EMPLOYMENT TRIBUNALS

Claimant: Ms M Couperthwaite

Respondent: Hilton Nursing Partners Limited

Heard at: Watford Employment Tribunal (In Public; In Person)

On: **12, 13, 14, 15 March 2024**

Before: Employment Judge Quill; Mr I Murphy; Mr A Scott

Appearances
For the Claimant: In Person
For the respondent: Mr A Pickett, counsel

JUDGMENT and reasons having been given orally on 15 March 2024, and written reasons having been requested after the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

Introduction

1. This is a claim by a former employee, who brings claims of breach of contract, discriminatory dismissal, and of disability discrimination and harassment.

The Hearing

2. This was an in person hearing, save for two witnesses who attended by video, and that, on Days 3 and 4, with our permission, the Claimant attended by video.

3. There was an agreed bundle in which last page was 148. There were various inserted pages within that numbering, and we added some additional pages during the course of the hearing.

4. There were two witnesses on the Claimant's side:

4.1 The Claimant

4.2 Ms Amy Evans (by video)

5. There were 4 on the Respondent's side

5.1 Ms Kelsey Ford (by video).

5.2 Ms Lisa Selling

5.3 Ms Dawn Walton

5.4 Ms Joanna Stevens

6. Each of them had produced a written statement, which they swore to (with amendments where necessary), and answered questions from the other side the panel.

7. In the Claimant's case, there was also an additional statement, being her impact statement, at [Bundle 52.1], which she also swore to.

8. Following the preliminary hearing, on 23 June 2023, a case management summary and list of issues had been produced. That had not been included in the bundle, but we arranged for printed copies to be supplied to the parties.

9. The Claimant's solicitors had represented her at that telephone hearing. The Claimant had not attended. Her solicitors are still on the record, and their contact details are still to be used when serving documents on the Claimant. However, she and they had agreed that she would represent herself at this hearing. She did not recall having seen the summary and list of issues before.

10. Mr Pickett had not seen the item before. On reading it, he very fairly and appropriately pointed out that it did not specifically mention the complaints in paragraph 8 of the Grounds of Complaint:

> The Claimant contends that withholding training from her because of her age and health amounts to direct disability and age discrimination contrary to s.13 of the Equality Act 2021.

11. That was therefore added. The list of issues, therefore, was as follows.

> <u>Section 15 EqA 2010 – Discrimination Arising from Disability</u>
>
> 1. The Claimant contends that the following arise from her disability:
>
> a. The inability to wear a blue face mask for long periods of time; and
>
> b. The inability to wear a blue face mask during a coughing / choking episode.

2. Did the Respondent dismiss the Claimant due to something arising out of her disability – due to her not being able to wear a face mask during a coughing / choking episode?

3. If so, did the dismissal amount to unfavourable treatment?

4. If so, did the Respondent know, or could it have been expected to know, that the Claimant was disabled at the material time?

5. If so, has the Respondent proved that the treatment complained of was a proportionate means of achieving a legitimate aim?

Section 21 EqA 2010 – Failure to Make Reasonable Adjustments

1. What is the PCP that the relevant Respondent applied to the Claimant?

2. The Claimant relies upon the following PCPs:

a. The requirement to wear a blue face mask under the HNP Coronavirus Policy; and

b. The Disciplinary Policy.

3. Did that PCP place the Claimant at a substantial disadvantage in comparison to a person who is not disabled?

4. Did the relevant Respondent know, or could it reasonably have been expected to know, that the PCP placed the Claimant at the substantial disadvantage?

5. The adjustments the Claimant contends should have been made are:

i. Relaxing the requirement to wear a blue face mask when the Claimant was experiencing a coughing / choking episode;

ii. Allowing the Claimant to wear a full face / full head visor or respirator;

iii. Dis-apply the Disciplinary Policy for any conduct related to the Claimant's disability; and

iv. Alternatively, treat the Claimant's conducts on that occasion as one of medical capability.

6. Did the relevant Respondent fail to take such steps as would be reasonable to avoid the disadvantage?

Section 26 – Harassment (Disability)

1. Did the Respondent subject the Claimant to unwanted conduct?

2. The Claimant relies on the following acts:

a. In March 2021, Joanne Stevens remarked that the Claimant could not undertake Team Leader training due to her health issues [GoC 7];

b. From March 2021 until November 2021, Joanne Stevens withheld Team Leader training from the Claimant due to the Claimant's health issues [GoC 8];

c. In May 2021, Joanne Stevens breached the Claimant's confidentiality and disclosed details of the Claimant's health issues to Maggie Stimson and other team members [GoC 10];

d. In September 2021, Joanne Stevens breached the Claimant's confidentiality and disclosed to Maggie Stimson and other team members that the Claimant "has found another lump in her breasts" [GoC 10];

e. On 15 November 2021, summary dismissal [GoC 25]; and

f. From 15 November 2021, Sonny Dhatt failed to deal with the Claimant's Grievance regarding discrimination and her Appeal.

3. If so, was this unwanted conduct related to the Claimant's age?

4. If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

5. If so, was this unwanted conduct related to the Claimant's disabilities (breast cancer / coughing / choking conditions)?

Section 26 – Harassment (Age)

1. Did the Respondent subject the Claimant to unwanted conduct?

2. The Claimant relies on the following acts:

a. In March 2021, Joanne Stevens remarked that the Claimant was too old for Team Leader training [GoC 7];

b. From March 2021 until November 2021, Joanne Stevens withheld Team Leader training from the Claimant due to her age [GoC 8];

c. On or about 31 October 2021, Kelsey Ford remarked that people over 60 years should not be allowed to drive and should have their licence taken away [GoC 11];

d. On or about 31 October 2021, Kelsey Ford remarked "Well back in your day it was probably free…" [GoC 12]; and

e. From 15 November 2021, Sonny Dhatt failed to deal with the Claimant's Grievance regarding discrimination and her Appeal.

3. If so, was this unwanted conduct related to the Claimant's age?

4. If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Direct Discrimination

If the corresponding harassment complaint does not succeed, did the Respondent withhold team leader training from the Claimant? If so, was that:

a. less favourable treatment because of age?

b. less favourable treatment because of disability?

Wrongful Dismissal

1. Whether the Claimant was guilty of gross misconduct?

2. If not, how many weeks' notice is the Claimant entitled to?

Remedy

1. If any of the Claimant's claims succeed, what Remedy, if any, should be awarded for:

a. Injury to feelings;

b. Loss of income; and

c. Interest.

ACAS Uplift

1. Whether the Respondent's failed to comply with the ACAS Code on Disciplinary and Grievance procedure?

2. If so, to what extent, if any, the Compensatory award should be increased, up to 25%?

The findings of fact

Background and the early stages of the Claimant's employment

12. The respondent is a healthcare provider which provides support to patients who have been discharged from hospital and patient assessment and recovery programs.

13. The claimant first did work for the respondent in around December 2018, as a personal nursing assistant.

14. In 2020, she was appointed to the role of assessor.

15. In January 2021 she was promoted to the role of cluster assessor.

16. Joanna Stevens started working for the respondent in around November 2017. She worked as an assessor until around November 2020 when she was promoted to team leader. At that time, she became the claimant's line manager.

17. Prior to working for the respondent, in around 2014, the claimant had been diagnosed with cancer. She had a significant amount of treatment for that cancer.

18. The Respondent was aware of the cancer from the outset of the Claimant's employment. Ms Stevens was not aware of it at that time, as she was not the Claimant's line manager at the time.

19. It is common ground between the parties that the Claimant's cancer meets the definition of disability, as set out in the Equality Act 2010 ("EQA").

20. During the time she was working for the Respondent, the claimant has regular checkups and hospital appointments. Our finding is that this was not a source of any friction between her and the respondent, or her and any of her colleagues.

21. Ms Stevens had not been aware of the claimant's cancer until she became the claimant's team leader (in November 2020).

22. Our finding is that the was never a time when Ms Stevens shared any details of the claimant's 2014 cancer diagnosis or the treatment she had for it with any of the claimant's colleagues.

23. In January 2021, Ms Stevens invited the claimant to a sickness disciplinary meeting which was held on 28 January 2021.

    23.1 The claimant waived the right to have a representative. Dawn Walton attended as well. Dawn Walton is a workforce adviser on the HR team. She has worked for the respondent since around 2016.

    23.2 The decision was that the claimant's absences had hit the trigger. The claimant was given a first stage written warning due to last for a period of 12 months.

    23.3 As accurately mentioned in the letter, the respondent was aware of the claimant's previous cancer and the treatment for it and the claimant had confirmed that none of the absences in question were linked to that.

24. One of the absences was between 30 November and 3 December 2020. The claimant had had four days absence with a cut finger. On the claimant's return to work after the absence, she had worn a bandage on the cut finger. Therefore, the bandage would have been visible to colleagues, and the Claimant accepts that she might have explained that it was because of a cut finger.

<u>Coughing Episodes</u>

25. The impact statement alleged that the Claimant had suffered a physical impairment, namely severe bouts of coughing which can cause vomiting, from June 2021. So that was 7 months after Ms Stevens became her line manager

26. In paragraph 4 of that statement, the Claimant refers to extreme bouts, rendering her unable to talk without coughing. We accept that is true that, around June 2021, she had started to have that type of cough

27. We also accept her evidence that, at that time, such extreme bouts lasted for several hours once a week or once a fortnight.

28. We also accept what she says (in paragraph 6) that during extreme bouts communication was difficult, sleep was disturbed, and there would be some episodes of vomiting. Furthermore, during the severe bouts she would have to reduce physical activity.

29. We will discuss what the claimant says about medication in our analysis and conclusions.

30. However, it is clear that the coughing started around June 2021 not earlier. This is also confirmed by the claimant's comments to Ms Stevens and Ms Walton at the sickness review meeting on 1 October 2021.

    30.1 The claimant reported problems with a cough that (as of 1 October 2021) had lasted for a few months. The claimant reported that she had been regularly testing herself for Covid and all the tests had come back negative.

    30.2 She referred to the fact that she had been to see her GP. One of the things the claimant was worried about possibility of having Covid. Another was that the symptoms could indicate a return of her cancer.

    30.3 The email from Ms Walton sent the same day is [Bundle 79.1]. We accept the contents are accurate. It was written while fresh in Ms Walton's memory. Although it was not sent to the Claimant at the time, Ms Walton had no reason to write anything other than her genuine recollections.

31. Furthermore, on 11 October, the claimant and Ms Stevens had a supervision meeting. In that meeting, the Claimant confirmed that her chest x-ray had come back clear and that she was taking medication for acid reflux but that she did not think she suffered from acid reflux flux and the tablets did not make a difference to her cough.

32. The claimant has submitted an extract from her health records at [Bundle 89]. This document was printed 21 October 2021. It is said to be page 2 of 3, but we have not been provided with the other two pages. The extract stated that the claimant had conferred with the GP on 9 September 2021 about a cough and but no further details are contained in that particular document.

33. The only other medical evidence supplied post dates the termination of employment.

33.1 On 9 November 2021, the hospital sent her details of an appointment (following a referral by her GP to the hospital) for 9 December 2021. The appointment was with the ENT team.

33.2 The claimant had one hospital visit and one only in connection with the cough. We think that the appointment probably went ahead on 9 December 2021 although there is no direct confirmation of that in the bundle.

33.3 On 11 February 2022, the claimant had a telephone consultation. A letter reporting on the outcome of that telephone consultation is [Bundle 97.1]. The letter is dated 25 February 2022.

33.4 The letter states that all the examinations were negative. This is reference to the fact that on 9 December 2021 (or whichever date the claimant actually did attend at the hospital) various examinations were carried out. That is the date the claimant has in mind when she refers to having made one hospital visit.

33.5 What the letter states, and what the claimant confirmed in evidence is accurate, is that her symptoms had diminished by February 2022. She informed the doctor that the medication she was on did not make any difference to her cough because she was not having any symptoms of gastric reflux (which is what that medication was for).

34. We are satisfied that the claimant's comments to the doctor that she thought she might have gotten used to clearing her throat by now, as well as the comments about the symptoms easing off, refer to the fact that the severe coughing bouts (that are described by the claimant in her impact statement) were no longer occurring by February 2022.

35. Those severe coughing bout have not recurred since. The claimant has not been back to her GP about this problem nor been referred back to the hospital.

36. The February 2022 letter confirmed that the hospital did not regard her symptomatic and did not regard as having any underlying condition and that, for those reasons, she was being discharged to the GP.

37. We are satisfied that the cough was not connected to cancer. In any event, the Claimant has not provided any evidence that it was.

<u>Team Leader Training and Discussions</u>

38. In around March 2021, it came to Ms Stevens attention that the respondent was running a pilot scheme for Team Leader training. There was no guarantee of promotion to team leader at the end of the training. Ms Stevens was asked to nominate one person from the staff reporting to her to undertake this training. She did not select the claimant or discuss it with her. She also did not select the

claimant's colleague, Amy Evans, or discuss it with Amy Evans either. Instead, she selected a colleague, Jana, to undertake that training.

