EMPLOYMENT TRIBUNALS

Claimant: Vanessa Squire

Respondent: University College London Hospitals NHS Foundation Trust

Heard at: on a hybrid basis from the Central London Tribunal

On:

Monday to Friday 27, 28, 29 and 30 November and 1 December 2023;
Monday 4 December, Tuesday 5 December and Thursday 7 December 2023;
Monday 11 December, Tuesday 12 December and Friday 15 December 2023.

In chambers: Monday 18 December 2023, Monday 8 January 2024 (half day), Tuesday 9 January 2024 and Monday 15 April 2024

Before: Employment Judge Woodhead
Ms D Keyms
Ms N Sandler

Appearances

For the Claimant: Representing herself

For the Respondent: Mr S Keen (Counsel) with Ms E Ensing (Instructing Solicitor)

RESERVED JUDGMENT

1. **The complaint of direct disability discrimination is not well-founded and is dismissed.**

2. **The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.**

3. **The complaint of indirect disability discrimination is not well-founded and is dismissed.**

4. **The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.**

5. **The complaint of victimisation is not well-founded and is dismissed.**

6. **The complaint of harassment related to disability is not well-founded and**

is dismissed.

THE ISSUES

7. The Respondent is a NHS Foundation Trust which provides acute and specialist services across six hospitals in central London to a diverse local population and to patients from across England and Wales. The Respondent employs around 9,700 staff. The Claimant commenced employment with the Respondent on 1 April 2012. Since January 2015 she has been employed as Senior Finance Manager (Projects), a band 8C role according to Agenda for Change. The Claimant continues to be employed by the Respondent as a Senior Finance Manager.

8. The Claimant presented her claims of disability discrimination on 14 May 2020 and she sought to amend her claim on 3 August 2022 to add claims of disability harassment and victimisation.

9. The Respondent accepts that at all material times, from August 2015, the Claimant was disabled by reason of cancer and, from September 2015, she was disabled by reason of endometriosis, and the Respondent had knowledge of the same.

10. The Respondent accepts that from April 2017, the Claimant was disabled by reason of depression and anxiety.

11. The Claimant alleges that she has had post-traumatic stress disorder ('PTSD') from January 2019. The Respondent accepts the Claimant's PTSD met the definition of disability from January 2020.

12. The parties positions as regards when the Respondent knew, or ought reasonably to have known, that the Claimant was disabled by reason of PTSD / depression and anxiety are as follows:

    12.1 PTSD - from 4 March 2020 after the formal diagnosis;

    12.2 Anxiety - February 2019 when the Claimant was signed off with work related stress and anxiety;

    12.3 Depression from July 2019 by Occupational Health Consultant (the Respondent accepts that it had knowledge of depression from July 2019).

13. The Claimant brings claims of:

    13.1 Section 13 direct disability discrimination

    13.2 Section 15 discrimination arising from disability

    13.3 Section 19 indirect disability discrimination

    13.4 Section 20 and 21 failure to make reasonable adjustments

    13.5 Section 27 Victimisation

13.6 Section 26 disability harassment

14. There were case management hearings on 7 October 2020, 13 June 2022 and 16 September 2022. The claim had been listed for final hearing on a number of occasions (July 2021 and March 2023). There was as stay in the proceedings in 2021 due to the Claimant suffering poor health.

15. At the hearing on 13 June 2022 the Claimant indicated that she intended make an application to amend her claim. She agreed to make her amendment application by 4 July 2022. On 3 August 2022 the Claimant made an application to amend her claim to bring further complaints of indirect discrimination and harassment, as well as victimisation. At the hearing on 16 September 2023 the Claimant was given permission to amend her claim as set out in the amended particulars that had been submitted on 4 July 2022 (the Claimant could have brought the complaints as a new claim rather than seeking an amendment).

16. The amendments were to add a new allegation of indirect disability discrimination and to add allegations of harassment and victimisation.

THE HEARING

17. The Claimant represented herself at the hearing and we discussed the adjustments she would need. She had had the benefit of the advice of solicitors, Slater & Gordon in the preparation of her claim. The Respondent had had the benefit of the advice of solicitors DAC Beachcroft.

18. The Orders issued on 7 October 2020 made it clear (SB12) that witness statements must (amongst other things):

    18.1 Be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

    18.2 Set out the facts in numbered paragraphs on numbered pages, in chronological order.

    18.3 If referring to a document, include the bundle page number.

19. This claim was listed for a hearing of 13 days but unfortunately we were only able to offer the parties 10 of those days (albeit we were able to find an 11th day in the hearing window (Monday 11 December 2023)). At the outset we made clear that we were unable to sit on Wednesday 6 December, Friday 8 December, Wednesday 13 December and 14 December 2023. It had been agreed before the hearing that we would be determining liability alone.

20. There was some delay at the start of the first day in us obtaining the documents relevant to the case. We were presented with:

    20.1 The Claimant witness statement dated 27.11.23 totalling 124 pages of close, small typed paragraphs which did not in many respects meet the requirements of the October 2020 orders.

20.2 Respondent witness statement bundle (**WSB)** totalling 114 pages and including statements for:

20.2.1 **Charles House** (WSB 1 – 3) - the Medical Director of the Medicine Clinical Board and heard an appeal by the Claimant against the outcome of her formal complaint/grievance/employee led complaint ("**ELC**") raised in December 2018.

20.2.2 **Deeksha Sood** (WSB 4 – 9) - Human Resources Business Partner at the Respondent and HRBP with primary responsibility for supporting the business in respect of the Claimant from August 2021.

20.2.3 **Jennifer Townsend** (WSB 10 – 16) - Chief Accountant for the Respondent from September 2019 until July 2021 when she became Head of Finance. She took over managing the Claimant in January 2022.

20.2.4 **Jyoti Grewal** (WSB 17 – 29) - self-employed HR consultant appointed by the Respondent in May 2019 to investigate an ELC made by the Claimant raised in October – December 2018.

20.2.5 **Launa Pettigrew** (WSB 30 – 39) – Human resources specialist employed by the Respondent and responsible for managing elements of the Respondent's internal processes with respect to the three grievances that the Claimant raised. We were asked by the parties not to take account of paragraphs 24-45 of her statement as they dealt with events outside the Claim Period.

20.2.6 **Mark Turner** (WSB 40 – 57) - Head of Finance for the Specialist Hospitals Board ("**SHB**") clinical board of the Respondent. He was the line manager of the Claimant from the time he joined the Respondent in September 2016 until the Claimant moved to a role in Corporate Finance in February 2017 (working under the management of Ms Zaharieva).

20.2.7 **Naina Arnett** (WSB 58 – 66) - Head of ER since February 2018. She met the Claimant for the first and only time at her appeal hearing for the First ELC. Ms Arnett's statement explained the impacts of the COVID pandemic and gave an overview of the approach taken to the Claimants various ELC's.

20.2.8 **Peter Sharpe** (WSB 67 – 71) - Head of Financial Performance and Planning at the Respondent since July 2020 and a regular point of contact for the Claimant from October 2019 to April 2023.

20.2.9 **Roger Rawlinson** (WSB 72 – 91) – Human Resources specialist who was appointed by the Respondent to investigate the Claimant's second ELC on 28 February 2020 and who was initially appointed to investigate the third ELC in August 2022 but ultimately did not do so. We were asked by the parties not to take account of paragraphs 24 onwards his statement as they dealt with events outside the Claim Period.

