



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

and

**Respondents**

**Mrs M. Longstaff**

**(1) University Hospitals Plymouth NHS Trust  
(2) Ms Rasheal Carr**

**Held at: Exeter by Video**

**On: 23 January 2024**

**Before: Employment Judge Smail**

## **Appearances**

**Claimant:**

Mr G. Pennant (Race and Equality Council)

**Respondent:**

Mrs H. Winstone (Counsel)

# PRELIMINARY HEARING JUDGMENT

The Claimant's claims have been brought out-of-time and are dismissed.

## REASONS

1. By Claim Forms presented on 22 May 2023 and 29 August 2023 the Claimant brings claims of race and disability discrimination, and constructive unfair constructive dismissal. The ACAS early conciliation process took place on 1 day only, 19 May 2023. Claims of unauthorised deductions from earnings were withdrawn.
2. This was the second period of employment the Claimant had with the Respondent. It was between 12 May 2014 and 30 October 2022. The Claimant was an Emergency Nurse Practitioner. The first period was between 12 February 1990 and 27 April 2014.
3. In 2016 the Claimant had brought a claim to the Employment Tribunal. She was represented by a trade union. The case settled under an ACAS COT3

agreement on 22 February 2018. Part of the COT 3, as I understand it, involved a transfer of the place of work.

4. The claims came before Employment Judge Bax at a Preliminary Hearing on 20 November 2023. He ordered the issue of time limits to be determined at this hearing.
5. The claims the Claimant wished to bring were identified at that hearing. They are set out in the Appendix to this Judgment and Reasons. It can be seen that the core factual assertions are these:

1. In about Spring 2018, after the COT 3 agreement, the First Respondent at first refused to move Claimant from Tavistock to The Cumberland Unit, which was closer to her home; (race and disability)

2. In about Spring 2018, after the COT 3 agreement, the First Respondent employed 4 white workers at Cumberland in preference to the Claimant. (race)

3. When the Claimant was eventually working at the Cumberland unit, Ms Carr, the receptionist mocked the way the Claimant walked between the time she started at the unit in 2018 and until November 2021. This occurred on a regular basis. (disability) (specific incidents to be provided by way of further information).

4. Ms Carr referred to the smell of weed around the Claimant on about 5 occasions between when she started at the unit in 2018 and November 2021. Ms Carr said the Claimant should just admit it and say she takes it for her pain. (Race and disability) (specific incidents to be clarified by way of further information)

5. In about late October/early November, 2021 Ms Carr, when purporting to fix her computer, buried her face in the Claimant's neck and sniffed loudly 4 or 5 times. (race)

6. In December 2021, the First Respondent failed to deal with the harassment from Ms Carr. (Race and disability) (The Respondent says this requires an amendment application).

6. Further particulars of the claims in respect of Ms Carr confirm the above but also add that in July 2020 Ms Carr referred to those participating in a Black Lives Matter rally as 'You lot' and suggested that slavery and racism were caused by black people.
7. In terms of the First Respondent failing to deal with Ms Carr's harassment: the Claimant alleges that a mediation meeting held on 31 December 2021 between the Claimant and Ms Carr, and overseen by Caroline Dowse, the Head of Nursing for Acute Medicine, proved unsatisfactory, with Ms Carr denying any responsibility for the alleged racism, although making some

limited concessions in respect of mocking the Claimant's physical disabilities.

### **The Evidence on the Preliminary Issue**

8. The Claimant gave evidence before me and was cross-examined by Mrs Winstone. The following was significant:

(a) Following the mediation meeting which she regarded as unsatisfactory, the Claimant was signed off with stress at work for 9 months before giving notice of resignation on 5 September 2022.

(b) She wrote a resignation letter that day which included an 'impact statement' setting out her dissatisfaction with events in full. The statement is well-written. The statement recorded, amongst other events, that Ms Carr had expressed objection to the Claimant performing poetry at a Black Lives Matter rally in Plymouth on 7 June 2020. Ms Carr suggested that public meetings in Covid times threatened the safety of police officers such as her husband. The Claimant raised matters of race and disability discrimination in respect of Ms Carr. The Claimant wrote:-

'The reason for my forced departure is due to the prolonged effects of the degradation, bullying, intimidation and offensive behaviours of Rasheal Carr.'