39. On around 7 April 2021, the claimant and Ms Stevens met to carry out the claimant's annual appraisal. The record [Bundle 66 to 72] is signed by both of them. The claimant saw the document at the time and she was aware of the contents. A personal development plan was also drawn up around the same date and that is [Bundle 73 to 76]. Again, that was a document that the claimant had in her possession and she was aware of the contents.

40. By the date of this meeting, 7 April, there had been no discussion between the claimant and Ms Stevens about Jana undertaking the training and the claimant had not been aware of the fact that Jana had been nominated and/or undertaking the training.

41. In response to the question about how her knowledge and skills had progressed during the year, the claimant's answer was that she had progressed from personal nursing assistant to assessor and then cluster assessor during the course of the period that was under review.

42. She said that she was grateful to her team leaders, including Ms Stevens for the opportunity. She stated that she felt supported by her team leaders, including Ms Stevens. The claimant's comment referred to her age, but that was not prompted by anything Ms Stevens said. It was purely on the claimant's own initiative that her age was mentioned in the meeting.

43. In the meeting, Ms Stevens comments referred to various aspects of training, and in particular stated, [Bundle 72]:

> Looking forward to Mags developing further within Hilton and I will be putting mags forward for discussion on next team leader training.

44. This comment was made during the meeting as the claimant's signature confirms. Further, and in any event, she could see it in writing in the minutes. Our finding is that it represented Ms Stevens' genuine opinion and intention. She did intend to put the Claimant's name forward for consideration the next time there was to be team leader training.

45. The team leader training was not mentioned in the personal development plan.

45.1 Our finding is that the reason that it is not mentioned there is doing the team leader training had not been made one of the claimant's objectives; she was not required, as an objective, to successfully complete the team leader training during the year.

45.2 Furthermore, Ms Stevens was not aware of whether or when further team-leading training might be offered. She intended the claimant to be nominated for consideration if and when it became available, but she did not know whether that would be in the next 12 months.

46. There is a dispute between the parties about what was said and when, after the claimant and her colleague, Ms Amy Evans, discovered that Jana was doing team leader training.

Credibility Issues

47. The claimant's claim form alleged that her employment had began on 13 January 2020. That was stated in box 5 of the form and repeated in paragraph 2 of the grounds of complaint. In other words, it was not a typographical error.

48. The claimant makes similar comments in paragraph 2 of her witness statement. Although specifically what she says in that paragraph is that she was employed as an assessor from 13 January 2020. It cross references the document which starts [Bundle 53]. Both sides accept this is a genuine document. On its face, it states that it is a contract of employment, in the role of Assessor, with effect from 13 January 2020. No earlier period of employment is mentioned.

48.1 During the preliminary discussions with the parties, before the witness evidence started, both parties agreed that the claimant had actually worked for the respondent prior to January 2020. We do not have any written contract for any earlier period. Neither side has alleged that the claimant had employment status that was other than “employee” or that there was any break in employment.

48.2 We do not draw adverse inferences from the Claimant’s grounds of complaint and witness statement expressly asserting the start of employment was January 2020.

48.3 She had legal assistance both at the time the claim form was presented and when her witness statement was written (indeed, her solicitors are still on record, albeit not representing her during the hearing).

48.4 If she is, in fact, wrong about the start date, it is simply an honest mistake, which is not relevant to her credibility.

49. However, what is more relevant to the Claimant’s credibility are the things which she asserts happened at the start of employment. The following analysis does not depend on whether the Claimant’s start date was January 2020, or whether it was earlier than that.

49.1 Even if her statement was intending to refer to January 2020 (being the start of her work as assessor) as opposed to November 2018 (being the first time she did any work for the Respondent), Ms Stevens was not the claimant's line manager in January 2020 (or at any time prior to November 2020), and so comments about what the Claimant told Ms Stevens, as line manager, at the start of employment are not accurate.

49.2 Furthermore, the claimant's paragraphs 6, 7 and 8 of her main witness statement are misleading.

49.3 In paragraphs 6 and 7, the claimant refers to severe bouts of coughing which made communication difficult and caused sleep disturbance due to coughing in the night and episodes of vomiting. She says that when her condition started, she informed Ms Stevens her team leader who had heard coughing over the phone. The claimant claims that she told Ms Stevens about her condition and that she considered herself disabled.

49.4 In paragraph 8, as written, she says that she informed Ms Stevens about “this” when she commenced employment. At the outset of her evidence, prior to confirming the accuracy of the statement, the Claimant told the panel and the Respondent that paragraph 8 was intended to refer to her cancer, rather than the coughing issue described in paragraphs 6 and 7.

49.5 However, even with that correction, the statement would not be accurate. The claimant did not inform Ms Stevens about her cancer when she started employment because Ms Stevens was not her line manager as of 2018 or as of January 2020.

49.6 The claimant’s impact statement produced for these proceedings is at page 52.1 of the bundle. In that document, she refers to the coughing having started in June 2021. As we will discuss below, we accept that date is accurate. Thus the coughing did not start until after Ms Stevens had been the Claimant’s line manager for more than 6 months. So she did not tell Ms Stevens, or anyone else, about the coughing at the start of her employment. (As we have said, the Claimant sought to make a clarification to paragraph 8 of the statement to assert that paragraph 8 was not seeking to imply that she reported the coughing at the start of employment.)

50. The claimant's main witness statement states that it was signed January 2023. The claimant is not sure whether that is a typo and it should really refer to January 2024. The impact statement is signed April 2023. The claimant says she is not sure whether the impact statement or the main statement was produced first. We think it more likely that the main statement was produced in January 2024, but nothing directly turns on whether we are right or wrong about that. We do not think her uncertainty about the dates on which the respective statements were drafted

and signed is relevant to our assessment of whether she is seeking to tell the truth or not. However, it does tend to show that her memory might not be fully reliable, especially as the disputed conversation with Ms Stevens was in 2021, rather than 2023.

Coronavirus Policy

51. The Covid pandemic became a major issue in the UK around March 2020.

52. The claimant started work for the respondent prior to the Covid pandemic, and that is the true whether the start date is taken as January 2020, or earlier.

53. The claimant was aware that the respondent had introduced a coronavirus policy and procedure during 2020.

54. The earliest version we have is the version that applied from October 2020. It was supplied as a supplementary item at our request. It is Version 4. This is the version that was applicable at the time of the termination of the Claimant's employment.

55. Version 7, effective from 1 September 2022 was already in the bundle.

56. The policy said that its purpose was to comply with the legal requirements for the regulated activities that the respondent was registered to provide. The objectives were to ensure that safe and effective procedures were in place for both staff and patients.

57. The policy set out some steps that were intended to minimise the risks as far as possible of their staff contracting the virus in their day-to-day life away from work. That included a requirement that employees wear facemasks when visiting shops, restaurant, bars or on public transport, as well as a requirement to follow government guidance.

58. The guidance included information about hand washing and various other items.

59. Section 5.5 dealt with personal protective equipment. (PPE)

    59.1 Paragraph 1 of that section deals with the minimum requirements for PPE that were applicable at all times, for any patient related activities, and other work activities including attending training.

    59.2 It stated that staff were required to follow the advice and guidance issued to them. It stated that they were required to use this equipment for all patient - related activities, and as and for other training as well. So for other activities as well, such as training.

    59.3 It was made clear that this requirement was regardless of whether or not there had been negative tests.

59.4 It was stated in bold that fluid repellent masks should be worn for all activities at any distance.

59.5 There were additional requirements when actually providing care. This was the second paragraph of section 5.5. These were that "aprons, gloves and fluid repellent surgical masks" (these 7 words being in bold) should be used when providing care. Eye protection was not always required, but was required in the circumstances set out in the paragraph.

59.6 The third paragraph stated:

> Gloves and aprons must be single use and used for each new episode of care. Fluid repellent masks can be used for a session and should be disposed of safely when they need to be changed. It is essential that used personal protective equipment is stored securely within disposable rubbish bags.

59.7 The section went on to state (bold is in the original):

> Staff are responsible for ensuring they do not run out of PPE supplies and must notify their manager giving them at least 48 hours' notice (Monday -Friday) when they require a new delivery of PPE
>
> **The disciplinary process will be followed for any staff who intentionally do not comply with the PPE standards as per the government guidance**.
>
> HNP will ensure staff are notified of any changes to safe working practices via internal emails and policy updates. All relevant Covid resources and guidance will be published on the staff resources centre for easy reference.
>
> All employees must ensure they keep updated and comply with the latest guidance.

60. The practice that developed for distribution of PPE was that the respondent would arrange for supervisors such as Ms Stevens to organise a meeting in an open air place, such as a convenient car park, and the equipment would be distributed.

61. The Respondent had sufficient supplies of PPE available at all the times relevant to this dispute. There was no time at which the Claimant informed the Respondent that she had run out of a particular item, and it was not supplied to her.

62. The types of face covering which the Respondent had available included what the Claimant was referred to as "blue mask". This is they type that is most likely being referenced in the second paragraph of section 5.5, which refers to "fluid repellent surgical masks". Our finding is that this is more specific than the first paragraph which omitted the word "surgical". We find that the type of face covering that could be worn when actually providing care was more specific than the type that was required at other times when on duty (as set out in the first paragraph of Section 5.5)

63. The types of face covering which the Respondent had available included, plastic visors as well. The claimant accepts that she received plastic visors.

63.1 Her opinion was that they were single use and she treated them as such.

63.2 That opinion was based on what she thinks she was told by the Respondent, that the foam around them could potentially act as a reservoir for the virus.

63.3 However, whether she is right or wrong that the Respondent told her that they were single use, the Respondent did, in fact, provide them to her, and there was no time when she asked for more and was told that she could not have more.

64. In paragraphs 17 of her witness statement, the claimant confirms that she was aware of the policy. She claims the Respondent's "policy on PPE is that it can be discarded when personal care is complete". It is not true that the policy says that there is no need to continue to wear PPE once there has been an episode of care. It does say that the PPE must be safely disposed of, but the policy is clear that, while still with a patient, PPE must be worn. There might be a requirement to use fresh PPE for each new episode of care, but it does not say that no PPE is required in between episodes of care (and it expressly says the opposite).

65. The claimant alleges that the Respondent's chief executive, on a video call, had said that staff could take off facemasks if the client could not hear them properly.

65.1 That might be correct and would not be inconsistent with a need to take account of a patient's disabilities. However, it is not relevant to the dispute which we have to decide, because the Claimant does not allege that she was disciplined for removing her mask so that a patient could lipread (or hear her better).

65.2 However, we do not accept the remainder of paragraph 18 is true. The claimant alleges that the chief executive said that staff could also remove masks if the patient asked them to, or they could remove them of their own accord, provided there were 2m away from the client. Neither of those things are stated in the written policy and we do not accept that they were said orally.

66. In paragraph 19 of claimant's statement, she alleges that "*I immediately, informed Joanne Stevens that* …". In context, the "immediately" refers to the video call from the chief executive referred to in paragraph 18. However, that makes no sense.

66.1 No date is given for the call, but if the implication is that it was near to the start of the pandemic, and near to the introduction of the coronavirus policy, then Ms Stevens was not the Claimant's team leader at the time.

66.2 Whereas if the claim is that video call happened much later, after November 2020, then – on her account of what the chief executive said – it would make no sense that she "immediately" informed Ms Stevens that she could only wear a blue facemask for a short period of time. The face mask policy had been in for a long period of time by then. If the Claimant's account of what the chief executive had said was true, then it would have represented a loosening, and not a tightening, of the mask requirements.

66.3 In any event, the claim that she had been told during a hospital visit that she must remove the mask if coughing became severe cannot be true.

66.3.1 Firstly, if the video call was after the Claimant's coughing episodes began, it would position the video call later than June 2021. The coronavirus policy (and its mask requirements) had been in place for well over a year, and if the Claimant's account of what the chief executive had said was true, then it would have represented a loosening, and not a tightening, of the mask requirements.

66.3.2 Secondly, she did not have any hospital visit because of coughing until December 2021 (or later) which was after the end of employment. [In oral evidence, the Claimant said that the information had been given to her during a visit to her GP when she was collecting documents. When asked which documents, she said it was the letter from the hospital dated February 2022; again, that is not advice that she received during her employment and does not support her claim to have made this remark to Ms Stevens during her employment.]

67. We do accept that it is common sense that if someone is having a severe coughing episode, they will need to remove their facemask (in such cases, doing so safely so as to avoid coughing near others might have to be considered). We do not accept that the Claimant had medical advice, during her employment that, for medical reasons, she should refrain from wearing a mask, or that she could only wear a mask for a short period of time. We also do not accept that, during her employment, she told Ms Stevens that she had had such advice.