20.2.10 **Vicky Clarke** (WSB 92 – 114). Ms Clarke was employed by the Respondent from 17 February 2017 until 13 January 2022 but then moved to another NHS body. She was one of two Deputy Directors of Finance and then became the sole Deputy Chief Finance Officer from February 2019 reporting to Mr Tim Jaggard (Director of Finance). Part of her role involved working with Ms Mariyana Zaharieva (Head of Finance Productivity and Cost Improvement Programmes). Ms Zaharieva became the Claimant's direct line manager for a period. Ms Clarke, from 30 September 2019 took on management of the Claimant and continued to have responsibility for her until Ms Clarke left the Respondent in January 2022.

20.3 A Core Hearing Bundle of 2053 pages (**CB**).

20.4 A Case Management bundle of 207 pages (**CMB**).

20.5 A supplementary bundle of 5098 pages (**SB**).

20.6 A written argument from the Respondent relating to the Claimant's witness statement and two case authorities.

20.7 A chronology (page CM56) in relation to which we were asked to note that on 17/18 November 2016 the Claimant was on sick leave.

20.8 A Cast list (page CM54).

21. We were told a draft hearing bundle had been provided by the Respondent on 12 September 2023. There had been late disclosure of around 1000 pages of documents by the Claimant which we were told had delayed preparation of the bundle and witness statements and witness statements had been exchanged late on 15 November 2023 (rather than 3 October 2023). This was without the agreement of the Tribunal.

22. There were two issues that we needed to address on the first day:

22.1 The fact that there was no agreed list of issues (we had a list of issues from the Claimant (CMB4-39) which was unworkably lengthy and unclear and a list of issues from the Respondent (CMB40-48) which was workable but in which the new harassment and victimisation allegations were unclear.

22.2 The problems with the list of issues were exacerbated by the fact that the Claimant's witness statement was extremely long and written in a narrative style. The Respondent said that the Claimant's witness statement was fundamentally flawed and that in particular it included swathes of argument and commentary and did not in large part explain on what basis assertions were made. The witness statement also made only limited references to the tribunal bundle. The Respondent said that it was prejudiced by this particularly since the harassment and victimisation allegations in the list of issues remained unclear. The Respondent applied for the Claimant's witness statement to be struck out or in the alternative for it to be given little to no weight or finally for the Claimant to be required to produce a

redacted version of her statement to include matters only within her own knowledge and to be subject to a word limit and with the Respondent's witnesses giving evidence first (the Claimant had not however started preparing her cross examination). A variation on this application was made after a short break for lunch which would have involved only the Respondent's witnesses giving evidence and the Claimant being subject to an unless order and required to come back on the last day of the hearing with a witness statement that met certain requirements and for her claim to then either be struck out or if she met the requirements for the case to be listed at a future date to hear her evidence and submissions.

23. Whilst the Respondent complained that the list of issues was unclear and that the Claimant's witness statement was too long and unclear, the Respondent did not appear to have raised these issues with the Tribunal after it received the amended particulars of claim and having not been able to agree a list of issues with the Claimant. As noted above the parties together had agreed to late exchange of witness statement without the permission of the Tribunal.

24. The length of the Claimant's witness statement is reflective of her approach to concerns she raised with her employer. For example her first grievance totalled 116 pages (excluding the supporting evidence) (Grewal para 36 and CB 134 – 268)

25. We concluded having spoken to the Claimant that the Respondent's suggested approach to require the Claimant to produce a different witness statement would have been unlikely to see progress and we were wary of using an unless order in these circumstances.

26. At the start of the hearing, having given the Claimant guidance on the Tribunal process, we explained the importance of the overriding objective and the fact that we had to not only use the Tribunal time fairly for these parties but also share out its resources fairly in order to serve the needs of the Tribunal's significant body of service users.

27. We considered that in the circumstances it was important for the case to be heard in this trial window and concluded, taking into account that both parties had had the benefit of legal representation in the preparation of the case, it was in the interests of justice and the overriding objective more generally to adopt the following approach:

    27.1 We gave the Claimant some time to decide which of the harassment and victimisation complaints were most important to her;

    27.2 We explained that we would give her time (which amounted to approximately 1hr 45mins) to particularise those claims with us and that would form the case that we would hear (this included some allegations that we considered were already clear);

    27.3 We would take the latest version of the Claimant's statement (updated with a large number of page references on the first day of the hearing) but would need to assess whether her cross examination of the Respondent's

witnesses was fair in its reference of them to pages in the bundle (given that they had had little forewarning of what documents she relied upon).

28. We held the pen in amending the List of Issues prepared by the Respondent and, working with the clarification given to us at the hearing by the Claimant, sent the list of issues out to the parties early on the second day of the hearing (reserved for reading time). At the conclusion of the first day the Claimant indicated that she considered our approach to have been fair and the Respondent confirmed that it could now also proceed on this basis and with our direction that the parties should focus cross examination on the list of issues.

29. While we read into the case on 28 and 29 November, we directed that:

    29.1 The parties discuss and agree between themselves a proposed hearing timetable for our consideration and which would need to cater for submissions being concluded by the end of the day on Tuesday 12 December.

    29.2 The Claimant confirm to the Respondent and to the Tribunal on 28 November 2023 the page numbers for the documents referred to in paragraph 27. ll of the list of issues.

30. We made clear to the parties that if we were not referred to a document in a witness statement or in cross examination and were not given the opportunity to read it during cross examination then we would not read it. We could not read the over 7000 pages of documents put before us.

31. We were left to consider a concern raised by the Claimant in respect of evidence (witness and documentary) adduced by the Respondent in relation to events after the last date relevant to the claim (being 4 July 2022 - when the amendments to the Claim were submitted). This had been explained in an email from Slater and Gordon to DAC Beachcroft on 8 November 2023 (CMB122 and 125).

32. On 28 and 29 November 2023 as we sought to read the witness evidence it became apparent to us that:

    32.1 Large parts of the Claimant's witness statement, whilst written in clear English, were so detailed and descriptive that it was extremely hard to understand the statement and link it to the issues we were being asked to determine. This was particularly the case with the second half of the witness statement;

    32.2 We would not be in a position to review even a fraction of the documents in the bundle.

33. Before 12:30 on 29 November 2023 we sent the following correspondence to the parties:

Reading

As we have read into this case it has become apparent that we will not have time and it would not be proportionate for us to read every document referred to in the witness statements.

The parties are warned that they cannot take that we will have read a page in the bundle unless a witness has been taken to it cross examination and we have been given the opportunity to ensure that we have read it during cross examination.

Cross examination and the list of issues

As we directed on Monday, when cross examining the witnesses both parties are to make clear to us which item of the list of issues they are referring to during the cross examination.

Claimant's application of 13 November 2023 as regards evidence on matters post dating 4 July 2022 (the end of the claim period)

We understand this to be at pages 1-3 of the Case Management Bundle.

By 5pm on 29 November 2023 *the Claimant is to confirm that it is Mr Rawlinson's witness statement that she says we should not read (or if not then what precisely the Claimant says in the witness evidence we should not take into account by reference to paragraphs in specific statements).*

The Respondent is ***by 10am on 30 November 2023*** *to send in correspondence to the Tribunal explaining their position on this application given the list of issues that is now being worked to.*

Witness evidence – cross references to key factual issues in the List of Issues

The parties (including the Claimant as she is represented by a firm of solicitors), are ***by 10am on 30 November 2023*** *to have sent into the Tribunal the table attached complete with page references to their respective witness evidence. The Claimant is to complete the column headed Claimant Witness Statement Reference and the Respondent is to Complete the column headed Respondent Witness Statement Reference. One or at most two page / paragraph references are to be included per row.*

Timetable

We remind the parties of our direction that they were to provide a provisional agreed timetable for the rest of the hearing by this morning.

