely and manages her reports and shifts well. He stated that she often supports a more junior SPOC, even when she is not, herself the SPOC. The claimant gave evidence on her condition and the effect upon it of working shifts other than night shift. Her own evidence was supported by clear medical evidence and by an occupational health report instructed by the respondent. It was also corroborated by Tony Miller, who described having witnessed the effect of non-nightshift working on the claimant's health when she started at Cardonald in 2020; and the subsequent improvement in the claimant's health when her shifts were adjusted to night shift only. The evidence on this was overwhelming. It was sensibly and appropriately not challenged in cross examination and substantial disadvantage was conceded. We found the claimant an impressive witness. We noted that she made appropriate concessions and gave her evidence in a measured way.

64. Both Mr Miller and Ms Blair were sceptical of the rationale given by the respondent at J181 - 3 for concluding that night shift only rotas were not conducive to a SCN being able to undertake the full range of duties and responsibilities, as outlined in the job description and as would be required moving forwards. Mr Miller stated that this was not reflective of what he had seen and he disputed that working a night shift only rota had impacted or would impact on the claimant's ability to do her full range of duties and responsibilities. Taken to the stage 1 grievance outcome letter, and the various tasks associated with

personal development and playing a key part in a culture of continuous quality improvement and service development, Ms Blair said of the claimant: "*Kimberley has been NSO for several years and she does do all these things."* Referred to the list of additional activities in the fourth paragraph on J183 ("*project participation, for example, Adverse Event review meetings, clinical governance, team development, CPD and recruitment..*") Ms Blair's evidence was: *"Again she does do all these things and someone on late shift only would be in exactly the same position because the meetings are during the day. You'd have to want to attend and then we'd have to see if we could resource it and that is exactly the same for Kimberly."* Ms Blair made clear that if SCNs were being asked to attend meetings or events in non - working daytime hours, they would have to want to do it. "*It will be their choice between 9 and 4".* She stated that there were a lot of SCNs on late shift who would agree to attend meetings during daytime hours. She commented: "*Some of our staff are links and choose to attend meetings during the day but that is not because of their shift. They choose to*." This was not disputed by the respondent's witnesses.

65. There were conflicts between the evidence of the claimant and her witnesses and that of the respondent's witnesses. We have said more about how we resolved specific conflicts in the 'discussion and decision' section below. However, where there were conflicts, we generally preferred the evidence of the claimant's managers where this differed from that of the respondent's witnesses for the following reasons. Firstly, they made appropriate concessions readily. For example, Ms Blair readily conceded that an alternative to having to close a centre if there was no SCN on night shift was to ask an experienced Band 6 to step up. Secondly, as Ms Campbell pointed out, the CSMs are the people closest to what actually happens on each shift and also to the claimant's performance in her job. They have first-hand experience of the steps the claimant takes to perform the various tasks required of her and the extent to which she attends and can be expected to attend daytime meetings and events going forward. Since these are outside the normal hours of all the SCNs at Cardonald and would require the consent or co-operation of an SCN irrespective of shift, the claimant's approach to her role and professionalism were potentially relevant to the practicability of the adjustment given the respondent's demands. The CSMs are also currently involved in some of the duties the respondent aspires to pass to SCNs following Shift Review and when staffing permits.

66. By contrast, the Shift Review team were looking at the issue in a more general way. Whereas Ms Dawson gave the impression that there was (according to her modelling) overstaffing on the night shift, Ms Blair's evidence was "*We absolutely need Kimberly on night shift to keep the minimal staffing requirement*." We felt that some of the differences in the evidence came down to theory versus practice. Ms Blair stated: "*There's a difference between what's on paper and what happens*." Ms Campbell submitted that Mr Miler and Ms Blair see the impact of staff taking annual leave on nights and the understaffing within Cardonald, which causes them to struggle to fill the night shifts.

67. As Ms Campbell submits, Ms Dawson was occasionally reluctant to make appropriate concessions, for example that nights shifts are generally unpopular shifts, in contrast to the other witnesses. She was asked by Mr McGuire about the email Mr Miller had sent (J144) in relation to the claimant's NSO rota being required due to medical need/ disability. Asked what she thought of this email, her response was: "*I was very disappointed because we had done a lot of engagement around the requirements of the Shift Review and I was surprised there was no understanding from Tony Miller regarding why night shift only was not an appropriate arrangement for a SCN. We were unaware people were on NSO until recently and there shouldn't have been people on them, so it was disappointing there was no understanding that those working patterns were not appropriate*." We were struck by her unwillingness to consider any departure from her standard rotas and 'no NSO for SCNs' rule by way of an adjustment for a disabled employe as the following exchange illustrates:. Ms Campbell: "*You need someone on night shift?*" Ms Dawson answered: "*But we've got people on night shift.*" Ms C: "*If Cardonald needed someone to fill night shift?*" Ms D: "*Other people have been put on night shift. I would need time to schedule it out against the rotas and rotations. I know the cover and there are people scheduled on the night shift.*"

68. Ms Dawson testified that she had overall responsibility for the delivery of the Shift Review and had chaired the cross directorate working group. responsible for the shift review process, having co-authored some of the key documents. Understandably, she was keen to promote it. However, we agree with Ms Campbell that Ms Dawson appeared unwilling to accept deviation from it, wishing to avoid what she viewed as the problem of "bespoke rotas". Ms

Dawson had discussions with Joan Main in relation to whether NSO would be appropriate. Ms Dawson was also present at the stage 1 grievance with Mr Quinney as a 'subject matter expert'.