68. In terms of credibility, paragraph 19 appears between paragraphs 18 and 20 of the claimant's witness statement. Paragraphs 18 and 20, when read together, contain the claimant's assertion that under the general policy, she was able to remove her mask if she was more than 2 m away from clients. Those two paragraphs are asserting that the respondent had informed her that any employee could remove the mask in those circumstances. We reject that assertion.

69. However, in any event, paragraph 19 is making the inconsistent and contradictory assertion that she had informed the respondent of the need for them to potentially

make an adjustment for her in relation to strict mask wearing requirements that she could not otherwise comply with. We find that she did not do so.

70. Paragraph 21 of the claimant's written statement is also inaccurate because it alleges that the respondent failed to provide the claimant with a face shield, but in fact, as she confirmed during cross-examination (i) face shields had been provided and (ii) she never requested more. She has been inconsistent as to whether, as of October 2021, she had run out, or as to whether she had some in her car, but believed the Respondent did not allow her to wear them (as an alternative to the "blue mask").

71. We take all of the credibility points into account when we assessed the dispute about what was said in Morrisons car park.

Car Park Conversation

72. There is a direct conflict in the evidence between Ms Stevens on the one hand and that of the claimant and Ms Evans on the other.

73. The claimant's witness statement itself was very vague.

73.1 However, what she does specify in the statement is not inconsistent with what she said in November 2021 [Bundle 94.5; email from the Claimant to Michelle Ford on 15 November 2021]. The statement gives no date for the conversation, but it implies that it was "between March 2021 and October 2021". The statement gives no place for the conversation, or details of anyone else present, or any context for what was said. The email stated that it was "second or third week in June", and that the Claimant and "AE" (and we are satisfied that the Respondent would have known this meant Ms Evans) had found out that Jana was doing the team leader training and asked why had it been "kept quiet" and why had they not been considered.

73.2 What the Claimant says in her statement is not inconsistent with what Ms Evans said in her statement.

74. The allegation is that Ms Stevens said that the Claimant had not been selected for team leader training because she was "too old" and because she had "health issues". On the balance of probabilities, what Ms Stevens said about the Claimant during the car park conversation has not been recalled accurately by the Claimant and Ms Evans.

74.1 The date of the conversation is in dispute. Ms Stevens says that she does not recall the conversation at all. The Respondent challenged the Claimant's witnesses on the basis that there were such inconsistencies in the accounts that they should not be found to be reliable at all; part of that was an assertion that Ms Evans claimed that the conversation happened on a day on which

Jana was doing the training (which started in March and lasted 6 weeks according to the Respondent) but also said that the conversation happened in July.

74.2 The conversation certainly did not happen later than August, because that was when Ms Evans left the Respondent's employment. Ms Evans is sure that the conversation with Ms Stevens happened at least a few weeks prior to end of her employment, because it was a PPE collection day (in Morrisons car park) and there was a later PPE collection (at MacDonalds) when she spoke to Ms Selling about what Ms Stevens had said.

74.3 Ms Stevens is also certain that the conversation happened on a warm day, and that is what leads her to conclude that it was most likely July (rather than earlier).

74.4 We accept that there was a conversation in Morrisons Car Park in which Ms Evans asked Ms Stevens about the team leader training. We do not think it undermines Ms Evans' credibility that she thinks it took place on a day when Jana was actually doing the training. For one thing, the Respondent has not proven the training dates. However, in any event, even if Ms Evans is wrong about how long passed between her finding out about the training, and asking Ms Stevens about it, we accept that she accurately remembers speaking to Ms Stevens, and the explanation given by Ms Stevens for why Ms Evans had not been considered, and the fact that she later spoke to Ms Selling about Ms Stevens comments as they related to her, Ms Evans. Ms Evans does not claim to have spoken to Ms Selling about anything said about the Claimant, and the Claimant does not claim to have spoken to Ms Selling herself.

74.5 There was no contemporaneous written record of what Ms Stevens said, and no prompt written complaint. The Claimant made no oral complaint either.

74.6 The Morrisons Car Park conversation was later than the 7 April 2021 discussion mentioned above. If Ms Stevens had actually said what she is alleged to have said in Morrisons [that (i) the Claimant was not suitable for team leader training and (ii) this was partly because she was "too old" and (iii) partly because of "health issues"] then she would have been directly contradicting something said a few weeks earlier. Not only that, but the Claimant would have known, as soon as she heard the alleged comments in Morrisons, that Ms Stevens was directly contradicting what she had said (orally and in writing) on 7 April.

74.7 We find it implausible that Ms Stevens would have made an oral comment, around June or July 2021 which stated that the Claimant was not suitable for the training, given that she had already told the Claimant that she was suitable for it. It is also implausible that, if such an oral comment had been made, then

there would have been no objection from the Claimant. There was nothing stopping her making a written complaint at the time (she had the contact details for Ms Walton, and others), and also nothing stopping her from doing what Ms Evans did (raise the matter informally with Ms Selling orally).

74.8 On the balance of probabilities, the Claimant is mistaken about what Ms Stevens said, even if, later, she has come to believe in this version of events. The earliest she raised it was several months later, in November, after she had already been dismissed, and the events of her dismissal are likely to have affected her opinions about how she was treated by the Respondent during employment.

74.9 It is by no means impossible for Ms Evans to be accurately recollecting what was said to her, without accurately recollecting what was said about the claimant. We allowed Ms Evans to give evidence (over the Respondent's objections) despite the fact that her statement had not been sent to the Respondent at the time of exchange, and was only presented to the Respondent very late, and shortly before the start of the hearing. We do not think that that lateness – in itself – undermines either the Claimant's credibility or Ms Evans' credibility. However, it did mean that Ms Stevens was not presented with any details of the alleged conversation (no details being in the Claimant's witness statement) until more than 30 months after it happened. Further, the first time anything was said about Ms Evans speaking to Ms Selling was in Ms Evans' oral evidence, after Ms Selling had already given hers, and no questions had been put to Ms Selling about it. Even on the assumption that everything Ms Evans says about what she was told about why she, Ms Evans, was not put forward for the training is true, we do not find that that undermines Ms Stevens' credibility in general, and it does not persuade us that Ms Stevens did (ever) tell the Claimant that she was "too old" for team leader training, or that she had "health issues" which would dissuade Ms Stevens from nominating her for it.

<u>Possible Team Leader Training In September 2021</u>

75. There was another piece of evidence which the Claimant invited us to take into account, both directly in support of her allegations that training was withheld from her (for discriminatory reasons) and indirectly in support of her allegations that Ms Stevens made the alleged comments at Morrisons.

76. We have taken the evidence into account, but we accept that Ms Stevens is telling the truth about it.

77. Ms Walton sent an email to the team leaders on 16 September 2021 [Bundle 79]. She asked the team leaders to nominate people for team leader training. Similarly

to the training which Jana had done, this would not have necessarily led to progression to team leader.

78. Ms Stevens did not respond to the email by nominating the Claimant. That was because, before she replied to the email making any suggestions whatsoever, the Respondent changed its mind, and the training course was not offered to anyone at that time.

Alleged comments by Kelsey Ford

79. One of the claimant's colleagues was a personal nursing assistant named Kelsey Ford. Kelsey Ford commenced working for the claimant in order for the respondent in January 2021 and she was still employed by the date of termination of the claimant's employment in November 2021.

80. During the year 2021, the claimant was in her early 60s and Kelsey Ford was a lot younger than the claimant.

81. There are two particular alleged comments by Ms Ford which the claimant says were made and were each harassment related to age.

82. One of these comments was made in late October 2021 at a training course that they both attended.

82.1 According to both the grounds of complaint and paragraph 14 of the claimant's witness statement, the alleged words were that people over 60 years should not be allowed to drive and should have their licence taken away

82.2 According to paragraph 5 of Kelsey Ford’s written statement and her answers during cross-examination what she had actually said was that when people reached the age of 60, perhaps they should be made to do a refresher driving course.

83. One part of the claimant’s written statement is – in our view - inaccurate and misleading. In the statement, there is an allegation that Kelsey Ford made the alleged remark directly to the claimant. That is, it sought to allege that Kelsey Ford was speaking directly to the Claimant and that it would have been clear to onlookers that Kelsey Ford was making the comments directly to the Claimant.

84. However, as the claimant accepted in her evidence, that is not what happened. Her argument is that they were in the same room sitting maybe 2m or 3m or so apart from each other and that while Kelsey Ford was ostensibly talking to the two people next to her, she was looking at the claimant when she said it and making the comment loudly, meaning that the Claimant could easily hear it. It is on that basis that the Claimant argues that the comment was directed at her, not on the basis that the two of them were in conversation with each other.

85. Kelsey Ford suggests that, by referring to people taking refresher courses when they reach 60, she said “we” and meant to refer specifically to herself and the two colleagues that she was talking to. We reject that as implausible. We accept her account that she had witnessed some driving that was (in her opinion) poor, and that the driver was (in her opinion) over 60, and that there was (in her opinion) a connection between that poor driving and the driver’s age. She expressed the opinion that people over the age of 60 should potentially need to do some sort of further driving test to be allowed to continue to drive, and she was suggesting that that was a policy that ought to be in place immediately, not implemented in a few decades time when she reached 60. She did not, however, say that people over the age of 60 should not be allowed to drive.

86. We are not persuaded that Kelsey Ford was deliberately setting out to insult the claimant or that she specifically brought the conversation round to this topic so that she could make the remarks within the Claimant’s hearing. Rather, we accept that she was having a conversation with the two people next to her and her only reasons for discussing it is that is was something fresh in her mind because it was mentioned something that caused annoyance to her the previous day.

87. We accept the claimant was offended by the comments. We accept that Kelsey Ford did not know the claimant's exact age or date of birth, but and we agree with the claimant that Kelsey Ford is likely to have been able to infer that, even if the claimant had not yet passed her 60th birthday she was someone who might, in the not too distant future, be within the category of over 60s whose driving skills had been referenced by Kelsey Ford in her comments.

88. The other alleged comment by Kelsey Ford is the one referred to in paragraph 15 of the claimant's witness statement.

> Kelsey would also make derogatory comments about my age, such as “well back in your day it probably was free, but I would not get it free now…” I contend that the comment amounts to harassment on the grounds of age.

89. That is more or less an exact replica of the allegation in paragraph 12 of the grounds of complaint:

> Kelsey would also make derogatory comments about the claimants age, such as "well back in your day it probably was free but I would not get it free now..." The Claimant contends that the comments amount to harassment on the grounds of age contrary to s.26 of the Equality Act 2010.

90. No date is attributed to the alleged remark, and nor is there any context.

90.1 During cross-examination, the claimant suggested that there had been a discussion about some elective surgery and the claimant had volunteered to Kelsey Ford that she, the claimant, had had that particular surgery in the past.

90.2 Following cross-examination, the judge asked the claimant to be specific about the exact surgery that she was referring to. The claimant was reluctant to answer at first, and we note that the reason she gave was that she did not wish to refer to Kelsey Ford's personal medical circumstances, without permission. On being pressed, she gave slightly more information about the particular surgery she had in mind, but remained vague about the specific details of the conversation and the alleged date.

91. In her 15 November email [Bundle 94.5], the Claimant had written:

> … this is not the first time she has brought my age into our conversation as when discussing certain surgeries, these included operations that I have had that were on the NHS, she then said well back in my day it was probably free but that wouldn't happen now.

92. Kelsey Ford was asked about this during her evidence. She denies making the remark. Her witness statement said that she had no recollection of making any such remark as per the grounds of complaints. She had not seen the 15 November email, and the first time that some details were provided to her (that it was said to be in connection with her potentially wishing to have surgery, and the Claimant commenting that she, the Claimant, had had the surgery in question) Kelsey Ford was able to say that she had never had any such surgery or considered having it and had never discussed it with the claimant. We accept that Kelsey Ford's evidence is accurate on that point and we reject that the claimant's recollection that that specific discussion ever took place.

93. Our finding is that the reason that the Claimant was unable to add anything more specific, in 2024, than what she had said previously, is that she has no specific recollection of what she might have been referring to when she wrote the November 2021 email. That email itself was very light on detail, and the Grounds of Complaint and witness statement were less specific. It has not been proven to our satisfaction that, in any context, or any conversation, Kelsey Ford actually uttered the words "back in your day it was probably free". In any event, there is no evidence of date (at all) and no evidence of context (since we reject the assertion that it was in a conversation about elective surgery).

94. If any remark similar to "back in your day" was ever made, we are not satisfied that the Claimant was significantly offended by it. She is unable now to recall the specific details, and there was no complaint about the alleged comment until after she had been dismissed for wholly unrelated reasons.

<u>Events leading to dismissal</u>

95. On 27 October 2021 the claimant was performing her duties at the home of a particular patient that we will refer to as H. H is a vulnerable individual. On the

door of H's home, there was a sign stating that no one should enter the property if they were not wearing a mask.