And later –

'Also, extensive counselling during my sick leave has helped me to accept that I cannot and will not work in a hostile environment where all the principles of the Trust have been violated'.

(c) The content of the resignation impact statement could have perfectly plausibly been cut and pasted into a claim form for the Employment Tribunal.

(d) Whilst she had brought a claim to the Employment Tribunal before, she had not had a good experience with her trade union, she tells us. She would not consult her union again.

(e) Whilst she knew she could bring claims to the Employment Tribunal, she was not conversant with time limits.

(f) Time limits were made clear to her when she consulted the Race and Equality Council shortly before the claim on 22 May 2023 was issued.

(g) She had not researched time limits. She could have researched time limits. The Claimant is entirely literate.

- (h) As a hobby, the Claimant writes poetry and had given poetry recitals.
  - (i) The Claimant was suffering from depression throughout and claims to be disabled with that as a mental impairment as well as a physical one.
  - (j) Her GP Dr Dawson tells us in a letter dated 9 December 2023 that the Claimant has longstanding mental health problems requiring antidepressant medication (currently amitriptyline 100mg). She suffers from life-altering and disabling pelvic pain requiring ongoing analgesia. She has reduced mobility, with pain and fatigue.
  - (k) That she is disabled with a physical impairment seems strongly arguable. That she is also disabled with a mental impairment seems arguable.
9. Mr Richard Maguire gave evidence on behalf of the First Respondent. He informs us that Caroline Dowse left the Trust on 4 June 2023. Her emails have been deleted.

### **The Law**

10. Section 111(2) of the Employment Rights Act 1996 (“ERA”) deals with the time limit for bringing a claim of unfair dismissal.

“An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal-

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.”

11. Section 123 of the Equality Act 2010 deals with the time limits for bringing claims under that Act (discrimination claims).

(1) ... proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(2) -

(3) For the purposes of this section—

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

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

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

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

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

12. The unfair dismissal concept of ‘not reasonably practicable’ means not reasonably feasible: see the judgment of May LJ in Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119 (Court of Appeal) citing Sir John Brightman in Singh v Post Office [1973] ICR 437 (in the original National Industrial Relations Court).

13. The Tribunal has a wide discretion in deciding whether to substitute another period for the primary 3 months on the grounds that it is just and equitable to do so.

14. We have been reminded of this by HHJ Tayler in Jones v Secretary of State for Health and Social Care [2024] EAT 2. He wrote –

30. It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at paragraph 25 of Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are “exercised strictly” in employment cases and that a decision to extend time is the “exception rather than the rule” as if they were principles of law. Where these comments are referred to out of context, this practice should cease. Paragraph 25 must be seen in the context of paragraphs 23 and 24:

23. I turn now to the second issue. The decision by the employment tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.

24. The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in *Daniel v Homerton Hospital Trust* (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p.3, where he said: 'The discretion of the tribunal under s.68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong.'

25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

31. The propositions of law for which Robertson is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds.

32. In *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2009] IRLR 327 Wall LJ stated:

24 Mr Rose placed much reliance on paragraph 25 of Auld LJ's judgment ... This paragraph has, in turn, been latched onto by commentators as offering 'guidance' as to how the judgment under the "just and equitable" provisions of the Race Relations Act and DDA fall to be exercised. In my judgment, however, it is, in essence, an elegant repetition of well-established principles relating to the exercise of a judicial discretion. What the case does, in my judgment, is to emphasise the wide discretion which the ET has – see the dictum of Gibson LJ cited above – and articulate the limited basis upon which the EAT and the court can interfere. [emphasis added]

33. Sedley LJ stated:

30. I agree with Mr Justice Underhill and Lord Justice Wall that the EJ's decision, while it could have been (and, had it been reserved, no doubt would have been) a great deal better expressed, was not vitiated by any error of law.

31. In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. [emphasis added]

34. Longmore LJ agreed, and added, pithily:

I agree and would only reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still.