34. On 30 November 2023:

34.1 The Respondent submitted a chronological summary of the factual allegations which had not been agreed with the Claimant but which the Respondent said was not controversial.

34.2 We were also provided with tables by each party which, for each issue in the list of issues, gave what they considered to be the appropriate cross references in the documentary and witness evidence ("**Evidence/Issues Cross Reference Document**").

34.3 Regrettably the Claimant's solicitors provided comments on the List of Issues (aspects of which we understand had been 'in play' back in mid-2022) which we had to hear from the parties on and decide. We made clear that any frustration we showed with this was not directed at the Claimant but at her representing solicitors.

34.4 We also heard representations on how the reading could be sensibly managed and directed the parties to provide reading lists (which the Respondent agreed to combine into the LOI / Witness Evidence cross reference document such that it became the "**Evidence/Issues/Document Reference Summary**"). Both the Claimant and Respondent agreed to provide this by Monday 4 December 2023 and we gave guidance on the need for the suggested reading to be manageable and that it would not be helpful if a the whole of a lengthy document was referred to – we needed to be directed to the part of any lengthy document which was relevant to the issue in the list of issues.

34.5 We rejected an application by the Claimant to move Ms Clarke's evidence out of natural order. The Claimant had had time to prepare her cross examination, we reminded her of the need to prepare her cross examination on Monday 27 November 2023, there would be a weekend and non-sitting days before Ms Clarke gave evidence and the hearing had been listed for months.

34.6 We agreed with the parties that we would not take account of paragraphs 24-45 of Ms Pettigrew's witness statement or paragraphs 24 onwards of Mr Rawlinson's witness statement as they dealt with events after 4 July 2022 and therefore outside the claim period (the period up to 4 July 2022 hereinafter being referred to as the "**Claim Period**").

34.7 We clarified time limit points in the list of issues and other minor points that we were not clear on having read evidence and we recirculated the LOI in redline to the parties and gave the parties time over the lunch break to consider and agree it. This included giving the Claimant time over the lunch break to take advice from her solicitors before she went under oath in the afternoon.

35. The List of Issues was agreed with the parties and finalised as it appears in the Appendix to this judgment. The Claimant then started her evidence at around 14:20 on the afternoon of 30 November 2023. Unfortunately the Claimant did not answer questions in a straightforward way and limited progress was made that afternoon.

36. At the beginning of the fifth day, Friday 1 December 2023, we heard that the Respondent had prepared a new version of the Evidence/Issues/Document Reference Summary and had updated the issues within it to reflect our decisions of the previous day. We continued hearing the evidence of the Claimant. At the end of the day we recapped on the actions to be completed over the weekend and the timetable. We told the Respondent that we only expected them to cross examine on issues central to the list of issues and did not expect the Respondent to challenge the Claimant on all things in her very long statement which were disputed. The Respondent expected to finish cross examination on Monday afternoon. We also discussed with the parties the number of documents referred to in the Evidence/Issues/Document Reference Summary, the fact that the Respondent would need time to consider the documents that the Claimant referred to before the Respondent concluded its cross examination of her. Finally we agreed that the Claimant could, on 4 December 2023 or in re-examination of herself, point us to documents that she could not find in the bundle when being cross examined.

37. On day 6, 4 December 2023, the Claimant referred us to documents that she had not been able to recall in cross examination on Friday and we discussed the Evidence/Issues/Document Reference Summary which had been completed by the parties over the weekend. We then gave the Respondent some time to check that document to ensure that the documents that the Claimant had referred to did not give rise to any further cross examination. We started hearing cross examination of the Claimant again at around mid-day.

38. Cross examination of the Claimant continued into 5 December 2023 and concluded after some Tribunal questions and after the Claimant had briefly re-examined some of her evidence just before a break for lunch. We then heard the evidence of Mr Turner under cross examination by the Claimant who got to grips with the process as the afternoon went on. We sat late to conclude Mr Turner's evidence.

39. We could not sit on Wednesday 6 or Friday 8 December but heard further evidence from the Respondent's witnesses on Thursday 7 December. At the start of that day we queried the Claimant's suggestion that she expected to spend 2-3 hours cross examining Mr Grewal given that Ms Grewal investigated the Claimant's first grievance but did not need to answer an allegation of discrimination herself. We indicated that we would expect the Claimant to focus more on Ms Clarke who had been the line manager of one of the Claimant's line managers (Ms Zaharieva). Unfortunately the Claimant did not heed that guidance and spent much of the day with Ms Grewal.

40. In the afternoon of 7 December 2023 there were some problems with the CVP link to Ms Clarke. Not much time was lost to this but due to timetabling issues we paused her evidence and heard the evidence of Ms Deeksha Sood. Ms Clarke agreed to attend in person on Monday 11 December 2023 because the Claimant had not covered all the issues and needed a further hour with her. We guided the Claimant on how she could best use her time during the day (including focusing on the issues in dispute and list of issues). We made clear that bringing Ms Clarke back on Monday did not mean there was more time for the Respondent's evidence but that more witnesses would need to be heard on 11

and 12 December. During the Claimant's cross examination of the Respondent's witnesses we ensured we reminded the Claimant of the timetable and passage of time. It became apparent that we would not have time for submissions and that they would have to be put back to the morning of Friday 15 December.

41. On Monday 11 December 2023 the parties had reached agreement that there was no dispute in the evidence set out in the witness statements of Ms Arnett and Mr Rawlinson (albeit we were not to read 24 – 45 in Ms Pettigrew's statement or from paragraph 24 to end the end of Mr Rawlison's statement). It was therefore agreed that we would not hear cross examination of them and that this would free up more time with the more important witnesses (in particular Ms Clarke). As regards Ms Arnett's evidence at paragraph 17, the Claimant wanted to clarify that it was in fact her Union Representative rather than the Claimant herself who was not able to attend the meeting referenced. The Respondent did not dispute this. Ms Clarke then continued her evidence but notwithstanding a number of warnings to the Claimant we had to guillotine cross examination of Ms Clarke at 13:00 to allow for our questions. We then in the afternoon heard the evidence of Mr Sharpe and Ms Pettigrew.

42. On Tuesday 12 December 2023 we heard the evidence of Dr House and Ms Townsend and then gave the Claimant further guidance on submissions and the process for making written and/or oral submissions (the Claimant wanted to make written submissions). We could not sit on 13 and 14 December 2023 but the parties agreed to send in their written submissions by 5pm on Thursday 14 December and reconvene via CVP at 10am on Friday 15 December 2023 to speak to their written submissions.

43. The Claimant initially said she would just speak to her written submissions as she had not sent them to the Tribunal or to the Respondent. Having heard Counsel for the Respondent speak to his submissions the Claimant then chose to send in her written submissions which she then spoke to. The Respondent was given the opportunity to comment on those submissions.

THE LAW

Time limits – the EqA

44. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

45. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

46. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

47. In **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of

an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of **Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17** where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

48. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548**; The tribunal in ***Lyfar*** grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

49. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

50. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the *rule (***Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576***).*

51. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23,** the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of **British Coal Corporation v Keeble [1997] IRLR 36** as well as other potentially relevant factors.

52. Where the reason for the delay is because a claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (**Apelogun-Gabriels v London Borough of Lambeth and anor 2002 ICR 713, CA**). Each case should be determined on its own facts, however, including considering the length of time the claimant waits to present a claim after receiving the grievance outcome.