96. On that day, when the claimant initially was providing care to H, just the two of them were present. However, while the claimant was at the site H's daughter arrived. It is common ground that when H's daughter first saw the claimant the claimant was not wearing a mask and that the claimant continued to not wear a mask until she left the property. In other words, she continued to not wear a mask during the conversation that she had with H's daughter.

97. The discussion between the patient's daughter and the claimant was followed by a formal complaint from the patient's daughter. The matter was referred to Michelle Ford, Head of Service Development. Michelle Ford has not been a witness and we are told she left the Respondent not long after these events (for wholly unrelated reasons). After H's daughter had spoken to Michelle Ford by phone, she put the complaint in writing. That email, at 10:52 on 28 October 2021 [Bundle 94] stated as follows. Where we have written "[H]" below is redacted in the bundle copy of the email, but we are satisfied, in each case, that the redaction simply covers up information that can be replaced by "H".

> Good morning Michelle. Further to our earlier conversation regarding ppe. When I arrived home at around 6pm last evening - 27 Oct - the support worker who was supporting my mother [H] was in the kitchen heating a microwave meal. She took the meal into [H] and went back in the kitchen. I asked her where her mask was as she was not wearing one. She said she did not have to wear one, it was her choice. I said no it isn't and she then said she was medically exempt from wearing one. She did offer to get one but she was just leaving anyway. I said if she wasn't going to wear one why has she not asked [H] to put one on... There are masks on the table by the side of the chair where she sits. I told the carer that my mother has not yet had her jabs and she should be aware of that. There is also a large note on the outside of the front door saying " do not enter if you are not wearing a mask" - it has been on the door for at least 6 months. The carer has been previously when I have been there and was wearing her mask. I do not think she was wearing any other ppe last evening either. Unfortunately I have had to return to work this week and I am concerned that when I was home I could keep my mother safe and now I am not there I do not know what goes on with ppe and my mother is not able to remember if carers are wearing ppe.

98. The claimant was contacted and she was asked to attend a meeting by Teams. This meeting was conducted by Michelle Ford. She was assisted by Dawn Walton.

99. An audio and video recording of this investigation meeting was made. It had not been disclosed during the course of the litigation or been made part of the bundle of documents for the hearing. We allowed the recording to be played to the claimant during cross-examination. The respondent's representative had

previously played it to the Claimant in the tribunal building prior to the start of her cross-examination.

100. The claimant was told that the meeting was an investigation meeting and she was told that it was because of a complaint by the H's daughter. Before being given details, the claimant confirmed that she knew that the complaint would be about the fact that she had not been wearing a mask.

101. As part of the meeting, the entire email from the patient's daughter was read out and the claimant was given the opportunity to comment.

102. She was told that there might be a disciplinary hearing.

103. The letter at [Bundle 155] was produced and emailed to the claimant. We do not have a copy of the covering email, but the letter is dated the same day of the investigation meeting, namely 28 October 2021 which was a Thursday.

104. Regardless of whether the Claimant received it (and read it) exactly on that date, 28 October, she did receive it. We accept that – as stated in the letter - the coronavirus policy was attached as was the disciplinary procedure.

105. The letter was from Lisa Selling, Head of Operations. It was headed "invite to disciplinary hearing". It gave time and location of a meeting to take place on Monday 1 November 2021. It said

> The purpose of the hearing is to consider the following allegation of misconduct or gross misconduct against you:
>
> • Failure to follow HNP Coronavirus Policy & Procedure (attached):
>
> • You were not wearing a face covering in a patient's house [H] on 27th October 2021.

106. The letter said that the matter might be found to be gross misconduct conduct and she might be dismissed without notice or pay in lieu of notice. The letter stated that Ms Selling would be conducting the hearing accompanied by Ms Walton.

107. The Claimant was informed that she could bring a colleague or trade union representative and that if either the claimant or a chosen representative were not able to attend then they should contact Ms Selling. The meeting was to be held in person.

108. The claimant did attend, and the notes are [Bundle 84 to 85]. We are satisfied that they are an accurate record of what was discussed.

108.1 At the outset of the meeting, the claimant was asked if she had received the letter and the policies and she said that she had.

108.2 She was asked if she had wanted to bring anybody with her and she said she did not.

108.3 Ms Selling said that she had listened to the audio recording of the investigation meeting. She did not supply a copy of that recording to the claimant or a copy of the email from the daughter. She referred to the fact that the email had been read out to the claimant previously.

108.4 The claimant did not ask for any information from the email or the investigation meeting to be repeated.

108.5 It was put to the claimant that she said she was exempted. She confirmed that that was the case. The claimant said she been given advice from her doctor to take the mask off if she was coughing. Ms Selling asked for confirmation that that was a requirement to remove the mask only while she was coughing and the claimant and agreed with that.

108.6 The claimant asserted that when she arrived at H's property, and started providing care to H, she had been wearing both mask and gloves. She said that, in order to prepare some food, she took off the gloves. She said this was because she believed that the correct procedure was that different gloves should be worn during food preparation and she did not have the correct gloves with her. When challenged about this, the claimant asserted that actually she had been wearing gloves when she took the food in to the patient from the kitchen. She said she done taken them off and put them in her pocket.

108.7 She claimed that it was after she had taken the food to H that she went back to the kitchen and started coughing and, that was when she had taken off both the gloves and the mask.

108.8 There was an inconsistency, therefore, in relation to the gloves. The claimant having first claimed that she took them off, after providing personal care. Her later answer implies that either she was wrong about that, or else she did have more than one pair of gloves with her, or that she put the same old pair back on, and took off some gloves after the food delivery, and when she had returned to the kitchen and started coughing.

108.9 The claimant said that it was after she taken off both mask and gloves that the daughter came and spoke to her. She confirmed the daughter asked the claimant where her mask was. She said her answer had been that she did not need to wear one when coughing. She stated she offered to put another one. Ms Selling asked if she had another one with her. The claimant did not directly answer but stated that when she got home she found the mask that she taken off in a trouser pocket.

108.10 The claimant's oral evidence during the tribunal hearing was that when the patient's daughter asked about her mask, the claimant had claimed that she just taken it off because she been coughing; when the daughter asked where it was, the Claimant went to her pockets to show the recently removed mask to the daughter, but she could not find it. She said that was because – as she later discovered when she got home – the mask was in her trouser pockets not her uniform pockets.

108.11 In the disciplinary hearing, Ms Selling put it to her that the policy stated that fluid repellent masks should be worn for all activities at any distance. She said that the policy was that masks should be worn at all times, even in the kitchen. The claimant confirmed that she agreed that that was what the policy said.

108.12 She was asked if she had resumed and wearing any PPE while leaving while having a discussion with the daughter and while leaving the property. The claimant said "no", she did not, and said she left the property without going back into the living room where H was.

109. Ms Selling made various attempts to get the Claimant to confirm or deny whether she had, in fact, as the daughter claimed, stated that it was a matter of choice whether she wore a mask.

> LS – ok, let me just check if there is anything else I need to ask you. The daughter said that you said to her that it was your choice not to wear a mask.
>
> MC – I don't have to wear one given the choice, I do wear one but when the cough gets consistently worse, for 3-4 days it gets worse it gets violent, its happened 3 times now, it get really violent, and it makes me sick, the doctor said to take the mask off.
>
> LS – the daughter said you said it was your choice not to wear it.
>
> MC- I was not rude.
>
> LS - can you confirm if you said it was your choice not to wear one.
>
> MC – I was not confrontational.
>
> LS – is there anything else you want to add.
>
> MC – No.
>
> LS – can you confirm if this is the first time you have taken it off.
>
> MC – yes.

110. There was no direct answer (either express confirmation or express denial). We note how the Claimant answered by stating that she was not rude or confrontational, and also by stating that she did choose to wear a mask (other than when removing for cough-related reasons).

110.1 Our finding is that, in the context of the disciplinary meeting, these answers actually amounted to an acceptance by the claimant that she had said to the daughter that it was her choice whether or not to wear a mask.

110.2 At the very least, it was reasonable for Ms Selling to form the opinion, based on these answers, and the daughter's email, that the Claimant had, in fact, stated that it was her choice whether or not to wear a mask. That is the conclusion which Ms Selling reached.

111. There was a short break in the disciplinary hearing and, after the break Ms Selling said she had reviewed everything and that decided that this was a serious breach of policy, which amounted to gross misconduct. She said she had decided that she had no alternative but to dismiss the claimant with immediate effect.

112. The claimant said that she had her resignation in her bag in any event. She did not actually hand the letter to the respondent at the time. During the course of this litigation, the letter has not been produced, and the Claimant believes she destroyed it after the meeting.

113. A letter dated 1 November 2021 was sent to the Claimant [Bundle 82].

113.1 It stated the claimant had waived her right to have a representative. It referred to the fact that the allegation was that she failed to follow the coronavirus policy and that she had not been wearing a face covering at H's house on 27 October 2021.

113.2 The letter explained that the findings were that each of these allegations was upheld and that this amounted to a serious breach of the company's policies and procedures.

113.3 It confirmed that this had been deemed to be gross misconduct and that termination of employment took place with immediate effect and without notice and that without pay in lieu of notice.

114. Section 4.2 of the respondent's disciplinary policy deals with gross misconduct.

> Gross misconduct is misconduct which is serious enough to prejudice the Company's business or reputation, or which irreparably damages the working relationship and trust between employer and employee. It is a serious breach of contract and is likely to lead to summary dismissal without notice or pay in lieu of notice.

115. There is a list of items which is said to be examples, not an exhaustive list. The list includes bringing the company's name into disrepute; serious breach of any of the company's policies or procedures; serious breach of the company's rules, including health and safety rules; serious breach of relevant codes of practice.

116. We accept Ms Sellings' evidence that part of her reason for deciding on summary dismissal was that the claimant was aware of the policy had chosen not to follow it, despite having been aware of the patient's specific requirements, as detailed in the medical notes and as shown on the house sign.

117. Ms Selling was satisfied that she had given the claimant the opportunity to comment on the daughter's allegation that the claimant had stated that it was her choice not to wear a mask and that the claimant had not denied this. It was Ms Selling's opinion that the evidence demonstrated that there had been wilful non-compliance with the coronavirus policy by the claimant.

118. Ms Selling was aware that other people had been dismissed for such matters. In all the circumstances, she believed that no lesser sanction was appropriate in the claimant's case.

119. The dismissal letter stated that the claimant had the right to appeal within five working days. In our judgement, that would have meant that an appeal on or before 8 November 2021 was in time. (An appeal on a later date might have been in time if the dismissal confirmation letter was emailed later than 1 November 2021; neither side has produced a copy of the covering email, but the Claimant accepts that she received the letter by email.)

120. She was told that she, the appeal should be sent to Sonny Dhatt, Head of Systems and Communications, and his email address was quoted in the letter. (Since the letter was emailed to the Claimant, she could, therefore, have copied and pasted the email address.)

121. The respondent accepted that it received the document that is at [Bundle 86] on 8 November 2021.

    121.1 Somewhat bizarrely, neither side has put a proper copy of the email into the bundle. Instead there is a photo that has been taken of a laptop screen on which part of the email is shown.

    121.2 The item has not been produced by either side with all the header information included.

    121.3 The subject line was "Grievances", and it started "Dear Dawn". It is common ground that the sender of the email was the Claimant and the recipient was Ms Walton.

    121.4 The opening sentence says:

> During my past year at Hilton, I would like to bring to your attention that things have been said and done, which constitutes to bullying, discrimination and equality, lying breaching GDPR and unfair dismissal.

121.5 Later in the email she stated that “the instant dismissal was unfair” and claimed that the policy said that masks could be removed if they were 2m or if the patient asked them to, as well as if there was a need to take the mask off because the patient could not hear properly. She also implied that she the references in the policy to discarding masks meant that they could be taken off (and left off) immediately after an episode of care. She sought to explain and justify her actions at H’s home.

121.6 The Claimant made various other comments and allegations in the email. She said that she and another assessor had challenged why they had not been put on team leader training. It alleged the claimant had been told and that it was because she had old and health issues.

121.7 The email alleged that the team leader had passed on details of the claimant's illnesses to other employees. It also alleged that the team leader had lied by saying that the claimant resigned before she was sacked.

121.8 The email referred to the same two allegations about Kelsey Ford that are in the list of issues for this case .

121.9 It alleged a GDPR breach by Michelle Ford handing out the claimant's phone number to an outside company without the claimant's consent.

122. Ms Walton replied the following day.

122.1 She asked if the claimant had the grievance policy and quoted some particular sections from it.

122.2 She referred to 11.1 as stating that any grievance should be submitted in writing to the registered manager within one month of the last day of employment and pointing out that the registered manager was Michelle Ford.

122.3 She also pointed out that section 13.1 said that if an employee was dissatisfied with any dismissal or disciplinary action taken against them by the respondent, they should submit an appeal under the disciplinary policy, not the grievance policy.