35. Without meaning any disrespect to Auld LJ, there might be much to be said for Employment Tribunals focusing rather less on the comments in Robertson that time limits in the Employment Tribunal are "exercised strictly" and an extension of time is the "exception rather than the rule"; and rather more on some of the other Court of Appeal authorities, such as the concise summary by Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194 at paragraph 17-19:

17 The board's other grounds of appeal all seek to challenge the decisions of the employment tribunal that it was just and equitable to extend the time for bringing (a) the claim based on a failure to make adjustments and (b) the claim alleging harassment by Ms Keighan. Before turning to those grounds, the following points may be noted about the power of a tribunal to allow proceedings to be brought within such period as it thinks just and equitable pursuant to section 123 of the Equality Act 2010.

18 First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corp v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2009] 1 WLR 728, paras 30–32, 43, 48 and *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72, para 75.

19 That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

36. As noted recently by HHJ Auerbach in *Owen v Network Rail Infrastructure Limited* [2023] EAT 106 Leggatt LJ went on to state at paragraph 25:

As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent

reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.

37. In our turn, judges of the EAT will be assisted by what Leggatt LJ said at paragraph 20:

20 The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle—for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant—or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre (trading as Leisure Link)* [2003] IRLR 434, para 24.

38. A factor that may be of importance in considering an extension of time on just and equitable grounds where there is a potential comparator is when the claimant knew the race of the comparator. In *Barnes v Metropolitan Police Commissioner* and another UKEAT/0474/05 HHJ Richardson held:

18. In Mr Barnes' case, there was no doubt that the acts complained of were more than three months before proceedings had commenced. His case was concerned with the second stage: s 68(6). Knowledge of the existence of a comparator at that stage may be relevant to the discretion to extend time. In *Clarke v Hampshire Electroplating* [1991] UKEAT 605/89/2409, the Appeal Tribunal said: "Under section 68(6) the approach of the tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison."

19. It follows that a tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first know or suspect that he had a valid claim for race discrimination? Was it reasonable for him not to know or suspect it earlier? If he did know or suspect that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying? These, of course, are far from being the only questions which the tribunal may ask in order to decide whether it was just and equitable to consider the complaint. The tribunal has to consider all the circumstances. We single out these questions because this appeal turns on the tribunal's finding about Mr Barnes' state of mind.

## **Discussion and Conclusions**

15. I regard the cogency of the Claimant's resignation impact statement as significant on the matter of time limits. Plainly she had been considering resigning for some time. She had been signed off for 9 months since the failed (as she saw it) mediation meeting. Over that time, she had resolved to resign and assert the matters she did in the impact statement. Given that she had brought an Employment Tribunal claim previously, it was entirely feasible for her to accompany her resignation with a claim alleging constructive unfair dismissal. Given 9 months had passed, the Respondent



would argue waiver (affirmation) of any breaches of contract. There would be an issue about that, however, given the Claimant was off sick, prescribed with anti-depressants. The issue would be an open one.

16. The effective date of termination was 30 October 2022, following notice of resignation on 5 September 2022. The primary period of limitation for presenting a claim of unfair dismissal was 29 January 2023. The first claim was presented on 22 May 2023, nearly 4 months late.
17. It was reasonably feasible and so reasonably practicable for the Claimant to present her unfair dismissal claim within the primary period of limitation. She has the intellectual resources to research time limits, if she did not know what they were. Having composed the well-written resignation impact statement, she could have cut and pasted it into a claim to the Employment Tribunal with little difficulty. It was unreasonable to fail to research time limits, if she did not know what they were.
18. The unfair dismissal claim is plainly out-of-time. What about the discrimination claims?
19. I have thought long and hard as to whether it is just and equitable to extend time in respect of the alleged discriminatory conduct of Ms Carr and the alleged failure by the Respondent to deal with it.
20. It is easier to deal with the alleged 2018 failures to move the Claimant to the Cumberland unit. Those matters are factually different from Ms Carr's allegedly discriminatory conduct. They were 5 years prior to the presentation of the claims. I reject the suggestion that there is 'conduct extending over a period' linking the 2018 staffing decisions with Ms Carr's conduct and the Respondent's treatment of it. The 2018 matters are separate and unrelated. Claims in respect of the 2018 staffing decisions are plainly out-of-time and are dismissed.
21. Whether or not they are found to be factually accurate, the Claimant makes significant allegations against Ms Carr and the First Respondent's handling of the problem. Those allegations, subject to the matter of time limits, have prospects of success. If time is not extended, I acknowledge that viable claims of discrimination would fail.
22. The passage of time, however, is a problem. The allegations span March 2018 to December 2021. The first claim form is not presented until 22 May 2023, some 17 months after the last allegation.
23. Inevitably, the detail of the particular allegations will lessen in cogency as recollection of each alleged incident and its circumstances fade. Caroline Dowse's emails will no longer be available to the First Respondent. It may be that some emails can be recovered from HR. Any emails on the Claimant's work account will have been deleted, also. There is evidential prejudice to the Respondents in that the allegations and their circumstances will not be as clear as they might have been. Determining

the accuracy or otherwise of the claims will be less reliable than it should have been.