53. In the case of **Harden v (1) Wootlif and (2) Smart Diner Group Ltd UKEAT/0448/14** the Employment Appeal Tribunal reminded employment tribunals that we must considering the just and equitable application in respect of each respondent separately and that it is open to us to reach different decisions for different respondents

Discrimination under the EqA

54. The Equality Act 2010 (EqA) protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics' (section 4). These include disability (section 6) race (section 9) and sex (section 11). Race includes colour, nationality and ethnic and national origins.

Direct disability discrimination

55. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. This includes direct discrimination because of a protected characteristic as defined in section 13.

56. Section 13 of the Equality Act 2010 provides that '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'.

57. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

58. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

59. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

60. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was.

61. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

62. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's disability. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

63. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258** and we have followed those as well as the direction of the court of appeal in **Madarassy v Nomura International plc [2007] IRLR 246, CA**. The decision of the Court of Appeal in **Efobi v Royal**

Mail Group Ltd [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

64. The Court of Appeal in Madarassy, states:

> 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.' (56)

65. It may be appropriate on occasion, for the tribunal to take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (**Laing v Manchester City Council and others [2006] IRLR 748; Madarassy**) It may also be appropriate for the tribunal to go straight to the second stage, where for example the Respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his/her favour that the burden at the first stage has been discharged (**Efobi v Royal Mail Group Ltd [2019] ICR 750,** para 13).

66. In addition, there may be times, as noted in the cases of **Hewage v GHB [2012] ICR 1054** and **Martin v Devonshires Solicitors [2011] ICR 352**, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, <u>but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment</u>.

67. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach **Qureshi v London Borough of Newham [1991] IRLR 264, EAT**. We must "see both the wood and the trees": **Fraser v University of Leicester UKEAT/0155/13** at paragraph 79. Our focus "must at all times be the question whether or not they can properly and fairly infer… discrimination.": **Laing v Manchester City Council, EAT at paragraph 75**.

Discrimination arising from disability - section 15 EqA

68. Section 15 EqA provides: "(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".

69. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant.

70. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as “detriment” found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

71. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators’ conscious or unconscious thought processes to a significant extent **(Charlesworth v Dronsfield Engineering UKEAT/0197/16).**

72. By analogy with **Igen**, “significant” in this context must mean more than trivial. Whether the reason for the treatment was “something arising in consequence of the Claimant’s disability” could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator’s thought processes.

73. Simler P in **Pnaiser v NHS England [2016] IRLR 170, EAT**, at [31], gave the following guidance as to the correct approach to a claim under **section 15 EqA**:

> '*(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport [1999] IRLR 572**. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.*
>
> *(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a*

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

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

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

(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

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

74. The burden of establishing a proportionate means defence is on the Respondent. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective

balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax [2005] IRLR 726, CA**.

75. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

76. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

77. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person.

Indirect disability discrimination

78. Section 19 EqA provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

Meaning of provision, criterion or practice "PCP"

79. The phrase Provision, Criterion or Practice is to be construed widely in accordance with the EHCR Code. "Provision" means any contractual or non-contractual provision or policy. "Criterion" means any requirement, pre-requisite, standard, condition or measure applied whether desirable or unconditional. "Practice" means the employer's approach to a situation if it does happen or may happen in the future. All that is necessary here is that there is a general or habitual approach by the employer **Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589**.

80. Generally PCP's suggest that there is a state of affairs that exists or would exist if the situation were to occur again. It means that there are things that an employer does do or would do should the issue arise in the future. A one off decision can also be a provision **Starmer v British Airways Plc [2005] IRLR 862 EAT**. This may include a one off act or decision only applied to one person, but similarly, one off acts and decisions are not automatically PCPs **Ishola v Transport for London [2020] EWCA Civ 112** (see also 'reasonable adjustments' below).

Group disadvantage

81. For a case of indirect discrimination to succeed, there must be both personal disadvantage and group disadvantage to those who share their protected characteristic(s).

82. The correct test for this is not whether there was an adverse effect on the group, but whether a seemingly neutral requirement has a discriminatory impact **Eweida v British Airways Plc [2010] EWCA Civ 80**.

83. In doing so, the Claimant does not need to prove why a PCP is having the effect of disadvantaging the group they belong to, they just have to prove that the PCP was having that effect. Also, the Claimant does not need to prove that all people belonging to the comparison pool are in fact disadvantaged. Some will be some who will not be. What is for the Claimant to prove on balance is that the group is particularly disadvantaged as a result of the PCP whether or not it actually affects all of that group **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.

84. The Claimant must also show that those who share the same protected characteristic were put at a particular disadvantage, which is not defined by the Equality Act 2010. This has been determined by the ECJ as meaning "that it is particularly persons [with the relevant protected characteristic] who are at a disadvantage because of the measure at issue" **Chez Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia C-83/14 [2015] IRLR 746**. It has nothing to do with how grave the disadvantage is or that the disadvantage has to be unique to that particular group. The group simply has to be at more of a disadvantage compared to a comparator group who have also been subjected to the PCP.

85. The comparator group or pool of people must be people who do not share the protected characteristic relied upon, but who are in circumstances that are not

materially different from the particularly disadvantaged group **Statutory code of practice paragraph 4.18**. In addition, the pool must be one that realistically tests the allegation of indirect discrimination being made by the Claimant **Ministry of Defence v DeBique [2010] IRLR 471 EAT**. Ultimately, regardless of the pleaded case and submissions by the parties, the Tribunal has the ultimate discretion to decide what the correct pool is because if the tribunal gets the pool wrong that has been found to be an error of law **Naeem v Secretary of State for Justice [2014] IRLR 520 EAT**.

Personal disadvantage

86. The Claimant must also prove that the PCP put them at the disadvantage complained about and that the disadvantage they have is the same as the disadvantage their group has because of the words "that disadvantage" in s19 (1)(c).

Causation

87. Both the group disadvantage and the personal disadvantage must be caused by the application of the PCP rather than because of any particular characteristic. In **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27** Lady Hale said at paragraph 25:

> "*A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot".*

88. If the Claimant is not affected by the PCP themselves, for example by there being a height restriction of 5ft 9 inches or above, and they are taller than this, then their claim fails. Similarly, if on average the group relied upon was taller than 5ft 9 inches, then it cannot be said that the PCP caused the group to be disadvantaged either. So in cases where the PCP does not produce a simple outcome of having two result for the group, namely compliance or non compliance, but has a scale of effect, then, following **McNeil and others v R&C Comrs [2019] EWCA Civ 1112**, the correct approach is to look at the average impact over the group.

89. In addition, a person will still have a claim if they are personally disadvantaged by a PCP applied to a group of people that they do not belong to themselves, which causes that group a particular disadvantage **Chez Razpredelenie Bulgaria AD** above.

Reasonable Adjustments

90. By section *39 (5) EqA* a duty to make adjustments applies to an employer. By section *21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

91. *Section 20(3) EqA* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

92. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

93. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

94. In **Environment Agency v Rowan 2008 ICR 218** and **General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4** the EAT gave general guidance on the approach to be taken in reasonable adjustment claims. A tribunal must first identify:

    94.1 the PCP applied by or on behalf of the employer

    94.2 the identity of non-disabled comparators;

    94.3 the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with the comparators.

95. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

96. The phrase PCP is interpreted broadly. The EHRC Code of Practice on Employment (2011) ("**the Code**") says at paragraph 6.10:

> "*[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*."