Discussion and decision

Time Bar - Is the claimant's reasonable adjustments claim time-barred?

69. Section 123 EqA deals with time limits. Mr McGuire submitted that the tribunal does not have jurisdiction to determine the claim because it was not brought within the period of three months starting with the date of the act to which the claim relates. Breach of a duty to make reasonable adjustments is normally regarded as a failure to do something. Section 123(3)(b) provides that: *"(b) failure to do something is to be treated as occurring when the person in question decided on it."* Sub-section 123(4) states that: *"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something — (a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it".*

70. Mr McGuire submitted that the time limit in a claim for a failure to make a reasonable adjustment in terms of s.20 EA 2010 starts to run from the time when the employer could reasonably have been expected to make the adjustment, unless there is either evidence of when a decision was taken not to make the adjustment or an act of the employer inconsistent with making the adjustment: Abertawe Bro Morgannwg Health Board v Morgan [2018] ICR 1194. He went on: "*In the present case, the Claimant asserts that she was first informed that she would have to work on a mixed rota on 14 October 2022: Claim Form para 33 [270]. This is the date of the "Shift Review Matching Outcome Letter" [140-143]. The Claimant was informed in that letter that she had been 'matched' to five new rota options, none of which was a nightshift only rota ("NSO rota"). The Claimant was asked to review the options and inform the Respondent of her preference. The letter notes that the Claimant had recently been given a NSO rota (which was different to her base rota). On this analysis, it is submitted that time started to run for the Claimant's claim in terms of s.123(1)(a) EA 2010 on 14 October 2022 because it was at that point that the Respondent could*

reasonably have been expected to make the adjustment now sought by the Claimant (to work a NSO rota at the Cardonald centre)."

71. In his additional written submissions handed to the Tribunal on 5 March 2024, Mr McGuire added that the respondent's letter dated 14 October 2022 was evidence that the respondent had decided not to make the adjustment sought by the claimant and/ or is an act that is inconsistent with making that adjustment. For the reasons given below, we do not accept this analysis, nor (given the terms of the relevant correspondence) do we accept the respondent's alternative submissions that time started to run on 18 October 2022 when Mr Miller sent an email requesting a NSO rota or on 21 October 2022 when the claimant made the same request.

72. Our reasons are as follows: In a typical reasonable adjustment claim, an employee will point to an adjustment her employer has failed to make which would have alleviated her disadvantage. Sometimes, the employer's failure to make the adjustment sought is inadvertent. This case is not typical in that way. As Mr McGuire submits, the claimant's CSMs had already made the adjustment for her in early October 2022 when they placed her on a NSO rota (J139) for health reasons. That adjustment remained in place throughout the events of this case. What we are dealing with in this case is a decision to rescind or remove an adjustment that was already in place. Effectively, a decision has been taken in this case to fail to make an adjustment in the future. This is not a case of inadvertent failure. In terms of section 123(3)(b) failure to do something is to be treated as occurring when the person in question decided upon it.

73. We analysed the facts as follows: On 14 October 2022 (J140), the respondent wrote to the claimant saying "*we are now able to match you to a rota*". The offer in the letter appeared to be based on an erroneous 'current rota' (J141). The letter did not impose a specific rota. It offered the claimant five rotas for her to choose from; four of them involved mixed shifts and one was a late shift only rota. It told her: "*We aim to communicate the new team lists mid November, once everyone has accepted a rota*." The letter did not say in terms that a decision had been taken that she could not continue working NSO. It did not say that her adjustment already in place was rescinded. The claimant continued to work a NSO rota (and was still doing so at the time of the tribunal hearing). The letter stated "*Of note, we understand that you have recently been given a*

nightshift only working pattern. Nightshift only rotas are not desirable for managers for a number of reasons, including role development opportunities being greater on mixed shift patterns. In recognition of these considerations, we have provided standard rota matches rather than nightshift only options, in addition to a single shift pattern of late shift only, to support your health." This wording, whilst expressing a view, was not informing the claimant that a decision had been taken that NSO was not permitted in her case. The letter then set out five proposed "new rota options" and asked the claimant to review the information and confirm which rota she accepted by 24 October 2022. The letter then stated: "*If you feel that this rota does not match your current working pattern, please speak to your Clinical Services Manager (CSM) in the first instance to discuss your concerns. After this, if you still feel it does not match your working pattern you have the right to request a review panel meeting within 14 days of this letter (Stage 1 of the Grievance Process-modified). Please email ShiftReview2@nhs24.scot.nhs.uk detailing the reasons for your request*." The next paragraph stated that "*Notice is hereby given to you from today's date of the intention to change your shift pattern, with a go live date of 9th January 2023".*

74. Since there were five options in the letter; since her agreement was being sought; and as there was a specific process (described as the right to request a review panel meeting) offered "*If you feel this rota does not match your current working pattern"*; the clear implication was that a decision about the claimant's rota going forward had not yet been taken. Thus we concluded that no decision to rescind the NSO adjustment had been taken by 14 October 2023. In the words of section 123(3)(b), it was not being suggested at this stage that 'the person in question' had decided to fail to continue the adjustment and the adjustment in fact continued while the decision about what to do was considered and subsequently made.