24. I return to the resignation impact statement. The Claimant had arrived at the position that she needed to resign over the 9 months between December 2021 and 5 September 2022. It would have been straightforward to bring a claim to the Employment Tribunal alongside or shortly after her well-crafted resignation impact statement. She had previously brought an Employment Tribunal claim in 2016 leading to an ACAS settlement in February 2018. She was not a stranger to the process. I accept she was on anti-depressants, yet so she was when she wrote the resignation impact statement. It was not reasonable to take another 8 and a half months to bring a claim to the Employment Tribunal.
25. In all the circumstances, I have come to the conclusion that it is not just and equitable to extend time. The Claimant has the intellectual resources to have brought a claim within the primary period of limitation, alternatively alongside her resignation. In arriving at that conclusion, I acknowledge, that had the claims been brought timeously, the claims in connection with Ms Carr's conduct and the First Respondent's handling of them had prospects of success.

16 April 2024

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Employment Judge Smail

South West Region

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Judgment sent to the parties on

17 April 2024

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**APPENDIX: the Issues identified at the Preliminary Hearing on 20 November 2023**

**1. Time limits**

1.1 The claim form was presented on 22 May 2023. The claimant commenced the Early Conciliation process with ACAS on 19 May 2023 (Day A). The Early Conciliation Certificate was issued on 19 May 2023 (Day B). Accordingly, any act or omission which took place before 20 February 2023 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unfair dismissal complaint made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

## **2. Disability**

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

2.1.1 Whether the Claimant had a physical or mental impairment. She asserts that she was and is disabled by reason depression and anxiety and physical issues arising from failed pelvic floor surgery.

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

## **3. Direct disability and race discrimination (Equality Act 2010 section 13)**

3.1 The Claimant describes herself as a black woman.

3.2 Did the Respondent do the following things:

3.2.1 In about Spring 2018, after the COT 3 agreement, refused to move Claimant from Tavistock to The Cumberland Unit which was closer to her home; (race and disability)

3.2.2 In about Spring 2018, after the COT 3 agreement, employed 4 white workers at Cumberland in preference to the Claimant. (race)

3.2.3 Whilst the Claimant was working at the Cumberland unit, Ms Carr mocking the way the Claimant walked between the time she started at the unit in 2018 and November 2021. This occurred on a regular basis. (disability) (specific incidents to be provided by way of further information.

3.2.4 Ms Carr referring to the smell of weed around the Claimant on about 5 occasions between she started at the unit in 2018 and November 2021. Ms Carr said the Claimant should just admit it and say she takes it for her pain. (race and disability) (specific incidents to be clarified by way of further information)

3.2.5 In about late October/early November, 2021 Ms Carr, when purporting to fix her computer, buried her face in the Claimant's neck and sniffed loudly 4 or 5 times. (race)

3.2.6 In December 2020, failed to deal with the harassment from Ms Carr. (race and disability) (The Respondent says this requires an amendment application).

3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than s/he was and therefore relies upon a hypothetical comparator.

3.4 If so, was it because of race or disability?

3.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race or disability?

#### **4. Discrimination arising from disability (Equality Act 2010 section 15)**

4.1 Did the Respondent treat the Claimant unfavourably by:

4.1.1 In about Spring 2018, after the COT 3 agreement, refused to move Claimant from Tavistock to The Cumberland Unit which was closer to her home;

4.1.2 Whilst the Claimant was working at the Cumberland unit, Ms Carr mocking the way the Claimant walked between the time she started at the unit in 2018 and November 2021. This occurred on a regular basis. (specific incidents to be provided by way of further information.