97. The Code goes on to provide at Paragraph 6.24, that *"there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask);* At paragraph 6.37, *that Access to Work does not diminish or reduce any of the employer's responsibilities under the 2010 Act.* At

paragraph 6.28 the factors which might be taken into account when deciding if a step is a reasonable one to take:

> *Whether taking any particular steps would be effective in preventing the substantial disadvantage; The practicability of the step; The financial and other costs of making the adjustment and the extent of any disruption caused; The extent of the employer's financial or other resources; The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer*.

98. In **Lamb v The Business Academy Bexley EAT 0226/15 the EAT** commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

99. It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

100. There is no formal requirement that the PCP actually be applied to the disabled Claimant. The EAT said in **Roberts v North West Ambulance Service [2012] ICR D14** that a PCP (in this case, hot desking) applied to others might still put the Claimant at a substantial disadvantage.

101. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one off decision which was not the application of policy is unlikely to be a "practice": **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. In that case the one-off application of a flawed disciplinary process to the Claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

102. In **Ishola v Transport for London [2020] ICR 1204** the Court of Appeal said that all three words "provision", "criterion" and "practice" "..carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

103. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the Claimant, but also take into account wider implications including the operational objectives of the employer.

104. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a "real prospect" that it will, the adjustment may be reasonable. In **Romec v Rudham [2007] All ER (D) 206 (Jul)**, EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)**, EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial

disadvantage'. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

105. Schedule 8 EqA (Work: Reasonable Adjustments) - Part 3 limitations on the duty provides:

> *S. 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— (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (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. Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.*

106. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual knowledge of <u>both</u> the disability <u>and</u> the substantial disadvantage and also that it could not be reasonably have been expected to know of <u>both</u> the disability <u>and</u> the substantial disadvantage.

Victimisation

107. Section 27 EqA provides: "*(1) A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. (2) Each of the following is a protected act— (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act. (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. (4) This section applies only where the person subjected to a detriment is an individual. (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule*."

108. The starting point is that there must be a clear allegation amounting to a protected act. Therefore an allegation that something might be discriminatory rather than is actually discriminatory, will not be sufficient **Chalmers v Airpoint Limited and Others UKEAT/0031/19.**

Harassment (disability)

109. Section 40 of the EqA renders harassment of an employee unlawful.

110. Section 26 EqA 2010 provides: *(1) A person (A) harasses another (B) if- A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of - violating B's dignity, or 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— the perception of B; the other circumstances of the case; whether it is reasonable for the conduct to have that effect.

111. The Tribunal is therefore required to reach conclusions on whether the conduct complained of was unwanted and, if so, whether it had the necessary purpose or effect and, if it did, whether it was related to disability.

112. If the Claimant proves any of the conduct they complain about, it was unwanted. There is no need to say anything further about that.

113. It is clear that the requirement for the conduct to be "related to" disability needs a broader enquiry than whether conduct is "because of disability" like direct discrimination Bakkali v Greater Manchester Buses (South) Limited UKEAT/0176/17.

114. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

115. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before the Tribunal **GMB v Henderson [2016] EWCA Civ 1049**.

116. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (they must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context. That much is clear from section 26 and was confirmed by the Employment Appeal Tribunal in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724**. The words of section 26(1)(b) must be carefully considered. Conduct which is trivial or transitory is unlikely to be sufficient.

117. Mr. Justice Underhill, as he then was, said in that case:

> *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have Case No: 1301063/2019 22 been apparent whether the*

> *conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …"*
>
> and
>
> *"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

118. Similarly in the case of **HM Land registry v Grant [2011] EWCA Civ 769**, Elias LJ as he became said, when discussing the descriptive language of subparagraph 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*."

119. In the case of **Greasley-Adams v Royal Mail [2023] EAT 86** for harassment to have occurred, the person must have been aware that it had happened in order to perceive that it was harassment. Therefore, if comments are made behind an employee's back that they become aware of later on, for example because of an investigation into their grievances about other matters, to determine whether harassment has taken place, the correct approach is to look at the Claimant's perception of the situation at the date time the alleged harassing incident took place. Consequently, if the Claimant was not aware of the harassment at the time, they could not perceive that they had been harassed at the time.

120. Further, if they then later found out about the harassment event, it could well still amount to harassment at the time they find out about it. However, whether it is reasonable for the Claimant to believe that they have been subject to harassment in accordance with section 26 (4) (c), that question is to be determined in the context of events taking place at the time the Claimant finds out about the harassing event. In the context of **Greasley-Adams**, this meant that finding out about a harassment event during an investigation meeting into his grievances and claiming this was violating his dignity, was unreasonable in the context of the employer investigation the Claimant's concerns in good faith.

121. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If they do, then it is plain that the Respondent can have harassed them even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c).

122. Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met **Driskel v Peninsula Business Services Ltd. [2000] IRLR 151**.

123. In addition, if what the issue alleged by Claimant as amounting to a breach of the EqA would not be unlawful under the EqA, then it cannot be a protected act for example see **Waters v Metropolitan Police Comr [1997] IRLR 589**.

124. The employee must be subjected to a detriment, which has been decided to mean placed at a disadvantage **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230**. Unfavourable or less favourable treatment arguments are not in accordance with the correct statutory wording of section 27. Detriment is established if treatment is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to their detriment: **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL.** Therefore, for detriment to be proven, it is for the Claimant to show that they were or would have been, in their subjective view, placed at a disadvantage and that it was objectively reasonable for them to have held that view.

125. Detrimental treatment of a Claimant will not be because of a protected act if the detrimental treatment is caused by the way in which the protected act is done or the behaviour of the Claimant whilst communicating the protected act or gathering information for it. For example see **Woods v Pasab Limited [2012] EWCA Civ 1578** and **Martin v Devonshire Solicitors [2011] ICR 352.**

126. The detriment relied upon by the Claimant, must be linked to the protected act. The same test for causation in direct discrimination, is therefore relevant to victimisation because the statutory wording is the same.

ANALYSIS AND CONCLUSIONS

127. Having considered all the evidence we make our findings of fact on a balance of probabilities. The parties will note that not all the matters that they told us about are recorded in our judgment and we have not reached findings of fact on everything in dispute. That is because we have limited our findings to points that are most relevant to the legal issues and the List of Issues.

128. We have been careful to look at the evidence 'in the round' to determine whether it suggested that the Claimant had been subjected to the unlawful treatment of which she complains (this is particularly important when it comes to allegations of direct discrimination, victimisation and harassment). Having done so we did not find cause to change our decisions on any issue or issues.

129. The Respondent has three Clinical Boards (one of which is the Specialist Hospital Board "**SHB**"), together with a Research & Development Board and

Corporate Board. Each of these Boards has a Head of Finance with responsibility for managing finances of the particular board. The budgets of the boards are significant. We were told that SHB has an annual budget of circa £500 million. There are approximately 130 members of staff across the finance team, including those in the Clinical Boards.

130. There is a distinction between work done at Clinical Board level and the work of the 'Corporate Board'. In the Corporate Board the work is higher level and oversees the whole of the hospital.

131. This distinction between Corporate Board and Clinical Board work is important in this case as this devolved structure means that some non-clinical finance professionals have roles working directly for clinical services and the Claimant enjoyed opportunities to work more closely with clinicians as part of a Clinical Board (rather than in the Corporate Board).

132. For the purposes of this claim finance work also falls into two broad categories:

    132.1 Firstly work that relates to the day to day operation of a Clinical Board's finances ("**Operational Work**"). Operational Work will come with a degree of routine monthly and annual reporting deadlines.