75. The claimant's email of 21 October 2022 (J145) to the Shift Review team gave them important medical information about why she was unable to accept any of the rotas she had been matched to. This information have would been essential to consider before making the decision whether to rescind or remove the adjustment.

76. On 12 December 2022, the Respondent's "Shift Review Team" emailed all SCNs, thanking them for their engagement with the Shift Review process so far

and explaining: "*There are a number of people at different stages of the process however, and we are continuing to support these staff as they move forward in agreeing a working pattern*." The email indicated the intention that all shift changes would be agreed and would commence on 6 February 2023. We accept that this email was sent to all staff and was not specific to the claimant and that the claimant's situation was being considered separately. However, it is clear that the process was to seek consent to changes at this stage.

77. The claimant met with Joan Main on 13 December 2022. At that meeting, the claimant explained why she needed to work a night shift only rota for health reasons. The ET3 states (J34 paragraph 16): "*In order to inform the Respondent's decision making process the Claimant was referred to Occupational Health (OH). An OH report dated 2 February 2023 was received which advised that, if operationally feasible, a nightshift only rota should be provided to the Claimant."* We considered that, having identified that it was necessary to refer the claimant to OH on 18 January 2023 "*in order to inform its decision making process*" it was unlikely that the respondent would have taken a decision to rescind the adjustment / or that it would it have been reasonable for the claimant to conclude that the respondent had decided to rescind the adjustment before it had sought input from OH. Having sought OH advice, Ms Main then reached an outcome decision which she sent to the claimant on 28 February 2023. She stated: "*As it stands, we are unable to offer you a night shift only rota*". We concluded that it was at this point that the decision was taken to fail to continue the claimant's adjustment of a NSO rota. Early conciliation notification was made on 26 May 2023. The early conciliation certificate was issued on 7 July 2023. The ET1 was presented on 4 August 2023. The claim is accordingly in time.

78. As will be clear from the foregoing discussion, we do not agree with Mr McGuire that section 123(4) is engaged in this case because the evidence about when the decision to rescind the adjustment was taken indicates that it was taken on 28 February 2023. However, in case we are wrong about that, we address his submissions on the point. Since the letter was conditional on the claimant's agreement to one of the rotas offered and as it provided a right to a review panel in the event that it did not match her current working pattern, we considered that the letter was not, at this stage an act inconsistent with making the adjustment for the purposes of subsection 4(a). The letter of 14 October 2022 specified the

claimant's current rota erroneously. It was seeking agreement and left open the possibility of agreeing an alternative and a process for doing so. In Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288, the Court of Appeal (referring to the predecessor provision) said this: *"However, para. 3(4), while it allows for evidence as to when the person in question did decide on the deliberate omission, goes on to define, in the absence of such evidence, when the person is to be taken as having decided upon the omission. There are two alternatives. The first, when he does an act inconsistent with doing the omitted act, is fairly self-explanatory. It may or may not be the case that, by doing the inconsistent act, the person in question realised that he was irrevocably omitting to do the omitted act, but it is fair in that situation to treat him as having made a deliberate omission because it is no longer open to him thereafter to do the omitted act. It is understandable that time should run from that moment."* The letter of 14 October 2022 does not irrevocably rescind the NSO adjustment. It leaves it open to agree to it as part of the review panel process offered (and invoked by the claimant). We do not therefore agree that it would have engaged subsection (4)(a) in October 2022 as Mr McGuire submits.

79. Turning to subsection (4)(b), in Abertawe Bro Morgannwg Health Board v Morgan [2018] ICR 1194, at paragraph 14 Lord Leggatt said this: *Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to s 20(3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was*

in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired.

15 This analysis of the mischief which s 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time."

80. In our view, a reasonable employee - having regard to the facts known by her at the relevant time and especially the terms of the correspondence - would understand from the 14 October 2022 letter that she was being consulted and asked to reach an agreement about a rota. The claimant followed the directions in the letter for employees who did not feel the rota matched their current working pattern. She spoke to her CSM, Tony Miller who advocated for her and then she set in train the "*review panel meeting*" process. This process used a modified version of the grievance process but it appeared from the letter to be part of the shift review and not - strictly speaking - an ordinary grievance. We do not agree with Mr McGuire's statement that the Claimant was or ought to have been aware on 14 October 2022 that the Respondent's position was that she would not be offered a NSO rota as a Senior Charge Nurse ("SCN"). The letter of that date was consultative and seeking agreement. It was not imposing at that stage a particular rota or stating a final position in the absence of the claimant's agreement. On the basis of the facts known to the claimant, the point at which it became clear that the respondent was not going to address the disadvantage by making the adjustment was the outcome decision letter on 28 February 2023.

Just and equitable extension

81. In the event that we are wrong in our conclusion that the claim was presented in time, we considered whether it would be just and equitable to extend time. Mr McGuire submitted that the Claimant has not established that the tribunal should exercise its discretion to allow the claim to proceed on 'just and equitable' grounds. He cited the recent decision of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, in which the Court of Appeal held that tribunals should not treat the 'Keeble factors' (British Coal

Corporation v Keeble [1997] ICR 336) as the starting point for its approach to the just and equitable extension and held that the best approach for a tribunal in exercising the discretion is to assess all the factors in the case that it considers relevant including in particular the length of and the reasons for the delay.