122.4 She also quoted from paragraph 6.2, which referred to the fact that in some cases further clarification would be needed before a formal investigation of a grievance could take place.

122.5 This was a reply to the claimant's email it and so it retained the same subject line “grievances”. It was copied to Ms Selling.

123. The claimant did not send any further correspondence to the respondent until 15 November.

124. On 15 November, she attempted to send the document that appears in the bundle at page 94.1. We accept that she made a genuine attempt to send the email to Sonny Dhatt. However, the email address she used was incorrect. Not only did she get his name wrong (the part of the address before the @ symbol), she also got the domain name wrong (the part after the @ symbol). We are satisfied that this email did not reach Sonny Dhatt and was not received by the respondent at all, in any email inbox.

125. The email says that the claimant had taken advice and believed that her dismissal had been executed unfairly. She made some comments about why she thought that. She added

> I am not looking to return to Hilton at any point, I feel the dismissal was unfairly administered on this occasion, as does my advisers.

126. The claimant asserts that she received no bounceback email telling her the address was wrong, and we have no reason to doubt the claimant that (regardless of whether such an error message was generated or not) she did not see one. In any event, she did not resend this particular email later on to anybody else, and the first time anyone working for the respondent saw it was in the course of this litigation.

127. On the same day, 15 November, the claimant also sent an email with the subject heading grievances to Michelle Ford.

    127.1 This was very similar to, although not exactly the same as the email that she sent to Ms Walton on 8 November.

    127.2 Importantly, she had removed from the comments about the dismissal, allegedly being unfair.

    127.3 She added the name of the team leader in question, namely Jo Stevens.

    127.4 She did not add the full name of the colleague involved in the discussion with Ms Stevens about team leader training, but supplied the initials AE to identify that person.

128. Michelle Ford responded [Bundle 94.3] about three hours later offering the claimant a meeting. 15 November 2021 was a Monday and the meeting was offered the same week on the Thursday or the Friday. After discussions it was agreed that the meeting would take place via teams at 2pm on Thursday 18 November.

129. The meeting did it take place. Michelle Ford has not been a witness, but Ms Walton, who also attended has been. Ms Walton discussed the matter with

Michelle Ford and is able to give first hand information about Michelle Ford's opinions about how the meeting had gone.

130. The issues raised in the claimant's email of 15th of November to Michelle Ford were discussed during the meeting. It was Michelle Ford's opinion that this satisfactorily resolved issues raised by the claimant and she asked Ms Walton to send the email which is [Bundle 95]. That was sent about 4:30pm on the same day of the meeting. It confirmed that the respondent's position was that the matters raised had been informally resolved. It did not explicitly refer to any right to take the matter further, either by the Claimant having the right to insist on a formal outcome or by telling her that she could appeal this particular outcome. However, it did specifically state that the claimant should not hesitate to contact Ms Walton if there was anything she could do to help. Further, Ms Walton had, on 9 November 2021, informed the Claimant about the right to have a grievance dealt with formally.

131. The claimant replied seven minutes later to say

> Thank you both for your time today, and kind words.
>
> If I may I will keep you updated .

132. Our finding is that, at the time, she wrote this email the claimant regarded her grievance as closed and she was not expecting any further response from the respondent.

133. ACAS early conciliation commenced on 6 December 2021 and lasted until 16 January 2022.

134. The claim form was submitted less than a month after 16 January, on 20 January 2022. It was submitted on the claimant's behalf by the solicitors named in box 11 of that form.

135. As a result, any matters which occurred on or after 7 September 2021 are in time. However complaints about anything which occurred on 6 September 2021, or earlier, will only be in time if part of a continuing act, which continued later than 6 September 2021, or else if we decide that it is just and equitable to extend time.

The Law

Equality Act 2010 ("EQA")

136. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

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

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

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

137. It is a two stage approach.

137.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

137.2 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

138. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

139. The burden of proof does not shift simply because, for example, the claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of discrimination or harassment or victimisation. They are not sufficient in themselves to shift the burden of proof; something more is needed.

140. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

141. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one.

That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

142. As noted in in Qureshi v Victoria University of Manchester [2001] ICR 863, when there are multiple allegations, while it would be an error of law to fail to consider each separate allegation on its on merits, it would also be an error of law to take a blinkered approach, which failed to look at the totality of what the Respondent (and relevant individuals) did, and consider whether the totality implies that different inferences should be drawn than would be drawn if the facts directly connected with each separate allegation were looked at only in isolation.

Time Limits for EQA complaints

143. In EQA, time limits are covered in s123, which states (in part):

> (1) Subject to sections 140A and 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.
>
> (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

144. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

145. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run (for a complaint based on that decision), regardless of arguments about whether the policy itself is discriminatory.

146. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

147. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

148. The factors that may helpfully be considered include, but are not limited to:

148.1 the length of, and the reasons for, the delay on the part of the claimant;

148.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

148.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

149. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) "whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)": Abertawe Bro Morgannwg University Local Health Board v Morgan Neutral Citation Number: [2018] EWCA Civ 640.

Definition of Disability

150. Section 6 of the Equality Act 2010 ("EQA") defines disability.

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference

to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a

reference to a person who has not had the disability.

...

(6) Schedule 1 (disability: supplementary provision) has effect.

151. The section refers to the need to take into account Schedule 1. The paragraphs in that schedule include the following extracts in Part 1.

2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

152. The “Guidance on matters to be taken into account in determining questions relating to the definition of disability” is issued by the Secretary of State under section 6(5) of the Equality Act 2010. The guidance does not impose any legal obligations and is not an authoritative statement of the law. In other words, where appellate court decisions differ from the guidance, then it is the court decision

which takes precedence in the interpretation of the legislation. The guidance must be taken into account (Part 2 of Schedule 1, paragraph 12), but, ultimately, it is the legislation itself which must be interpreted and applied by the Tribunal.

153. The Guidance includes the following extracts.

> **Meaning of 'impairment'**
>
> A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.
>
> **Section B: Substantial**
>
> **Effects of behaviour**
>
> B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.
> For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (**See also paragraph B12.**)
>
> When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping or using public transport.
>
> B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.
>
> **Effects of treatment**
>
> B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a

worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

Section C: Long-term

Recurring or fluctuating effects

C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (**Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).**)

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. See also example at paragraph B11. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

Indirect effects

D22. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example:

154. Furthermore, by virtue of section 15 of the Equality Act 2006, the Tribunal should take the Equality and Human Rights Commission's Equality Act 2010 Code of Practice into account. The EHRC has published both an Employment Statutory Code of Practice and a supplement to it.

<u>The questions to be answered</u>

155. In <u>Sullivan v Bury Street Capital Limited</u> Neutral Citation Number: [2021] EWCA Civ 1694, the Court of Appeal approved the following list as setting out the

questions that a tribunal is required to address when determining whether or not a claimant is disabled for the purposes of the Equality Act 2010.

155.1 Was there an impairment?

155.2 What were its adverse effects?

155.3 Were they more than minor or trivial?

155.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?

156. The Respondent's knowledge is not directly relevant to any of these questions or the issue of whether a person meets the definition in section 6 EQA. However, of course, evidence from the Respondent (whether witnesses or documents) can be taken into account whether there is any corroboration for (or undermining of) the Claimant's account to have been suffering from particular adverse effects at particular times.

157. The point in time which the question of disability is to be determined is the date of the alleged discriminatory act or omission. That therefore is the date to be used when deciding all of the four questions, including, importantly, the fourth (the long term condition).

158. If the definition is satisfied as of the date of the earliest alleged act, then it may not be necessary to separately consider later dates as well. However, where necessary that can be done. In any event, if the definition is not satisfied as of the earliest alleged discriminatory act or omission, then the four questions can be answered as of the dates of each later complaint.

Impairment Condition

159. There is no further statutory definition of "physical impairment". The expressions should be given its ordinary and natural meaning. If there is found to be no impairment, then the definition in section 6 EQA is not met. An adverse effect on day to day activities is not sufficient, if not caused by an impairment. However, the existence of an impairment can, in an appropriate case, be inferred from the evidence. As noted in paragraph 40 of in J v DLA Piper UK LLP [2010] UKEAT 0263/09/1506 (in a passage which is reflected in the Guidance):

> "In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."

160. In Walker v Sita Information Networking Computing Ltd [2013] UKEAT 0097/12/0802, the EAT said: "That is not to say that the absence of an apparent cause for an impairment is without significance. The significance is, however, not legal but evidential." In other words, where there is no recognised cause of the alleged effects/symptoms, it is open to a Tribunal to conclude that the claimant does not genuinely suffer from them. The EAT pointed out that "that is a judgment made on the whole of the evidence".

Adverse Effect Condition

161. The focus is on what the claimant cannot do, or can only do with difficulty, rather than on the things that they can do. The fact that a claimant can carry out a particular normal day-to-day activity does not mean that their ability to carry it out has not been impaired. When deciding the legal question, it is wrong to conduct an exercise balancing what the claimant cannot do against the things that they can do (because the focus must only be on what they cannot do, or can only do with difficulty).

162. As per Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, the requirement is to examine the effect on the individual, and this involves considering how the claimant in fact carries out the activity compared with how they would do if not suffering the impairment.

163. The expression "day to day activities" encompasses activities which are relevant to participation in professional life as well as participation in personal life. It is not further defined in the legislation, and should be given its ordinary meaning, taking into account the Guidance and the Code. D3 of the Guidance give some examples, but, of course, it would be impossible to create a complete list of an expression which is capable of covering such a large range of the things that humans do.

Substantial Condition

164. Section 212(1) EQA defines "substantial" as meaning "more than minor or trivial."

165. It was pointed out in Aderemi v London South East Railway Limited [2013] ICR 591 that the analysis must not proceed on the basis that there is "a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial" but rather on the basis that "unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial".

166. When deciding which (if any) day-to-day activities are affected and whether the effect was substantial, then various matters might need to be taken into account, depending on the particular circumstances of the case. These include:

166.1 Does the impairment cause the claimant to avoid doing a particular thing because (for example), it causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

166.2 The time taken to carry out an activity.

166.3 The way in which the claimant carries out the activity;

166.4 The cumulative effects of the impairment;

166.5 the cumulative effects of more than one of impairment;

166.6 the effect of behaviour;

166.7 the effect of environment

166.8 the effect of treatment (which is any treatment, not just medication).

Long term condition

167. There are three different routes by which a claimant can satisfy the long term condition (paragraph 2 of schedule 1 EQA). Where the claimant cannot demonstrate that the substantial adverse effects of the impairment had already lasted 12 months (by the relevant date), then they must demonstrate that the substantial adverse effects of the impairment were (as of that date) “likely” to last either long enough to reach the 12 month mark, or else for the rest of the claimant’s life.

168. The question of whether the effects are likely to last for more than 12 months is an objective test based on all the evidence, and it is not relevant whether the employer or employee knew (or could have known) that the effects were likely to last long enough.

169. In this context, the word “likely” means "it could well happen" and does not impose a requirement that it was more probable to occur than not occur: SCA Packaging Limited v Boyle [2009] UKHL 37; [2009] ICR 1056.

170. Conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments if the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. It is for the claimant to establish this, but it is sufficient that they show that "it could well happen" that the substantial adverse effects recur (beyond 12 months).

171. The likelihood of recurrence is to be assessed as at the time of the alleged contravention. It does not follow from the fact that there was actually a subsequent recurrence of an impairment that, as of the date of the alleged discrimination, it

must have been "likely" that there would be a recurrence. The issue of whether a recurrence was "likely" cannot be judged retrospectively, based on what actually did happen after the relevant date; however, evidence created later (especially medical reports) can still be taken into account to help answer the question about whether, as of the relevant date, recurrence was likely.

172. As noted in Sullivan, the fact that the substantial adverse effect has recurred episodically might strongly suggest that a further episode was something that (as of the relevant date) "could well happen" again in the future. However, that is not an inevitable finding. Each case must be decided on its own facts and evidence.

Treatment

173. When considering each of the four questions, as per paragraph 5 of schedule 1, it is important to effectively ignore any beneficial effects of treatment and to ascertain the effects on day-to-day activities as it would otherwise be but for that medical treatment.

174. This provision applies even if the ongoing treatment results in the effects being completely under control or not at all apparent. However, if the treatment results in a permanent improvement or "cure" it will be necessary to consider whether the effects of the impairment, prior to the treatment, were sufficiently "long term".

Evidence Issues

175. Medical evidence is likely to assist the Tribunal but, ultimately, it is the Tribunal's legal determination, based on the totality of the evidence, which is what counts. A claimant who fails to produce medical evidence to support their case runs the risk that the Tribunal will decide that they have failed to meet their burden of showing that the Section 6 definition is met. However, there is no rule of law that medical evidence is essential in order for the Tribunal to be satisfied that the definition is met.