    132.2 Secondly, work on projects which might for example, focus on addressing a particular problem or relate to the development of a new site or function ("**Project Work**"). Sometimes project work might be done by the Finance Manager doing the Operational Work for a division within a Clinical Board (for example if the project related to the division for which that Finance Manager did the Operational Work). Sometimes Finance Managers focus purely on Project Work without undertaking Operational Work. There is a higher degree of Project Work in the Corporate Board.

133. Project Work is sometimes, by its nature, up and down or changeable (the adjective applied by Mr Tim Jaggard (Finance Director at the Respondent) when being asked questions in an investigation of a grievance raised by the Claimant was "lumpy" CB412).

134. If a Finance Manager is doing project work and then is out of the office for a period (e.g. on maternity leave) the project work does not always get backfilled. In such circumstances it does not mean that the role is being disbanded or that the Project Work is no longer there, it just means that Operational Work is prioritised until the resource to advance the project becomes available again. Project Work might, for example, look at the potential for efficiency savings and that work can be paused. During the pandemic productivity work was stopped entirely (the NHS had to spend what it needed to spend to cope with the impacts of the COVID pandemic) and we accept Ms Clarke's evidence that it only resumed in 2022.

135. The Claimant secured a position within the Respondent in 2012 at the end of a graduate scheme. She started in a Corporate Board position as a band 7 Finance Analyst. However, as we say, the Claimant's main interest was in working more closely with the clinical services within the divisions. A clinical

board position would give her that interaction with clinical services.

136. In 2013 an opportunity came up in the Specialist Hospital Board (SHB) as an 8A Finance Manager which the Claimant was successful in securing. In that new role she worked for the Head of Finance in SHB, Mr Moses. She worked as Finance Manager for the Eastman Dental Hospital (EDH) and Paediatrics divisions. She was then promoted in this role to an 8B 'banding'.

137. The Claimant particularly enjoyed being able to apply her technical and analytical skills to real world issues and to translate that into meaningful output so as to help her divisions' clinical and operational managers achieve their goals wherever finance was relevant. As a Finance Manager the Claimant worked closely with a Management Accountant (MA) who reported to the Claimant.

138. In January 2015 the Claimant was successful in applying for a new role, one grade more senior, as an 8C Senior Finance Manager in the Specialists Hospitals Board. One of the Claimant's motivations for applying for this role was that it was a project role that required her to work with the clinicians. However, she was not able to start the role because her 8B role needed to be backfilled first. Ms Mariyana Zaharieva (with whom the Claimant had worked and who became Head of Finance for the PMO in the Corporate Finance department (which we will come on to describe)), was one of those who interviewed the Claimant for this role.

139. This new SHB 8c Senior Finance Manager Role ("**the SHB Role**") had been created by Mr Moses (Head of Finance for SHB). He and the Claimant met in June 2015 to discuss a long list of work she might undertake in the SHB Role when she started it ("**the Long List**").

140. Unfortunately the Claimant was then diagnosed with breast cancer in August 2015 and lost her father unexpectedly in early September 2015. Initially the Claimant undertook cancer treatment whilst in work but was not undertaking the SHB Role at that time. She then had a period of sick leave from 26 October to 4 December 2015.

141. The Claimant unfortunately then had to start a longer period of sick leave because of her breast cancer treatment on 9 Feb 2016. She was off work until July 2016.

142. Mr Moses was also himself off sick from April 2016. The Claimant started a phased returned on 11 July 2016 (SB2254) and Mr Moses returned around the same time (Grewal 48.6). Mr Moses by this point had planned to retire and he met with Mr Mark Turner, who was taking over from him on 18 July 2016. This was an informal meeting. Mr Moses showed Mr Turner a structure chart (CB 428) in which the Claimant was identified as "Senior Finance Manager - Projects".

Mr Turner's view of the Claimant's new role

143. Mr Turner started in his role as Head of Finance for the SHB in September 2016. The Claimant had yet to define her work in the SHB Role when he started and the SHB Role was unusual in that all the other people in Mr Turner's team were

assigned to divisions within SHB (such as paediatrics, Women's Health, EDH and Royal National Throat and Nose Hospital (RNTNE)).

144. Mr Moses had explained to Mr Turner that the SHB Role was newly created but in Mr Turner's experience, projects would normally be led by the finance manager assigned to the division to which the project related (as we explain above). For example, a finance project for the paediatric division would be led by the finance manager who was assigned to the paediatric division. Having a projects role within the SHB finance team would therefore mean taking away the projects work from the finance managers who were aligned to the division (thereby potentially removing some of the more interesting work from them).

145. We accept Mr Turner's evidence that he therefore had some questions right from the outset about whether it made sense for the SHB Role to sit within the SHB finance team and how the projects role fitted with his team.

146. We accept that this uncertainty was exacerbated by the fact that the Claimant had not had the opportunity to start developing the role prior to Mr Turner taking over from Mr Moses.

147. Mr Turner knew from Mr Moses that the Claimant had been through a difficult time due to ill health but he did not know the details. He knew that Mr Moses had agreed that the Claimant could work from home two days per week following her return to work (this was before the pandemic when working from home was less common).

Formation of the Project Management Office

148. In the time between the Claimant successfully applying for the SHB Role and her return from sick leave in July 2016 the Respondent had created an internal Project Management Office ("**PMO**") as part of the Corporate Board. Ms Grewal later, when investigating the Claimant's first grievance, concluded that the Claimant's role might have sat better in this PMO. However, we accept that this conclusion may have arisen out of a misunderstanding of the fact that the SHB Role had been conceived as a role working on SHB focused projects (rather than more general projects). (Grewal 48.22).

Management style

149. By 2016 Mr Moses had had a long term working relationship with and built up and understanding of the Claimant. He was described by others as being paternalistic and pastoral as a manager.

150. Mr Turner in 2016, although he had previously worked for the NHS, was new to the Respondent and to his role. He also did not know the Claimant. Ms Gaskin (who did not give evidence to the Tribunal but who was interviewed by Ms Grewal and knew Mr Turner's style CB 415)) contrasted Mr Turner with Mr Moses saying that Mr Turner was more reflective and analytical and took pride in good process and accuracy. She said he was more introverted but saw him having warm interactions with people.

151. We accept Ms Grewal's evidence (48.8) that the Claimant's expectations about what she could expect from a manager "*were not aligned with Mr Turner's own*

management style".

152. When the Claimant returned from sick leave in July 2016 a number of circumstances combined which led to the Claimant being unhappy with the situation:

152.1 She was returning to a job which she had not done before;

152.2 Soon after her return the manager with whom she had had a long and trusted working relationship, Mr Moses, retired;

152.3 She needed to build a new working relationship with Mr Turner who had a different management style and who she did not know;

152.4 Mr Turner had not been the person who had created her role and he had questions over it as explained above.

153. Mr Turner was taken aback when he learnt from the Claimant of the seriousness of the health challenges she had recently faced (Turner WS42).

Mr Turner and the Claimant scope the SHB Role

154. We accept that Mr Turner, to the best of his recollection, never saw the Long List and we do not accept the Claimant's assertion that he did see it but was not interested in it and that he discarded it. That assertion does not seem probable to us.

155. On 7 September 2016 the Claimant sent Mr Turner an email (CB 430) setting out what came to be referred to as the "**Short List**" of projects that she had been tasked to work on. We accept Mr Turner's evidence that he thought the medical staffing point (the production of an automated report of the SHB medical staffing financial position) in the Short List was useful. We accept Mr Turner's evidence that he discussed a number of areas of work that he identified that the Claimant could get involved in:

155.1 working with Sangeetha Mohanaruban, the Senior Finance Manager for Queen Square (which is the biggest division within SHB) who had some resourcing challenges in her team – the Claimant did not think this was commensurate with her new grade.