82. Mr McGuire submitted that the reasons for the claimant's delay in presenting the claim were unclear. She had the assistance of two experienced Clinical Service Managers ("CSMs") in advancing her position, along with the assistance of her RCN representative, Mr Sheriff-Scott. He argued that the length of the delay was significant, submitting that this is not a case where the claim was presented one or two days 'late' or shortly after the expiry of the statutory time period. The delay in presenting the claim had been substantial. He stated that by his calculation, Acas should have been notified for EC purposes at the latest by 20 January 2023, but were not contacted by the claimant until 26 May 2023. He submitted that the respondent had been caused substantial prejudice in defending the claim because one of the remedies sought by the claimant – a recommendation that she be allowed to work a NSO rota at Cardonald – would have implications for the shift review process and the organisation of acceptable work rotas at Cardonald. He submitted that in all the circumstances, the claimant had not established that it would be just and equitable to allow the claim to proceed.

83. For the claimant, Ms Campbell argued that it would be just and equitable to extend time limits. She cited the dictum in Abertawe that the tribunal has been given the widest possible discretion in relation to the extension of time (para 18) and this discretion is intended to be broad and unfettered (para 25). She stated that the Court of Appeal had gone so far as to say that there was no justification for reading into the provision that there is any requirement for the Tribunal to be "satisfied that there was a good reason for the delay" before it could reach the view that time should be extended on the basis that it was just and equitable to do so. Factors which would be relevant are the length and reasons for the delay and the prejudice suffered by the respondent. Ms Campbell submitted that the respondent had suffered no prejudice by the claim being lodged when it was. The grievance process was ongoing even after the claim was submitted; this was very much a live situation for the respondent. On the contrary, the claimant would suffer great prejudice were the claim not to be allowed to progress

because she is still in employment and is being told that she must either accept a rota which will harm her health, or face redeployment to a lower grader role.

84. We accept, as Mr McGuire submits, that the burden is on the claimant to persuade the Tribunal to extend time (in the event that this is required). In Abertawe the respondent employer challenged the tribunal's decision that it was just and equitable to extend time, arguing that, in the absence of an explanation from the claimant as to why she did not bring her claim in time and an evidential basis for that explanation, the tribunal should not have done so. The Court of Appeal held that the tribunal did not err in concluding that it was just and equitable to extend time, holding (as summarised in the rubric) that:

"*The discretion given by s 123(1) to the employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard…*"

85. We considered the length of and reasons for the delay. It is correct that the claimant did not give specific reasons as to why the claim was lodged when it was. As set out above, having applied the 'omissions provisions' of section 123 to the facts of this case, the tribunal reached the view that the claim was in time. If Mr McGuire is correct that the claimant ought to have notified Acas at the latest by 20 January 2023 - rather than on 26 May 2023 (which would be a delay of just over four months) - then the time limit issue is a difficult one to judge.

86. With regard to the apparent reason for any delay, a process which involved a panel review meeting was embarked upon by the claimant in response to the letter of 14 October 2022. The process was subject to significant delays which were not of the claimant's making and appeared to have been caused mainly by the respondent, with the result that the claimant did not receive the outcome until 28 February 2023. In the meantime, the adjustment continued in place. Considering the details of this process, the claimant spoke to her CSM, Mr Miller as directed in the letter of 14 October. Mr Miller emailed the respondent's shift

review team on 18 October 2022 stating that he fully supported the claimant working a NSO rota which was necessary for medical reasons. The claimant herself then emailed the shift review team regarding the suggested rotas on 21 October 2022. The meeting she was offered by the respondent was on 13 December 2022 (almost two months later). She attended that meeting. On 18 January 2023, more than a month after that meeting, the respondent referred her to OH. The respondent received the OH report on 2 February 2023. However, the shift review decision was not provided to her until 28 February 2023. In these circumstances, the delay (and the failure to lodge the claim in January 2023) appeared to have been caused partly by the respondent taking an unreasonably long time to process the panel review and make a decision. With regard to the potential merits of the claim, the tribunal has had the advantage of hearing all the evidence and the claim has ultimately succeeded.

87. The prejudice to the claimant in not extending time would be the loss of the opportunity to make a claim that has good prospects of succeeding with significant consequences for either her health or her career. With regard to the prejudice to the respondent, Mr McGuire submits that this is substantial. He states: "*There is an obvious (and relevant) prejudice to the Respondent in having to defend a claim which is 'out of time'. One of the remedies sought by the Claimant – a recommendation that she be allowed to work a NSO rota at Cardonald – will have implications for the shift review process and the organisation of acceptable work rotas at Cardonald*." Having carefully considered the above factors raised by the parties relevant to our decision whether to extend time, we have concluded that (if the claim is indeed out of time) it is just and equitable to extend time in this case. We accept that there is a level of prejudice to the respondent in dealing with a claim out of time. However, any delay could have been avoided or minimised had they dealt with the panel review process more quickly. The delay did not affect the respondent's ability to call witnesses, nor did it appear to affect the witnesses' ability to recall events. Clearly the effect of the recommendation sought has implications for the shift review process and the organisation of rotas at Cardonald. However, what is sought by the claimant is essentially a continuation of the status quo. The prejudice which would be suffered by the claimant in refusing to extend time would be the loss of a successful claim with consequent implications for either her health or her career.