176. In accordance with normal principles, if the Tribunal decides that either party (the Claimant or the Respondent) had documents in their possession that they have failed to disclose, then they run the risk of the Tribunal deciding that they did so deliberately, and that they did so because the documents undermined their case. However, in accordance with normal principles, not every failure to disclose will lead to that result, and the Tribunal might decide to accept the party's explanation for the failure, and/or accept that the missing documents did not assist the opposing party

Definition of Direct Discrimination – section 13 EQA

177. Direct discrimination is defined in s.13 EQA.

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

178. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

179. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

180. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

181. For comparators for direct disability discrimination allegations the EHRC Code gives useful guidance at paragraphs 3.29 and 3.30 in particular with the example quoted therein.

<u>Harassment – section 26 EQA</u>

182. Harassment is defined in s.26 of the Act.

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

183. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

184. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which it could conclude that the conduct was related to the protected characteristic then the burden of proof shifts.

185. The use of the word "or" in s26(b) (twice) is important.

186. "Purpose" and "effect" are two different things, and must be considered separately. Where it was the wrongdoer's "purpose" to do the things listed in s26(b), then the complaint can succeed even if the conduct did not successfully have that effect. Correspondingly, where the conduct does have the effect described in s26(b), then the complaint can succeed even if the Respondent (or the person whose conduct it was) did not have the intention of causing that effect.

187. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appeal said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

188. When assessing the effects of any one incident of several alleged acts of harassment then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself, but, in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Discrimination arising from disability

189. Discrimination arising from disability is defined in s.15 of the Act.

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—

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

190. The elements that must be made out in order for the claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the claimant's disability; the unfavourable treatment must be because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the claimant had the disability.

191. The word "unfavourably" in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice. Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

192. Where there is more than one step in the chain of causation - between the claimant's unfavourable treatment and the "something" that arises in consequence of the disability - that can be sufficient.

193. When considering what the respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. Thus, where there are different allegations, then the respondent's knowledge has to be assessed at the time of each alleged act or omission. For that reason, for example, what the Respondent knew (or could have been expected to know) at the time of a dismissal might be different than what it knew (or could have been expected to know) at the time of an appeal hearing.

194. The complaint will not succeed if the respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

195. In relation to proportionality, the respondent is not obliged to go as far as proving that the discriminatory course of action was the only possible way of achieving the legitimate aim. However, if there are less discriminatory measures which could have been taken to achieve the same objective then that might imply that the treatment was not proportionate.

196. It is necessary for there to be a balancing exercise which takes into account the importance of the respondent achieving its legitimate aim in comparison weighed against to the discriminatory effect of the treatment.

197. Regardless of whether the respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

198. If a respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be very difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

199. Section136 EQA applies to alleged contraventions of section 15 EQA.

Failure to make reasonable adjustments,

200. Section 20 EQA defines the duty. S.21 and schedule 8 also apply.

> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (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) The second requirement is a requirement, where a physical feature 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.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

21 Failure to comply with duty

(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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8, Part 3, paragraph 20: Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

201. The expression "provision, criterion or practice" [usually shortened to "PCP"] is not expressly defined in the legislation. We have regard to the guidance given by EHRC to the effect that the expression should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions.

202. The claimant must clearly identify the alleged PCPs to which the adjustments should have been made. The tribunal must only consider those PCPs as identified. See Secretary of State for Justice v Prospere [2015] UKEAT 0412/14/3004.

203. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled.

204. The claimant has the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If she does then we need to identify the step or steps (if any) which the respondent could have taken to prevent the claimant suffering the disadvantage in question, or to reduce that disadvantage. If there appear to be such steps, then the burden is on the respondent to show that the disadvantage could not have been eliminated or reduced by such potential adjustments or, alternatively, that the adjustment was not a reasonable one for it to have had to make.

205. There is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the claimant had the disability.

206. Furthermore, in relation to a particular disadvantage, there is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the PCP would place the claimant at that disadvantage

Breach of contract

207. The Tribunal has jurisdiction to consider complaints of breach of contract, subject to the conditions, requirements and limitations set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

208. The Tribunal will take a similar approach to other courts, including interpreting the contract to decide what obligations existed, and whether they have been breached.

209. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant may have grounds to succeed in a claim for wrongful dismissal.

210. It is an objective question for the Tribunal to consider whether the Respondent did, in fact, have good cause to dismiss the Claimant for committing a repudiatory breach of contract. Where there is a dispute about whether the Claimant did, in fact, commit certain acts (or make certain omissions) then the tribunal is required to make findings of fact about the Claimant's relevant conduct. In so doing, the tribunal is not limited to considering only the evidence which had been available to the Respondent when it made its decision to terminate. Any relevant evidence presented at the hearing can be taken into account.

211. To assess the seriousness of any breach which is found to have occurred, it is necessary for the Tribunal to consider all of the relevant circumstances including the nature of the employment contract, the nature of the term which was breached, the nature and degree of the breach, and also the nature of the Respondent's business and of the Claimant's position within that business. Having assessed the seriousness, the tribunal will decide if the breach was such that the Claimant had no entitlement to be given notice of dismissal (and no entitlement to a payment in lieu of notice).

212. To amount to conduct which entitles the employer to dismiss without notice, the conduct must be such that it "*must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*" Neary v Dean of Westminster [1999] IRLR 288. So called "gross misconduct" may be established without proving dishonesty or wilful conduct and so called "gross negligence" that undermines trust and confidence may also suffice to justify summary dismissal. Whether it does so is a question of fact and judgment for the Tribunal, taking into

account the damage that the acts/omissions caused to the employment relationship. Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22.

213. In Hovis Ltd v Lowton, Case No: EA-2020-000973-LA, the EAT considered what type of evidence an employer might need to present at a Tribunal hearing, if seeking to persuade the Tribunal that the employee had, in fact, acted in the manner alleged (and thereby lost the entitlement to notice of dismissal). On the facts of that case, the Tribunal had not been obliged to accept the employee's denials (or decide that the employer had failed to prove that the misconduct had been committed) merely because the Respondent did not call a live witness to the (alleged) event who disputed the Claimant's version. The Tribunal can, and must, take account of all the evidence presented to it, including contemporaneous documents and/or hearsay accounts. It was noted that:

> The fact that a hearsay statement has not been given under oath, or tested … at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, …. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.

Analysis and conclusions

Disability Issue

214. The Claimant's cancer is a disability and the Respondent was aware of that disability at all relevant times.

215. For the reasons that we will mention below, the Claimant has not persuaded us that the Claimant's coughing episodes were a "disability", within the definition in of the Equality Act 2010 ("EQA") at any relevant time.

216. Furthermore, the Respondent did not perceive of the coughing as disability.

217. Thus, for all the disability complaints, the cancer, and not the coughing, is the relevant protected characteristic.

Analysis of coughing episodes

218. We accept, as per her impact statement and oral evidence, that there was a period of time when she did have severe coughing and that it did have effects that included leaving her breathless and causing sleep problems and causing vomiting. It did have the effect of reducing her ability to undertake physical activity during the bouts.

219. We do accept that there was a substantial effect on day to day activities during the severe bouts.

220. The Claimant went to her GP and reported the cough about 9 September 2021. She had a conversation with the respondent which is recorded in Dawn Walton's email of 1 October 2021.

221. In the findings of fact, we commented on the GP's referral to the hospital and the invitation letter sent 9 November, and the telephone consultation on 11 February.

222. By 11 February 2022, the medical advice was that the tests had all come back negative. The cough was not connected to the cancer (which is a medical opinion likely to have been formed before the referral to ENT department; no doubt was cast on that opinion subsequently by the hospital or the GP).

223. By 11 February 2022, the hospital's opinion appeared to be that the severe effects were not likely to recur. In any event, the doctor's opinion, having listened to what the claimant had to say, was that the symptoms seemed to be clearing up and she was discharged back to the GP. The claimant accepts that the hospital letter contains an accurate summary of what she said to the hospital. The severe symptoms had resolved themselves by the 11 February 2022 consultation

224. We take into account that 11 February 2022 is later than the relevant date, because we have to decide if there was any time between June 2021 and 1 November 2021 at which it became likely that the severe coughing bouts (with the effects described above) were likely to continue for a period which exceeded 12 months (so continuously to, at least, June 2022, or with a likelihood of recurrence after then).

225. Other than the Claimant's own account in the Tribunal hearing, and to the Respondent near to the time, there is no evidence that the Claimant had a severe bout on 27 October 2021. It was not witnessed by H's daughter.

226. However, in any event, there is no reliable evidence of any severe bout that was any later than 27 October.

227. There had not come at time, even by 1 November 2021, that it was likely ("could well happen") that the severe coughing episodes were likely to last a year. It was understandable that they would be investigated. The first two potential causes to be considered and ruled out were Covid and cancer. The Claimant had been referred to the hospital by her GP (probably in September) and the hospital acted on that referral by sending the invitation letter of 9 November. However, neither the GP's referral nor the hospital's decision to give the Claimant an appointment shows that the GP or the hospital thought it likely that the episodes were going to continue until at least June 2022. These things simply show that there was something (severe coughing episodes that had commenced in June 2021) which required investigation.

228. We do, however, have to consider whether the reason that the severe coughing ceased is because the medical treatment had helped. We note that, by the time her impact statement was written, the Claimant was adamant that the medication was having beneficial effects: paragraphs 5 and 7, for example.

229. The Claimant discussed medication with the hospital in February 2022 and with the Respondent in October 2021. In October 2021, she did not think the medication was helping, and she was still having the cough. In February 2022, she stated that she did not think that the medication had made any difference.

230. Paragraph 5 of the impact statement reads

> If I didn't take my medication I would not be unable to put a sentence together, I would also suffer from sleeplessness due to coughing and vomiting.

231. It is not possible to reconcile that paragraph with the contemporaneous evidence. At the time, the Claimant had every reason to give accurate information to the hospital so that they could diagnose and advise her. There would have been no advantage to her to say that the medication was not helping if it was helping; and if it were true that there was a noticeable difference between taking the medication and not taking it, then she would have known that at the time and would have had no reason to forget to tell the hospital or deliberately conceal it from them.

232. For those reasons, we think it more likely that the contemporaneous comments from the Claimant (about medication) are accurate and that paragraph 5 of the impact statement (insofar as it mentions the medication), which was written much later than the events, and for the purposes of the litigation, is not accurate.

233. There is no medical evidence about the effects of Gaviscon and Omeprazole or about whether the reason that the severe symptoms of the coughing stopped was (partly) because of the medication and whether the bouts would have continued otherwise. There is no medical evidence that the effects would have resumed if the claimant ceased to take it.

234. When writing to her GP, if the hospital doctor had disagreed with the Claimant's assertions about the lack of effectiveness of the medication, then they would have been likely to say so. We infer that nothing in the tests which they had conducted had identified any issue that was being kept at bay by the Gaviscon and/or Omeprazole.

235. Doing the best with the available evidence, our decision is that even if benefits that this medication might have had are discounted, we are still not satisfied that there was ever a time when it became likely that – even in absence of treatment - the severe effects of the cough were likely to last for at least 12 months.

Respective Harassment allegations 2(f)/2(e): From 15 November 2021, Sonny Dhatt failed to deal with the Claimant's Grievance regarding discrimination and her Appeal

236. Sonny Dhatt did not receive any email from the claimant because the Claimant failed to send an email to his correct email address.

237. There was no failure or omission on his part. Thus the Claimant has failed to demonstrate that the alleged unwanted conduct occurred.

238. In terms of the appeal part, specifically:

238.1 The Claimant was told in the dismissal letter how to appeal.

238.2 She wrote to Ms Walton in an email headed "grievances" and Ms Walton gave a helpful reply which highlighted relevant parts of the grievance policy. The Claimant's email to Ms Walton was not in accordance with the instructions on how to appeal; on reading Ms Walton's reply, the Claimant did not promptly seek to make an appeal which complied with the Respondent's policies.

238.3 The Claimant did, later, attempt to send an appeal email to Mr Dhatt. Regardless of the fact that 15 November was potentially out of time, the reason there was no reply to it was that Mr Dhatt did not receive it and nor did anyone else at the Respondent.

238.4 The fact that no appeal process was performed by the Respondent had nothing whatsoever to do with the Claimant's age or disability. (It had nothing to do with her cancer, and also had nothing to do with the coughing either.)

239. In terms of the grievance part, specifically:

239.1 The correspondence sent to Michelle Ford on 15 November was treated as a grievance.

239.2 The Claimant followed the instructions for raising a grievance as confirmed to her by Ms Walton on 9 November. In the email to Michelle Ford, there was no request by the claimant that Sonny Dhatt deal with anything: either the grievance or an appeal against dismissal.

239.3 The Claimant was contacted the same day, a few hours after sending the grievance email. Having been contacted by Michelle Ford, arrangements to meet were made promptly. There was no request from the Claimant to meet Sonny Dhatt either instead of, or as well as, Michelle Ford.