155.2 undertaking a project to improve financial controls in the department (a major accounting error having been found which needed to be addressed). The Claimant said she did not want this project but we accept Mr Turner's evidence that it would have been commensurate with the Claimant's 8(c) grade. Mr Turner therefore ran this project himself.

155.3 attending Capital Works Committee meetings on his behalf and which he accepted were 'dry' but would help the Claimant raise her profile and give her stability and routine. The Claimant agreed to attend one meeting but declined to do so on an ongoing basis.

155.4 A Queen Square Theatres Business Case project which we accept was commensurate with the Claimant's grade. The Claimant did work on this

fast paced project. It was temporarily reallocated to other colleagues during times that the Clamant was on sick leave but came back to her on her return.

156. On one occasion the Claimant did approach Mr Turner with a suggestion that she provide training to budget holders. He did not say she could not undertake this work but did not see it as a priority (there was already budget holder training in place across the organisation and the Claimant was already on the rota to provide that training) and so he did not encourage her to do so.

157. Mr Turner considered whether a project involving the finance for private patients could be allocated to her but concluded that it would be disruptive to remove the project from Sarah Moore (Finance Manager for Women's Health) who had been told she would have responsibility for private patients when she started the role in Women's Health.

158. On the balance of probabilities we accept Mr Turner's evidence that the Claimant took much longer over the medical staffing report exercise than he would have expected, that she over-engineered the outputs from it and he gave her feedback on it. However, the Claimant (CB1058) then gave Mr Turner a number of options rather than, as he would have expected from a Grade 8(c) manager, providing a recommendation.

159. We consider on the balance of probabilities that the Claimant's confidence was affected by her being away from work for a substantial period of time, by not having bedded into the SHB role and because Mr Turner was not sure of how the SHB role sat in the organisation. The Claimant had clearly been through an extremely difficult period in her life. We do not intend any criticism of the Claimant given the personal challenges she faced with her health at the same time as losing her father but she:

159.1 became unduly anxious about the security of her employment;

159.2 came across to fellow employees as unsure of herself and indecisive (when she was in a senior role that required her personally to make decisions and drive projects independently).

159.3 was hesitant and needed more assurance and security and definition in her role than the Respondent could reasonably have anticipated her needing or offered her at the time;

159.4 was unduly suspicious of any references made to assessing her performance in the way that would be undertaken with any employee as part of the Respondent's an annual review process;

159.5 was unduly sensitive to any sense of criticism (she accepted herself that she I had been through a lot and had insecurities that she was somehow not recovering quickly enough or presenting 'well enough' in her work CSW18.02).

160. The Claimant accepted that she has a verbose communication style and is very process driven in her outlook. On the balance of probabilities we also find that

during the period in question she had a tendency towards adopting binary and intransigent views. These factors combined meant that it was often not possible for the Respondent to understand what the Claimant really wanted or needed or to understand why. This manifested itself, for example, in the Claimant's focus on her substantive SHB role (as against other work in which she was given the opportunity to get involved) and her insistence that the Respondent go through a formal process of redeployment/change management process with her when she concluded that the Respondent had decided that she could not return to the SHB role.

Ad hoc meetings with Mr Turner

161. The Claimant complains (**LOI 9b**) that Mr Turner insisted on holding ad hoc meetings with the Claimant in early September 2016 when Mr Turner first joined the Respondent, 23 November 2016, 23 January 2017, 25 January 2017 and 13 February 2017 along with two or three other meetings in the period between October and December 2016. She says that this amounted to unfavourable treatment of her that she was subjected to because of her sickness absence which was something arising in consequence of her disability and therefore that she was treated unlawfully under Section 15 EqA. She says it was unfavourable treatment because Mr Turner had been informed that she required structure and advanced warning to properly prepare for meetings.

162. We find that Mr Turner did instigate ad hoc meetings with the Claimant (Mr Turner accepts, for example, that he approached the Claimant at her desk or that on an ad hoc basis they might walk to a meeting room to have a discussion that had not been prearranged).

163. However, we accept that ad hoc meetings were not something that Mr Turner insisted on and we accept that, had the Claimant wanted more time to think about a topic of discussion, she could have asked.

164. The Claimant told Ms Grewal that she did not have a problem with the meetings (CB1276) and that her problem was Mr Turner would not give her the time to reply when he wanted to talk to her.

165. The Claimant clearly did not like not having notice of discussions of substantial matters – she wanted time to pre-prepare her arguments or thoughts. However, we do not consider that this amounted to unfavourable treatment of the Claimant. No substantive decisions impacting the Claimant were made on this basis and it would have been impractical, particularly given the seniority of the Claimant's role, for all meetings to have been pre-arranged with an agenda agreed in advance. Mr Turner had no expectation for the Claimant to prepare and she did not tell him that she needed time to consider her response to any point raised at an ad hoc meeting.

166. Even if we are wrong and this did amount to unfavourable treatment, Mr Turner did not hold ad hoc meetings with the Claimant because of her sickness absence (the "something" in the Claimant's claim). He had them with her, and others, in the normal course of work.

Secondment to Mariyana Zaharieva's team and meetings into early 2017

167. By November 2016 the Claimant had approached Ms Zaharieva (who at that time was the Head of Finance for the PMO (as described above) in the Corporate Finance department). She complained to Ms Zaharieva about the fact she was not undertaking any projects work (SB4717). We find that her criticisms of Mr Turner were not fair given the opportunities he had given her to be involved in work and given that he was new to his role and was still in the process of considering how the Claimant's role sat within SHB.

168. While the Claimant was on a period of sick leave in January 2017, Ms Zaharieva told Mr Turner about the Claimant's frustrations and explained that she and the Claimant had discussed, at the Claimant's instigation, project work that was available in Ms Zaharieva's team and which the Claimant was interested in doing. We accept Mr Turner's evidence that this seemed like the ideal solution to the situation for all concerned in that it addressed the challenges he was facing in finding project work for the Claimant and gave Ms Zaharieva the support she needed. It also provided the Claimant with a body of work.

169. There were some practical issues that needed to be addressed but on 10 February 2017 Mr Turner wrote to Ms Gill Gaskin (the Medical Director for SHB) to propose the Claimant's secondment to Ms Zaharieva's team as follows (SB423):

> *Our last 1:1 was pretty much filled with CIP so we didn't get to the bottom of this , but I've spoken to both Mariyana and Vanessa since then, and I am supportive of this proposal: that is temporarily changing the line management of Vanessa to Mariyana (for 6 months).*
>
> *I think it is the best thing for Vanessa. I think she will benefit from having some routine work to do which I hope will build up her confidence and give us a yardstick to measure performance by.*
>
> *The Carter stuff is something I haven't had much time to get into yet so I think this could be a good way in for the board, and I think Mariyana is happy that we can direct Vanessa's workload to look at things of particular interest to me/you.*
>
> *I have a concern that this is a short term plan, but after six months hopefully I would be in a position where I am more comfortable with some of the basic finance routines and processes so I could spend more time assessing the usefulness of the post in my structure, and what I want to do.*
>
> *Could we pick this up again, and agree a position? Tim is offering to pay for 20% of the costs in recognition of the corporate work that would be undertaken*.