Is the duty engaged?

88. In Environment Agency v Rowan [2008] IRLR 20 the EAT gave general guidance on the approach Tribunals should adopt in reasonable adjustment claims. The EAT held that "*An employment tribunal considering a claim that an employer has discriminated against an employee .... by failing to comply with the ... duty must identify:*

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant.*

They observed that "*Unless the employment tribunal has identified the four matters at (a)–(d) it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."*

89. Section 20 Equality Act 2010 states that where a provision, criterion or practice ("PCP") of an employer's puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid that disadvantage. The parties are agreed that the claimant was a disabled person by virtue of Crohn's Disease during the relevant period, being 14 October 2022 to 4 August 2023. It is also accepted that the respondent had knowledge of the claimant's disability at the relevant time. It did not appear to be in dispute that the respondent had knowledge that the claimant was likely to be placed by the PCP at the substantial disadvantage referred to and we so find.

90. It was not in dispute that the respondent applied to the claimant a PCP that night shift only rotas would not be a standard working pattern for SCNs. As is confirmed at paragraph 3.65 IDS Handbook on Disability (2023 edition), with

reference to the EHRC Code of Practice on Employment, a PCP may include decisions to do something in future.

91. Having heard the evidence of the claimant, the respondent sensibly accepted that the PCP would put the claimant at a substantial disadvantage compared to non-disabled persons in that working a rota other than night shift would have a negative effect on her health and well-being. The claimant's evidence on this issue was not challenged and the substantial disadvantage is set out in the findings in fact above. The non- disabled comparators are non-disabled SCNs employed by the respondent. We find (and the respondent accepts) that the duty to make a reasonable adjustment is engaged in relation to this PCP that night shift only rotas would not be a standard working pattern for SCNs. As set out above, we find that this PCP was applied to the claimant on 28 February 2023.

92. (The claimant had put forward an alternative case that the respondent had applied to her a PCP of requiring her to work a mixture of shifts. Mr McGuire submitted that although the respondent offered the claimant the opportunity to work a variety of mixed shift patterns in its 'matching letter' (J140-143), it also offered the opportunity to work a late shift only pattern. We agreed with Mr McGuire that the respondent did not therefore apply a PCP to the claimant that she was <u>required</u> to work a mixed shift rota and this alternative case does not succeed.)

Is the proposed adjustment/ step reasonable?

93. The duty, once triggered, is *"to take such steps as it is reasonable to have to take to avoid the disadvantage."* The Tribunal must look at whether the adjustment proposed by the claimant is itself reasonable. The test is an objective one. The sorts of factors which a Tribunal might consider in making that assessment are listed in paragraph 6.28 of the EHRC Code of Practice on Employment (2011):

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;

- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work]; and
- the type and size of the employer.

94. We did not understand it to be in dispute that the step or adjustment of allowing the claimant to work a night shift only rota has been entirely effective in preventing the substantial disadvantage. The relevant findings in facts are set out above. (The claimant's evidence on this point was not challenged.) As Ms Campbell submits, the claimant has been working night shifts only since the summer of 2021 and has felt the benefit of doing so in respect of better management of her disability and the ability to maintain an excellent attendance record.

95. The claimant points out that the adjustment is one which has already been made. It was in place since before the Shift Review. On the evidence of her line managers, the adjustment is practicable and works well for the respondent and this is still the case now that all the other staff at Cardonald have gone through the Shift Review with most of their post Shift Review rotas having been in place since February 2023.

96. By contrast, the respondent argues that the adjustment is not practicable and is therefore not a 'reasonable adjustment' in terms of s.20(3) EA 2010. Mr McGuire states that there are two reasons for this: Firstly, he submits that a NSO work pattern for an SCN does not meet the scheduling requirements for the SCN role due to: the minimal requirement for SCNs on nightshift locally and nationally, as compared to other roles; the standard requirement for all SCNs to work 5 out of 8 weekends (thereby – he submits - preventing the Claimant working the night shifts of another SCN on a permanent basis); and a NSO working pattern is only compatible with other rota types for 2 out of 8 weeks, resulting in over or understaffing in the remaining 6 weeks of a standard 8 week rota. There was a fundamental conflict in the evidence on this first submission as between the claimant and her CSMs and the respondent's witnesses.

97. As stated above, the claimant is currently working a NSO rota (J139) which (on its face, and as explained in the testimony of the claimant's line managers) fulfils the respondent's parameters The claimant does work 5 out of 8 weekends; She is not scheduled to work more than 5 shifts in a row; She has 80 – 90% alignment with the other members of her team; There is not – in practice - under or overstaffing as a result of the claimant working this J139 shift rota because up to 8 SCNs at Cardonald cannot or do not work night shift. The claimant's managers accepted that one of the main aims of the shift review was to align resources to meet patient demand. All witnesses accepted that there is a lower call volume overnight during a NSO rota. However, the evidence of those 'at the coalface' was that there is a corresponding reduction in staff numbers at night, so that the correct ratio of 1 SCN to 15 call handlers is observed. Ms Blair testified that if there are more SCNs on the rota for night shift than required, one of them will be moved to late shift or early shift (if at the weekend).