239.4 The meeting took place the same week (a few days after the grievance was raised, and at a mutually acceptable time). During the meeting, the Respondent came to believe that the grievances had been resolved informally. It was Michelle Ford's and Ms Walton's genuine opinion that it was resolved,

and that no further investigation was needed, and no formal outcome letter was needed. On Michelle Ford's instructions, Ms Walton wrote to the Claimant to say so, and the claimant sent the response mentioned in the findings of fact.

239.5 Not only did the claimant's reply fail to say that she wanted Sonny Dhatt to deal with anything, it failed to say that she wanted anybody to take any further action. On the contrary, she thanked them for their kind words.

239.6 In these circumstances, it was not unwanted conduct that Michelle Ford rather than Sonny Dhatt dealt with the grievance, and it was not unwanted conduct that there was an informal outcome, rather than a formal outcome.

239.7 Furthermore, and in any event, the respondent's actions were not related to the claimant's age. Furthermore, they were not related to the coughing episodes or the claimant's disability (cancer).

240. In addition, in terms of dealing with the Claimant's post termination correspondence, nothing which the Respondent did had the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

241. We are also not satisfied that, at the time, the Claimant regarded the conduct as having that effect, taking into account that the discussion on 18 November was amicable, and the Claimant's reply to the email that day.

242. In all the circumstances, it would not be reasonable to treat the Respondent's handling of the Claimant's post-termination conduct as having had the effect described in section 26(1)(b) EQA.

243. These harassment complaints fail for both protected characteristics.

<u>Respective harassment allegations 2(a): In March 2021, Joanne Stevens remarked that the Claimant could not undertake Team Leader training due to (i) health issues (disability complaint and/or (ii) age (age complaints)</u>

244. As stated in the findings of fact, the Claimant has not persuaded us that the alleged unwanted conduct did occur.

245. The fact that the list of issues stated "March 2021" rather than June 2021 (the Claimant's email to Michelle Ford said "2nd or 3rd week in June) or July 2021 (Ms Evans witness evidence) would not have been a problem in itself. As mentioned in the findings of fact, we did accept that there was a conversation in Morrisons Car Park, and it was probably June or July.

246. However, the date of the conversation would have meant that the complaint was out of time unless part of a continuing act or unless we extended time.

Respective harassment allegations 2(b): From March 2021 until November 2021, Joanne Stevens withheld Team Leader training from the Claimant due to (i) health issues (disability complaint and/or (ii) age (age complaints)

In the alternative, direct discrimination complaints based on same allegations of fact and same protected characteristics

247. As discussed in the findings of fact, the April 2021 annual review records state – accurately - that Ms Stevens was happy to put the Claimant's name forward for training.

248. The training was not run again from April until the end of the Claimant's employment. As discussed in the findings of fact, there was an email in September in which team leaders were asked to nominate people, but the Respondent changed its mind, and did not, in fact, run the programme at that time, and Ms Stevens was informed that it was cancelled before she would, otherwise, have made any nomination(s).

249. The specific decision - in around March 2021 - to offer the training to Jana (and therefore not to the Claimant, or anyone else reporting to Ms Stevens) was a one off decision. It did not represent a continuing state of affairs that Ms Stevens would block the Claimant from receiving the training, or "withhold" it from her. In April 2021, Ms Stevens confirmed (truthfully) to the Claimant that the Claimant would be considered for the training in future.

250. A complaint about the specific decision in around March 2021 that the Claimant was not offered the training would be out of time, unless we decided that it was just and equitable to extend time.

251. There was no later actual decision by Ms Stevens to prefer someone else for the training, rather than the Claimant. It was not available to any of her direct reports.

252. There are no facts from which we could conclude that the fact that the Claimant was not offered the training between March 2021 and November 2021 was:

252.1 Related to age

252.2 Related to cancer (or related to coughing episodes which commenced in June)

252.3 Because of age

252.4 Because of cancer (or because of the coughing condition)

253. These "2(b)" allegations of harassment (or, in the alternative direct discrimination) fail.

254. That means that, for the "2(a)" allegations of harassment, there is no continuing act that is in time. We have not upheld the allegation that "withholding" the training was a contravention of EQA which continued to (at least) 7 September 2021.

255. For the "2(a)" allegations it is not just and equitable to extend time.

255.1 The Claimant made no contemporaneous written or oral complaint. The Respondent had no opportunity to investigate the alleged remarks closer to the time and while they were fresh in anyone's memory.

255.2 No statement from Ms Evans was supplied to the Respondent until immediately prior to the start of the tribunal hearing (and after other statements had been exchanged) which was more than two and a half years after the event.

255.3 The Claimant's first complaints to the Respondent about it were in November 2021, so 4 or 5 months after the (most likely) date of the conversation and after the tribunal time limit had already expired.

255.4 Given the Claimant's stance on 18 November 2021, the Respondent reasonably concluded that no further investigation was necessary.

255.5 There is no extension for the ACAS conciliation, and therefore, when the claim was presented in January 2022, it was 5 or 6 months after the alleged incident.

255.6 The allegation stands or falls on the recollection of the witnesses of an oral conversation. There were no contemporaneous documents, and Ms Evans did not put her own recollection in writing until much more than 2 years after the conversation.

255.7 The Respondent has been prejudiced in the preparation of its defence to the allegations.

255.8 On the Claimant's side, there was nothing preventing her making a complaint to the Respondent at the time of the alleged remarks if she was aggrieved by them at the time; she did not do so, and only made her complaint about them after she had been dismissed for unrelated reasons.

255.9 On balance, the prejudice to the Respondent of extending the time limit outweighs the prejudice to the Claimant of declining to do so.

256. Therefore, the "2a" harassment allegations are out of time and the Tribunal does not have jurisdiction over them

Harassment Related to Age: (c) On or about 31 October 2021, Kelsey Ford remarked that people over 60 years should not be allowed to drive and should have their licence taken away [GoC 11]; (d) On or about 31 October 2021, Kelsey Ford remarked "Well back in your day it was probably free…" [GoC 12]

257. For the alleged "back in your day" comment, if those four words were said at all, then we do not have details of the specific context in which they were said, and we do not have details of the date when it was allegedly said.

258. We have rejected the Claimant's account of the specific conversation which she says she recalls. As per the findings of fact, we accept Kelsey Ford's remarks that she never had (a) an intention to have elective surgery or (b) a discussion with the Claimant about having it. Furthermore, the evidence (including from the Claimant) is clear that if the words were ever used at all, it was not on the training course in October.

259. We would accept that the words "back in your day" are related to age. Depending on context, the implication might be "*at the time that you were the same age that I am now, which was a significant period of time ago*". For similar reasons, and subject to being satisfied about the context of the conversation, we would have been likely to accept that such words would have been unwanted conduct, by being an unwelcome and barbed highlighting of the age difference between Kelsey Ford and the Claimant.

260. However, it would be cheapening the words of section 26(1)(b) EQA to conclude that Kelsey Ford's purpose would have been to have the effect described there, or, alternatively, that it would be reasonable for the Tribunal to treat those words as having such an effect.

261. The age harassment complaint 2(d) fails.

262. For age harassment complaint 2(c):

    262.1 Kelsey Ford did not say that people over 60 should not be allowed to drive.

    262.2 She did not literally say that people over 60 should have their licence taken away, but it is clear that the implication was that (a) they should have to pass a test and (b) that they would not keep their licence/be allowed to drive, if they failed the test, until they passed on a re-take.

    262.3 It is clear that the comments were related to age. They were directly referencing people aged 60 and over.

    262.4 We are satisfied that the words were not uttered because of the Claimant's age, or for any reason connected to the Claimant's age.

262.5 We are satisfied that the words were not uttered with the intention of the Claimant hearing them, or because the Claimant was present. The words were not targeted at the Claimant.

262.6 As per the findings of fact, Kelsey Ford did not know the Claimant's specific age, but, had she thought about the Claimant's age before speaking, she would have realised that the Claimant had either already had her 60th birthday (which was in fact the case) or was approaching it. Had she thought about the Claimant's presence, it would have been obvious to her that the Claimant would hear what she was saying.

262.7 We regard the words as potentially offensive to someone over 60 (or who was due to turn 60 within a few years) and, in our judgment, it would be (at best) thoughtless and inconsiderate to make such comments within the hearing of people who were likely to be offended by them. Kelsey Ford's comments were a blanket criticism of the (driving) abilities of people over 60.

263. We are satisfied, even taking account of burden of proof provisions, that Kelsey Ford did not make the comments with the purpose of (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. She was passing the time of day with her colleagues, and letting off steam about something that had annoyed her. She ought to have taken account of the Claimant's presence (and the presence of other people), and the fact that the Claimant (and other people) might find the comments offensive, but, in fact, she had not given those things any thought.

264. Taking account of the fact that this was a one off incident, in all the circumstances, as per section 26(4)(c) EQA, we do not think it is reasonable for the words to have had the effect described in section 26(1).

264.1 The words were rude and inconsiderate. However, "violating dignity" is a phrase deliberately chosen by Parliament to describe a very severe effect.

264.2 We also do not think that an "environment" was created by these words; amongst other things, Kelsey Ford's role as "Personal Nursing Assistant" was more junior in the hierarchy than the Claimant's role of Cluster Assessor and the Claimant had plenty of people to whom she could have complained had she wished to do so.

264.3 Furthermore, both Kelsey Ford and the Claimant give an account of a previous interaction when the Claimant had commented about a clothing issue. They have different versions about exactly what happened and why. However, the Claimant did not feel intimidated or oppressed by Kelsey Ford; the Claimant felt that she was in a position to tell Kelsey Ford how to behave.

265. The age harassment complaint 2(c) fails.

Disability harassment allegations (c) In May 2021, Joanne Stevens breached the Claimant's confidentiality and disclosed details of the Claimant's health issues to Maggie Stimson and other team members [GoC 10]; (d) In September 2021, Joanne Stevens breached the Claimant's confidentiality and disclosed to Maggie Stimson and other team members that the Claimant "has found another lump in her breasts" [GoC 10];

266. The claimant has not persuaded us that either of those alleged examples of unwanted conduct actually happened.

267. Even taking the Claimant's case at its highest, she does not claim that anyone told her that Ms Stevens had revealed medical information. Rather, based on what she was told, it seemed to her that colleagues had become aware of what should have been confidential information and she assumed that this must have originated from Ms Stevens.

268. The Claimant has not proven on the balance of probabilities that Joanna Stevens told anybody about the fact that the claimant had had time off with a cut finger. Apart from anything else, the Claimant came back to work with a bandaged finger and accepts that she might have discussed the reason for the bandage with colleagues. Even if, as per the Claimant's hypothesis, Ms Stevens told anyone, the complaint would potentially have been out of time and the act would not have been related to disability. This could not have been a successful complaint in its own right; at most, if proven on the facts, it might have proven a propensity to talk about the Claimant's confidential medical information. However, it does not even assist the Claimant to that extent, as she has not produced evidence that it happened, and we accept Ms Stevens denials.

269. The allegation that, in September 2021, Joanna Stevens had disclosed to other team members that the claimant had found a lump in her breast that would be out of time if it happened in the first few days of September or in time if it happened on 7 September or later. However, we are not satisfied on the balance of probabilities, that this happened. The claimant has provided no witness who asserts that they saw Ms Stevens or heard Ms Stevens making these comments. Furthermore, on the claimant own account, she simply assumed that the comments had come from Ms Stevens. Such a comment, if it had been made, would have been related to disability.

270. However, both these harassment allegations fail on the facts.

271. That deals with all the harassment complaints save for disability harassment allegation 2(e) which is concerned with dismissal and which we address when discussing dismissal below.

Reasonable Adjustments Complaints

272. For the reasonable adjustment complaints, the alleged PCPs are:

a. The requirement to wear a blue face mask under the HNP Coronavirus Policy;

b. The Disciplinary Policy.

273. The respondent accepts that PCP (b), the disciplinary policy was a PCP.

274. There is a dispute over alleged PCP (a).

275. In any event, in connection with the Claimant's cancer, neither (alleged) PCP placed her at any disadvantage in comparison with persons who are not disabled. Since cancer is the only disability, the reasonable adjustments complaints fail.

276. However, we heard full evidence and argument about what we should decide for these complaints if we decided that the coughing episodes amounted to a disability, and there is some common ground between these complaints and the complaints about dismissal, and so we set out our further comments below.

277. As discussed in the findings of fact, the description of required PPE in section 5.5 differed between (i) the minimum requirements that applied at all times when on duty and (ii) the minimum requirements that applied when, while on duty, the staff member was actually "providing care". The latter minimum requirements exceeded the former. In relation to face coverings specifically, the latter minimum requirements were "fluid repellent surgical masks" whereas, for the former, it was "fluid repellent masks" (which "should be worn for all activities at any distance").