4.1.3 Ms Carr referring to the smell of weed around the Claimant on about 5 occasions between she started at the unit in 2018 and November 2021. Ms Carr said the Claimant should just admit it and say she takes it for her pain. (race and disability) (specific incidents to be clarified by way of further information)

4.1.4 In December 2020, failed to deal with the harassment from Ms

Carr. (race and disability) (The Respondent says this requires an amendment application).

4.1.5 ;

4.2 Did the following things arise in consequence of the Claimant's disability?  
The Claimant's case is that.....:

4.3 Was the unfavourable treatment because of any of that/those things?  
(Did the Respondent dismiss the Claimant because of that sickness absence)?

4.4 Was the treatment a proportionate means of achieving a legitimate aim?

4.4.1 The Respondent says that its aims were:

4.4.1.1 .....;

4.4.2 That it was reasonable because:

4.4.2.1 ...

4.4.2.2 ...

4.4.3 That it was proportionate because:

4.4.3.1 ...

4.5 The Tribunal will decide in particular:

4.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 Could something less discriminatory have been done instead;

4.5.3 How should the needs of the Claimant and the Respondent be balanced?

4.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

## **5. Harassment related to race and disability (Equality Act 2010 s. 26)**

5.1 Did the Respondent do the following things:

5.1.1 In about Spring 2018, after the COT 3 agreement, refused to move Claimant from Tavistock to The Cumberland Unit which was closer to her home; (race and disability)

5.1.2 In about Spring 2018, after the COT 3 agreement, employed 4 white workers at Cumberland in preference to the Claimant. (race)

5.1.3 Whilst the Claimant was working at the Cumberland unit, Ms Carr mocking the way the Claimant walked between the time she started at the unit in 2018 and November 2021. This occurred on a regular basis. (disability) (specific incidents to be provided by way of further information).

5.1.4 Ms Carr referring to the smell of weed around the Claimant on about 5 occasions between she started at the unit in 2018 and November 2021. Ms Carr said the Claimant should just admit it and say she takes it for her pain. (race and disability) (specific incidents to be clarified by way of further information)

5.1.5 In about late October/early November, 2021 Ms Carr, when purporting to fix her computer, buried her face in the Claimant's neck and sniffed loudly 4 or 5 times. (race)

5.1.6 In December 2020, failed to deal with the harassment from Ms Carr. (race and disability) (The Respondent says this requires an amendment application).

5.2 If so, was that unwanted conduct?

5.3 Did it relate to the Claimant's protected characteristic, namely race or disability?

5.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

**6. Victimisation (Equality Act 2010 s. 27) (subject to any necessary amendment application)**

6.1 Did the Claimant do a protected act as follows:

6.1.1 Bringing a claim in 2016;

6.2 Did the Respondent do the following things:

6.2.1 In about Spring 2018, after the COT 3 agreement, refused to move Claimant from Tavistock to The Cumberland Unit which was closer to her home;

6.2.2 In about Spring 2018, after the COT 3 agreement, employed 4 white workers at Cumberland in preference to the Claimant.

6.2.3 Whilst the Claimant was working at the Cumberland unit, Ms Carr mocking the way the Claimant walked between the time she started at the unit in 2018 and November 2021. This occurred on a regular basis. (specific incidents to be provided by way of further information).

6.2.4 Ms Carr referring to the smell of weed around the Claimant on about 5 occasions between she started at the unit in 2018 and November 2021. Ms Carr said the Claimant should just admit it and say she takes it for her pain. (specific incidents to be clarified by way of further information)

6.2.5 In about late October/early November, 2021 Ms Carr, when purporting to fix her computer, buried her face in the Claimant's neck and sniffed loudly 4 or 5 times.

6.2.6 In December 2020, failed to deal with the harassment from Ms Carr. (The Respondent says this requires an amendment application).

6.3 By doing so, did the Respondent subject the Claimant to detriment?

6.4 If so, was it because the Claimant had done the protected acts?

**7. Constructive unfair dismissal (s. 95 and 98 Employment Rights Act 1996 and/or s. 39(2)(c) and 39(7)(b))**

7.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breach(es) was / were as follows;

7.1.1 The allegations of discrimination and harassment above (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

7.2 The Tribunal will need to decide:

7.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

7.2.2 Whether it had reasonable and proper cause for doing so.

7.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.



7.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

7.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

7.6 Was it a discriminatory dismissal within the meaning of s. 39 of the Equality Act 2010