98. The way the respondent went about its shift review is relevant by way of background only (since we are concerned with the practicability of the adjustment and not the process the respondent used) but one problem appeared to be that those conducting the review did not build the adjustments that were already in place for disabled employees into the system up front. With respect to Ms Dawson, she left us with the impression that she gave no thought to this at all and did not regard it as important (see paragraph 67 above). Instead, the Shift Review team built their standard rotas and then, in the claimant's case used the standard system as a justification for removing the adjustment – a sort of 'computer says no' approach. Asked by Mr McGuire to explain the rationale at J181 (set out in full at paragraph 59 above but briefly, why nightshift only working patterns for SCNs do not meet the scheduling requirements for the role), Ms Dawson stated: "*There's a rota which shows that in the bundle (J210) but basically it's the way the night shift is scheduled. Each rota has Monday to Wednesday, Thursday nights week 4 and Thursday to Sunday week 5 and each standard rota has that pattern across 18, 24, 30 and 37.5 hours. As staff rotate through each week of that rota, the same number of staff each week, for someone to do night shift only in place of a colleague they would require that exact pattern to repeat. As that repeats you then get 8 days scheduled in a row for the full time night shift worker because from Thursday to Sunday and start what the colleague is doing on the Monday.*"

99. Ms Dawson relied upon the computer print outs she had produced at J208, J209 and J211. In cross examination, she was referred to J209 (which is headed: '*Impact of one NSO SCN ono 5/8 weekend pattern meeting shift review parameters*'). She was asked whether the document factored in the people taken off night shift at Cardonald for medical reasons. Her answer was: "*This is an example of the standard so it shows why you could not put one in and one out. This is not the current staffing at Cardonald on the shift review."* In relation to J210 (the rota Ms Dawson had produced which demonstrated a breach of the parameters), she asserted "*This is the rota you're required to work if you're working in place of a colleague. This is the fact of the situation. There's no option around that."* It was unclear what assumptions had been used to produce the rota and print outs. What was clear was that Ms Dawson had not factored into her considerations and her documents at (J208 – 211) the 8 SCNs at Cardonald who do not work night shift. This was clear both from her evidence and because she described J210 as "*the rota that someone would be required to work if doing night shift in place of a colleague"*.

100. Aside from the assertions by the respondent's witnesses (which we did not accept), there was no persuasive documentary evidence to suggest that the rota the claimant is actually working at J139 was incompatible with other rota types. It was asserted to be so by Ms Dawson but no persuasive rationale was given. Against this, the claimant's managers testified that the claimant's team alignment is 80-90% and that the rota at J139 has been working well since October 2022 notwithstanding that all the other SCNs at Cardonald have now been on their new Shift Review rotas since around February 2023. The key to its success seemed to be that up to 8 SCNs at Cardonald cannot or do not work night shifts and the claimant is accordingly the mainstay of the night shift at the centre. In the circumstances, we preferred the evidence of the claimant, Mr Miller and Ms Blair firstly because they were closer to the action; and secondly because of the lack of cogent supporting evidence for Ms Dawson's stance and the fact that she did not adequately explain the assumptions underlying her conclusions. With the exception of Mr Moore, the respondent's other witnesses echoed Ms Dawson's evidence but their basis for doing so appeared to be what Ms Dawson had told them.

101. Mr McGuire's second 'practicability' point was that the national Shift Review process undertaken by the respondent seeks to change the respondent's operational model and working practices. In particular - he said - Phase 2 of the Shift Review seeks to put in place measures that would enable SCNs to 'work to their role' and fulfil all aspects of that role. He submitted that it had become clear in the Shift Review that the SCN role had become concentrated mainly on shift management and clinical supervision to the detriment of other important aspects of the role including personal development and playing a key part in a culture of continuous quality improvement and development of the overall service provided by NHS 24. He referred to the paragraph 4.2.2 of the Strategic Business case (J104) set out above.

102. We wish to make clear that we accept - of course – that it is an employer's prerogative to organize its operations as it sees fit. It is not for this Tribunal to express a view on its strategy or business case and we do not presume to do so. An employer may decide (as they have done in this case) to have a general rule that NSO rotas will not be a standard working pattern for SCNs. However, if they introduce such a rule, they require to think about whether to make an adjustment where its application will cause substantial disadvantage to a disabled employee by removing an adjustment made for them. Mr Moore stated that when he agreed to the rule he had not been aware that there were any SCNs working NSO rotas.

103. The issue for us on this point is the practicability or otherwise of the proposed adjustment standing the demands of the SCN role present and future. We asked ourselves whether the claimant would be unable to fulfill all aspects of the SCN role on a NSO rota. There was another major conflict in the evidence on this issue as between the claimant and her managers and the respondent's witnesses. As Mr McGuire submitted, a consistent theme of the evidence given by the respondent's witnesses (Nicola Dawson, Andrew Moore, Joan Main and Alasdair Quinney) was that a NSO working pattern would not enable an SCN to carry out the full duties and responsibilities of their role. This was disputed by the claimant and her managers, Jacqueline Blair and Tony Miller.