278. The difference (if any) between a "fluid repellent surgical mask" and a "fluid repellent mask" is not discussed in detail (or at all) in the written policy. Having heard all the evidence, including the Claimant's own account of what PPE was provided, we are satisfied that, when not actually "providing care" the Respondent's policy allowed the use of visors. We are also satisfied that the Claimant was fully aware of that. We are satisfied that the Claimant was fully aware that the Respondent would provide her with more visors if she ever told them that she had run out (which she did not do, at any relevant time).

279. We are not satisfied that a visor comes within the definition "fluid repellent surgical mask". Thus, in our judgment, the Respondent did have the PCP that staff had to wear (what the Claimant describes as) a "blue face mask" when providing personal care to patients. In other words, rather than a visor, the requirement was to wear the type of paper mask that covered the mouth and nose that was very familiar and common place during the pandemic. The Respondent provided this type of mask (as well as visors and other PPE) to its staff, and staff were required to use them when the policy required that they do so.

280. We are also satisfied that the Claimant was fully aware of, and did understand, the requirement to wear a mask when providing care. She has expressed the opinion that the policy allowed/required disposal of masks immediately after providing

care, which demonstrates that she did know that it was the policy to wear a mask when providing care (and we discussed in the findings of fact why we reject her assertions that she believed, based on chief executive's alleged comments, that there was freedom to remove mask in various scenarios).

281. Once the specific episode of care was over, the staff member was potentially free to remove the blue mask and replace it with a different face covering, such as a visor. However, they were not free to have no face covering at all while on duty (which included, therefore, at all times when on patient's premises).

282. It is not true that - as alleged in paragraph 21 of the claimant's witness statement - the respondent failed to provide face coverings other than paper masks.

283. In paragraph 24 of the grounds of complaint, the claimant alleged:

> The Claimant could have worn a full face or full head visor or respirator but neither were provided by the respondent. The Claimant contends the failure amount to a breach of the duty to make reasonable adjustment contrary to s.21 of the Equality Act 2010. I did have visors in my car.

284. If she had visors in her car, she could have taken them inside H's property and used them there. She knew that she could do that, because the Respondent had provided her with visors.

285. In her oral evidence, the claimant claims that she had run out of visors, but she accepted that she had not told the respondent about that or asked them to provide any more.

286. There is obviously an inconsistency between the Claimant saying, on the one hand, that visors were in the car, and, on the other hand, that she had run out. However, either way, for the time periods when the Claimant was (in a patient's home but) not actually providing care, there was no failure to make reasonable adjustments. The actual PCP was flexible enough to allow visors (and not only blue masks) to be worn, and that was the case for all employees, whether they had a disability or not. The Respondent provided visors (and, on the Claimant's account, provided instructions about when to dispose of them) and they were available on request. It was a requirement of the policy to plan ahead, and to give the Respondent 48 hours notice when more were required, but that aspect of the policy did not disadvantage the Claimant.

287. If the specific allegation had been that the PCP to wear a blue mask while providing care to patients disadvantaged the Claimant because it made it more likely that a coughing episode would have been triggered, then that would have been likely to fail on the basis that there was no medical evidence to support it and/or because the Respondent could not have been reasonably expected to know about it. We

do not accept that, the Claimant could only wear a blue face mask for a short period of time.

288. However, we do accept that, when a coughing episode occurred, the Claimant needed to remove the face mask. As the Respondent pointed out during the Tribunal hearing, leaving the patient's premises and then removing the mask (whether because of a coughing fit or for any other reason) would not have breached the policy. We have decided that the coughing was not a disability. However, we would have been likely to decide that, because the Claimant was prone to coughing between June and October 2021, a requirement that she exit the property before removing her mask would have disadvantaged her in comparison to people who were not prove to coughing attacks, and the Respondent became aware of that, after the complaint from H's daughter (not before).

289. It would not have been a reasonable step for the Respondent to have had to take (even had the Claimant's coughing amounted to a disability) to decide that she did not need to wear a face covering (i) while providing care or (ii) at other times when in the patient's house.

289.1 For the former, when providing care, she was in close proximity to vulnerable individuals, who were at risk of death if they contracted Covid. It was reasonable, and in line with government and industry requirements, for the Respondent to seek to minimise those risks, by having rules that if one of their employees was providing care, then they must wear a mask.

289.2 For the latter, as we have said, wearing a visor, rather than a blue mask, would have been sufficient.

290. In terms of item 4 in list of issues, since the claimant was not at either such disadvantage, the respondent could not reasonably have been expected to know that she was. Had we found that the coughing had amounted to a disability, then the respondent would have been on notice by the time of 1 November hearing. At that the claimant's suggestion was that her coughing had caused her to have to take the facemask off yet.

291. To the extent that the claimant says that the step that it was reasonable for the Respondent to have had to take would have been to allow her to take the mask off when she was actually experiencing a coughing or choking episode, we have not been persuaded that the Respondent had a PCP which prevented this (subject, as above, to the Respondent's argument that they would have expected her to leave the premises). The Claimant was not disciplined (and dismissed) because she took off her mask when coughing.

292. The 4 suggested adjustments were:

i. Relaxing the requirement to wear a blue face mask when the Claimant was experiencing a coughing / choking episode;

ii. Allowing the Claimant to wear a full face / full head visor or respirator;

iii. Dis-apply the Disciplinary Policy for any conduct related to the Claimant's disability; and

iv. Alternatively, treat the Claimant's conducts on that occasion as one of medical capability.

293. None of these were steps which the Respondent needed to take to reduce or eliminate any disadvantage caused by the Claimant's cancer.

294. In any event, even had the coughing been a disability (or something caused by a disability)

294.1 The argument for item (i) fails for the reasons mentioned above, including that the Respondent did not seek to prevent the Claimant removing a mask when actually coughing. (They would have expected her to cease providing care, but she would presumably have been unable to continue providing the care, while having severe coughing, with or without a mask.) The claimant was not actually coughing or choking when speaking to H's daughter or when challenged by the daughter about why she was not wearing a mask.

294.2 For item (ii), as mentioned, visors/respirators could be worn some of the time. On the Claimant's account (assuming it is true; there is a conflict with H's daughter's account), she was in the kitchen and H was in a different room. At times such as that, the policy allowed a visor rather than blue mask. The Claimant either had visors in her car but failed to bring them in with her, or had run out and had failed to ask the Respondent for more. Either way, no adjustment to the Respondent's policy to allow her to wear a visor in the kitchen was required, because the policy *did* allow that.

294.3 For item (iii), the conduct that the respondent found the claimant had committed did not relate to cancer. The coughing did not amount to a disability. However, in any event, at the use of face coverings was mandatory and it was in the interests of patients including this particular patient who was vulnerable. The claimant had not obtained a medical exemption from wearing face masks. It would not have been reasonable in those circumstances for the respondent to have had to decide that it would not follow its disciplinary policy in order to decide what action, if any, would be taken. The Claimant was aware of the Coronavirus policy and of what it said about when disciplinary action would be instigated.

294.4 For item (iv), it would have not have been reasonable for the respondent to have had to treat the issue as being one of medical capability. The respondent

was not obliged to take the claimant's version of events as being fully truthful and accurate. The coronavirus policy stated (in bold) that "*The disciplinary process will be followed for any staff who intentionally do not comply with the PPE standards as per the government guidance*". It was not unreasonable for the Respondent (or any other employer) to investigate the circumstances of a failure to wear PPE and make a decision. There was evidence from which the respondent was entitled to decide that the claimant had intentionally failed to wear a facemask (rather than been unable to do so for medical reasons). Making a decision that the Claimant's actions had been for medical reasons was not a step which it was reasonable for the Respondent to have had to take.

Section 15 EQA - Discrimination Arising from Disability

295. It is alleged that each of the following were things arising in consequence of the Claimant disability:

a. The inability to wear a blue face mask for long periods of time; and

b. The inability to wear a blue face mask during a coughing / choking episode.

296. Neither of these were something arising from cancer.

297. We have not been satisfied that the Claimant was unable to wear a blue face mask for long periods of time.

298. It is correct that she had an inability to wear a blue face mask during a coughing / choking episode. We found that the claimant's coughing was not a disability, and was not caused by a disability. Thus, item (b) did not arise from disability (and nor would item (a), had we found it proven).

299. The alleged unfavourable treatment is dismissal. We do accept that a dismissal amounts to treating someone "unfavourably".

300. We do not accept that the dismissal was because of the claimant's inability to wear a blue facemask: (i) for long periods of time or (ii) while coughing.

301. The Respondent's decision to dismiss was based on the allegations from the H's daughter.

301.1 H's daughter had discovered that the claimant was in the house without wearing a facemask; the Claimant was not coughing when H's daughter encountered the Claimant, even on the Claimant's own account.

301.2 The daughter reported that the claimant had said that it was her choice whether to wear a facemask or not. The claimant did not deny that during

investigation meeting. During the disciplinary hearing, she was asked three times about that particular comment and she again failed to deny it.

301.3 It was reasonable for the Respondent to conclude that the claimant had not been wearing a facemask because she did not feel obliged to, and it was reasonable for the Respondent to conclude that the Claimant knew that the policy did, in fact, oblige her to.

301.4 As H's daughter mentioned, and as the claimant alleged, the Claimant did not give "free choice" as the only purported reason for not wearing a mask. She mentioned others too. But the first one given was "choice", and the Respondent was entitled to, and did, take account of the fact that the evidence showed that the other proposed reasons were mentioned after H's daughter had challenged the Claimant about that first stated reason.

302. In terms of paragraph 4 ("did the Respondent know, or could it have been expected to know, that the Claimant was disabled at the material time?") at all relevant times (investigation meeting, disciplinary meeting, meeting with Michelle Ford), the Respondent did know that the Claimant had had cancer prior to working for the Respondent. Since it had been told about the coughing, had we decided that that was a disability (or that it been caused by cancer), we would have decided that it would have been reasonable for it to know about the disability.

303. At paragraph 41, the grounds of resistance [Bundle 33] sets out the legitimate aim.

> ensuring the safety of its service users during a global pandemic, by ensuring it followed the relevant policy.

304. We accept that the respondent did have such an aim, that it was legitimate, and that the Respondent was seeking to pursue that aim, by its decision to conduct the disciplinary hearing and by the decision to dismiss the claimant. We cannot usefully comment on whether we would have decided that the Respondent had proven that dismissal was proportionate, given that we have decided that there was no discriminatory effect. However, the aim was an extremely important one.

<u>Wrongful Dismissal - Breach of Contract (Notice Pay)</u>

305. Based on the allegations from H's daughter, the claimant had said it was her choice whether to wear a mask, the respondent was entitled to conclude that the claimant had deliberately chosen to ignore the respondent's policy.

306. There was a conflict of evidence between the daughter and the claimant in relation to whether or not, the claimant had maintained distance from the patient and had remained completely in a different room. The email from H's daughter stated that the Claimant had taken food from the kitchen, into the room where H was, without wearing a mask. The Claimant firmly denied that part of the allegation.

307. However, the Claimant did not deny the part of the allegation that she told H's daughter that she was not wearing a mask because it was her choice. As we said in the findings of fact, we take her comments in the disciplinary meeting as effectively being an admission that she did say that. Those comments would be enough by itself to confirm that H's daughter's comments (and H's daughter has not been alleged to malicious or to have any motive to lie) were true on that point; further confirmation is the fact that the Claimant has, during the litigation, sought to maintain that she did, in fact, not have to wear a mask if (for example) she was more than 2m away, and claimed the chief executive had said that (and given other examples of when masks could be removed).

308. On the balance of probability, the Claimant deliberately and wilfully chose to breach the Respondent's coronavirus policy by not wearing a mask in H's home. She probably had not worn one at all during the visit, which is why she could not pull one out of her pocket and put it on when H's daughter arrived at H's home. However, even if she had worn one earlier, she had taken it off, and not put it back on; she was not prevented from putting it back on by a cough or other reason.

309. On balance of probabilities, H's daughter did, in fact, witness the Claimant taking food into H without a mask.

310. The summary dismissal was justified. The Claimant's actions were serious disobedience of company policy and the claimant placed H at risk.

311. The Respondent terminated the contract with immediate effect on 1 November 2021, and it was contractually entitled to do so.

<u>Dismissal as Harassment</u>

312. The allegation that the dismissal was an act of disability related harassment also fails.

312.1 The dismissal was not related to cancer.

312.2 It did not relate to coughing either, on the facts. In any event, the cough was not a disability or caused by a disability or perceived as a disability.

312.3 The dismissal did not have the purpose of (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

312.4 It would not be reasonable to regard it as having that effect, in all the circumstances.

Conclusion

313. All of the complaints have failed and the Claimant is not entitled to any remedy.

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Employment Judge Quill

Date: 8 April 2024

REASONS SENT TO THE PARTIES ON

9/4/2024

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FOR EMPLOYMENT TRIBUNALS