104. Mr McGuire submitted that this was clearly demonstrated by reference to the "concurrent" and "non-concurrent" activities listed at (J135-136). Concurrent activities are those which a SCN can undertake within their clinical supervision

time. The non-concurrent activities are those which, overall, cannot properly be carried out by a SCN during clinical supervision time. Mr Moore explained that they require allocated time 'off the floor' to be carried out fully and properly. As Mr McGuire submitted, the evidence of the respondent's witnesses was that those activities could not be properly discharged by a SCN on a NSO working pattern because, to a large extent, they involve activities that take place during daytime hours, Monday to Friday.

105. However, there was a logical problem with the respondent's case on this point: the respondent's Cardonald Centre is an out of hours centre. It is quite simply not open and operational on weekdays. Thus, as accepted by all witnesses, meetings and events that take place during daytime hours Monday to Friday are not within the normal working hours of any SCN at Cardonald. The fact is that for any Cardonald SCN to carry out those of the non-concurrent activities (J136) that occur during weekday daytime hours, that SCN would either have to agree to change their normal working hours to be there (by agreeing to 'slide' a shift) or agree to attend out of normal hours on overtime or in return for time off in lieu. The claimant working NSO is not, in our view in a significantly different position from any other SCN at Cardonald in relation to attending day time meetings.

106. The respondent's witnesses accepted, that the attendance of any Cardonald SCN at weekday meetings would require them to choose to change their hours. By way of example, the planning meetings all take place during the day. The service management meeting is weekly at 12.30 and the daily planning meetings are at 2.30pm on Teams. There are often reasons why people choose to work out of hours. An SCN on a late shift may have caring responsibilities and be unable to attend earlier than their normal shift. The evidence of the claimant and her line managers (which we accepted) was that she has been happy to attend work during the day for meetings as and when required. Often these take place online as opposed to in person. As Ms Campbell submitted, the Claimant's commitment to coming in on a voluntary basis may be greater than that of a SCN on late shift only who cannot attend meetings before their designated start times.

107. We agreed with Ms Campbell's observation that the respondent's concerns with people coming in during the day appeared to relate to burnout and frustration ultimately leading to increased absence levels and lower morale (J104). However, it would be a cause of greater burnout and frustration, for the claimant

were she to be denied an adjustment and to be placed on a mixed shift or late shift only pattern. For the reasons given below, the claimant is, in our view in the same position as any other Cardonald SCN would be who was not on the rota for any particular future meetings; something which is likely to happen frequently given that Cardonald is an out of hours centre.

Flexing late shifts

108. In an attempt to answer the point of logic that there was no difference between a SCN working a late shift rota and a SCN working a NSO rota in terms of availability for duties during the day - there being no weekday daytime rotas at Cardonald - Mr McGuire submitted that Ms Dawson had given evidence that 'an important element of 'flex' or flexibility had been built into the Shift Review that assumes that a back shift will be 'slid' to enable a SCN to attend meetings or carry out activities that habitually happen in daytime hours'. (Submissions paragraph 28). In this way, Mr McGuire sought to make a distinction between the claimant on nightshift and other SCNs working weekday late shifts. He submitted that "*the expectation that SCNs working on a backshift rota will attend meetings and activities during the day is therefore built into the Shift Review*". (We were not taken to any part of the voluminous Shift Review documentation where this was stated and the EJ checked with Mr McGuire during submissions that it was not contained in the documentation before us in evidence, which he confirmed.)

109. We considered Ms Dawson's evidence regarding this 'element of flex'. In chief, Ms Dawson's evidence on this was: *"The planning meeting happens at 2:00pm. We discussed as a team hard wiring into the rotas rotating members of staff to start at 2:00pm to attend those meetings. The group felt that that was too prescriptive. They wanted the ownership and responsibility for them to decide themselves when they would attend so we agreed not to adjust the rotas and that staff would flex."* This was picked up by Ms Campbell in cross examination: Ms C: *"Regarding meetings before 4pm, if there was really an expectation of SCNs attending meetings, they would have been offered a shift pattern to accommodate?* Ms D: "*The working group agreed not to change start times because it would affect pay and they would flex".* We noted that it was conceded by all the respondent's witnesses that the flexing in question would require to be by choice or agreement of the SCN in question. There may well have been an

expectation by the Shift Review team that SCNs on late shift would 'flex' their shifts but this did not appear to be based on any sort of legal footing and it was clearly not 'hardwired into the rotas' in such a way as to enable the respondent to rely on it. Ms Dawson's 'shift slide argument' was offered as a differentiation between NSO and the late shift only adjustment offered to the claimant, which, we accepted would not alleviate the disadvantage. We did not find it convincing as an explanation for a decision to remove an adjustment that had been put in place and we therefore did not accept Mr McGuire's submission that on this point.

110. Mr McGuire submitted that sliding shifts could not work for an SCN on a NSO rota because it would require a far greater 'slide' in the shift of a SCN on a NSO rota to attend meetings in the afternoon. He went on that there is also less SCN resource on a nightshift which could accommodate a SCN sliding off that shift, as opposed to a late shift on which many more SCNs are scheduled. We did not accept that submission either because the evidence was that there are up to four hours' cross over (9.30pm to 1.30am) when the late shift SCNs are still present and the night shift SCN has started. The claimant also testified that she had, on occasions slid her shift to attend a morning meeting. Also, some of the meetings an SCN could be required to attend occur in the mornings, which would make a shift slide difficult for a late shift SCN but possibly easier for an SCN on night shift. No SCN at Cardonald works daytime hours Monday to Friday.

111. For all the reasons given above, in relation to the issue of whether - whilst working an NSO rota - the claimant meets the NHS 24 Competency Framework and fulfils all the necessary requirements of her role and whether she will be able to continue to do so going forward, we preferred the evidence of the claimant and her managers to that of the respondent's witnesses who were much further removed from the claimant's day to day performance. We refer to the detailed findings in fact above to that effect.

112. The adjustment the claimant seeks is entirely effective in preventing the disadvantage, enabling her to continue in the SCN role that she loves and that - according to her managers - she excels at. The conclusion is supported by the OH and other medical advice the respondent received. With regard to practicability and the question of any disruption that would be caused by making it, the adjustment is already in place. All that is required is for the respondent to

leave it in place. We were not persuaded by the respondent's case on practicability for the detailed reasons given above. Put shortly, weekday duties are not within the normal working time of any SCN at Cardonald. The claimant has nevertheless made herself available to do them and will continue to do so. The respondent seeks to make a distinction between the claimant and all the other SCNs at Cardonald on the basis that 'an element of flex is built into' the late shift rota' but this appeared to us from the evidence to be little more than a notional expectation on the part of a working group. It was unclear what it meant in any practical sense. Ms Dawson herself conceded that to slide a late shift into the day time to attend a meeting would require the employee's consent just as it would require consent for the claimant to either slide a nightshift into the morning or attend a meeting in person or online during weekday hours. We did not conclude that the difference was such as to make the claimant's adjustment impracticable or justify the removal of the claimant's adjustment with all that that would entail for her and her managers. On evidence of her line managers, which we accepted, the adjustment which is already in place works well for the respondent, meets the respondent's parameters, delivers on team alignment and would not involve disruption (since it is already in place). As Ms Campbell submits, the respondent is a large public sector employer with substantial resources available to it. Weighing all the factors as discussed above, we conclude that the adjustment is reasonable and that accordingly the respondent's decision to withdraw it is unlawful.

Remedy

Injury to feelings

113. The claimant is still in employment and the adjustment has remained in place pending the outcome of this case. There is accordingly no financial loss. The claimant claims compensation for injury to feelings. We rely on the findings in fact above in relation to the distress the respondent's decision to withdraw the claimant's adjustment has caused. Over a period from 14 October 2022 to the date of the Tribunal hearing, the claimant experienced stress and had to increase the medication she takes to control her Crohn's. This medication causes her to become immunocompromised. As a result, the claimant became more prone to illness and she developed facial abscesses and a chest infection. She also experienced anxiety for which she consulted her GP on 9 October 2023.

114. The claimant's evidence was supported by her medical records (J225) and a letter from her specialist IBD nurse, Louise Martin dated 27 January 2023 (J166) which stated: "*In April 2022, her faecal calprotectin was below 30, which shows no inflammation within her bowel, and she was keeping well at this time. Her faecal calprotectin in November jumped to greater than 1800, showing that there was ongoing inflammation, and we had to increase her tablets at this time……."* Her evidence was also corroborated by her managers.

115. Ms Campbell submitted that based on the claimant's evidence of her distress, as confirmed by her managers, the ongoing nature of the discrimination here warrants an award in the region of £20,000. We agree with that submission. We assess the case as being in the middle of the middle Vento band applicable at the relevant time. The relevant band is £11,200 to £33,700. The claimant's symptoms were exacerbated by stress over a lengthy period.

Interest on awards

116. Under Regulation 2 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 the Tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. In the absence of any agreement by the parties regarding how much interest to award, interest is calculated under the Rules set out in Regulation 3. For injury to feelings awards, the interest runs from the date of the act of discrimination complained of and ends on the day the Tribunal calculates interest ('the day of calculation'). In Scotland, regulation 3(2) provides that interest accrues at the rate prescribed from time to time by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1975. The current figure is still 8%, set by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1993.

117. With regard to interest on the injury to feelings award, 8% of £20,000 gives an annual figure of £1,600 and a weekly figure of £30.769. The initial communication indicating the adjustment might be withdrawn occurred on 14 October 2022, with the decision that it *would* be withdrawn being intimated on

28 February 2023. The calculation day is 18 March 2024 (74 weeks). 74 x £30,769 = £2,277, rounded to the nearest whole pound.

Recommendation

118. The claimant seeks a recommendation that: *"she ought to permanently, work exclusively on night shifts".* Section 124(3) Equality Act 2010 provides that: "*An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate*". Since the adjustment is already in place, the recommendation simply recommends that it be continued. The word 'permanently' appears superfluous but also capable of meaning 'forever' which seems inappropriate. We think a recommendation: "*that the respondent should allow the claimant to continue to work exclusively on night shifts without demotion*" is better.

M Kearns

Employment Judge

19 March 2024
Date

Date sent to parties

I confirm that this is the Tribunal's Judgment in the case of Ms K Black v NHS 24 4104202/2023 and that I have signed the Judgment by electronic signature. M Kearns