170. The reference to 'Carter' was to a project focused on identifying high level productivity gains.

171. The Claimant was therefore seconded to Ms Zaharieva's team and expressed

her happiness at that prospect to Ms Zaharieva on 14 February 2017 (CB441).

172. The Claimant complains (**LOI 7 a**) that on 25 January 2017 Mr Turner informed the Claimant that there was no longer a role for her in his department and/or that she was not good at reporting and basic accounting. She says that this was less favourable treatment to which she was subjected because of her disability.

173. We accept the Respondent's submission that it was clear from the Claimant's written and oral evidence that she could not remember what Mr Turner had actually said to her at this meeting. In evidence she said that her witness statement had been drafted using the account that she had written for her grievance in October 2018. However, that October 2018 account was very different to the notes that she made in February 2017 and the Claimant could not explain why she had not used those earlier notes rather than the later ones. The note for 25 January 2017 does not support the assertion that Mr Turner informed the Claimant that there was no longer a role for her in his department and/or that she was not good at reporting and basic accounting (see SB1683 – notes that the Claimant emailed Ms Grewal in September 2019 which the Claimant said she had made on 16 February 2017). We accept Mr Turner's evidence that he did not have a basis for assessing the Claimant's capabilities on those things at that time. It is also clear on the evidence that the SHB Role remained in the structure of Mr Turner's team and we accept Mr Turner's evidence that he did not say there was no role for the Claimant in her team. We accept his evidence that he may have said that he struggled to understand the purpose of the role in the team (for the reasons we have set out above) and that he tried to be honest with the Claimant in saying that it was difficult to find projects that straddled the different divisions within SHB.

174. This claim fails because we do not think on the balance of probabilities that Mr Turner said what it is alleged he said. Even if he did, we do not consider that it would have amounted to less favourable treatment based on a hypothetical comparator or that Mr Turner would have said the things alleged because the Claimant had a disability.

175. We accept the Respondent's submission that the entry in the Claimant's notes relating to 13 February 2017 does not record Mr Turner telling the Claimant that her job was at risk or that the Respondent was considering making her redundant (**LOI 7d (iv)**) or that she should resign **(LOI 7d (vi)**) or that there was no role for her in SHB (**LOI 7d (ii)**) or that he thought that she was different (**LOI 7d (i)**). We accept the Respondent's submissions the Claimant could not explain why such important allegations were missing from a note that was made specifically to record her dissatisfaction. At their highest, these notes record that "*Mark made several comments that appeared to imply a negative view of my work/me, without directly stating this*" but also record that "*the current challenge is that Mark does not see where there is substantial work*." We accept Mr Turner's evidence (MTWS 74) that the meeting was a positive meeting as they were discussing giving the Claimant the opportunity to do the work in Ms Zaharieva's team that she wanted to do.

176. As regards the allegation that Mr Turner said to the Claimant that she was "different" following her return to work (**LOI 7d (i)**), we accept Mr Turner's

evidence (MTWS 75.3) that he does not recall saying that because he would not have been a position to know that (not having not known the Claimant before September 2016). It would have been surprising if the Claimant had returned to work unaffected by a substantial period away and the challenges she had had to contend with. Mr Turner accepted that he may have said that he had been told that the Claimant was different following her return to work as he had been told that by others. We accept his evidence that, if he did say it, then it was in the context of trying to be supportive (for example, because the Secondment to Ms Zaharieva's team would be an opportunity for the Claimant to build her confidence by doing the work she wanted to do). We do not consider that it would have amounted to less favourable treatment based on a hypothetical comparator or that Mr Turner would have said it because the Claimant had a disability.

177. As regards the allegation that Mr Turner also, at this later meeting, told the Claimant that there was no role for her in SHB (**LOI 7d (ii)**), we refer to our findings on LOI 7(i) and the comments above on the notes prepared by the Claimant. The SHB Role was there for the Claimant and it was fully funded but Mr Turner needed time to work out what it could focus on as he got to grips with his new team. Unfortunately the Claimant's approach to it and to him did not allow that to happen. Mr Turner may have said that he struggled to understand the purpose of the role in the team (for the reasons we have set out above) but this claim fails because we do not think on the balance of probabilities that Mr Turner said what it is alleged he said. If we are wrong on that, we do not consider that it would have amounted to less favourable treatment based on a hypothetical comparator or that Mr Turner would have said it because the Claimant had a disability.

178. As regards the allegation that at this meeting Mr Turner suggested that the Claimant might move to a Corporate Board Role (**LOI 7d (iii)**) we find that it was not Mr Turner who suggested this. The Claimant had herself initiated the discussion with Ms Zaharieva after expressing frustrations with the situation with her SHB role. Mr Turner understandably thought that the Claimant would be happy at the news that she could be seconded to Ms Zaharieva's team. We do not consider that it amounted to less favourable treatment based on a hypothetical comparator or that Mr Turner would have said it because the Claimant had a disability

179. As regards (**LOI 7d (iv) and (v)**) we do not find on the balance of probabilities that Mr Turner told the Claimant or implied to the Claimant that she was being performance managed. There is no evidence of her having been performance managed or put through a capability process notwithstanding that she has, over the years, regrettably had many health issues to contend with which have necessitated her taking substantial periods of time off work. It would of course have been for Ms Zaharieva to review the Claimant's performance. As such we do not find that Mr Turner subjected the Claimant to direct disability discrimination.

180. As regards the allegation that at this meeting Mr Turner implied that the Claimant should resign (**LOI 7d (vi)** direct disability discrimination and disability harassment **LOI 27 h**)) we accept Mr Turner's evidence that from his perspective

the 13 February 2017 meeting was a positive one and that he thought it was good news that he was giving the Claimant as regards her secondment. We do not consider it probable that at the same time he would say or imply that the Claimant should resign or consider resigning. As such the Claimant was not subjected to disability harassment or direct disability discrimination as alleged.

181. As regards the allegation that Mr Turner at this meeting told that Claimant that the Respondent was considering making her redundant (**LOI 7d (vii)**), we do not consider that it is probable that this was said. There is no evidence that the Respondent was considering making the Claimant redundant at the time, in fact there was a lot of work that the Claimant could have been doing. There was also no subsequent attempt to make her redundant or to engineer a redundancy situation for her.

182. The Claimant complains that Mr Turner repeatedly referred to her being performance managed in a meeting on 13 February 2017 because of her sickness absence which had arisen in consequence of her disability and as a result treated her unfavourably contrary to Section 15 EqA **(LOI 9 (c))**. We refer to our findings above in respect of **LOI 7d (d) and (e)** but note that in this issue **LOI 9 (c)** the Claimant says that Mr Turner repeatedly referred to the Claimant being performance managed. We conclude that this did not happen and that the Claimant was not subjected to the unfavourable treatment alleged.

Referral by Mr Turner to Occupational Health

183. On 3 January 2017 the Claimant sent Mr Turner an email to explain that she had been unwell with endometriosis over Christmas 2016 and would not be in work. (CB1059 – 1061). The Claimant was signed off work between 3 to 20 January 2017 (CB1061 - 1062) and returned to work on 23 January 2017. We accept Mr Turner's evidence that on the Claimant's return she asked him to make an urgent referral to the Respondent's Occupational Health team ("**OH**"). Mr Turner then had unexpected personal matters that he had to attend to and it was on his mind that he had committed to make the referral. He was not familiar with the Respondent's processes and started completing the referral form on the Friday evening (27 January 2017). We accept his evidence that he wanted to be thorough in completing the form as suggested by the guidance (CB1076). He responded as follows to a question asking "*Please give a summary of reasons why you have referred the staff member e.g. impact that health is having on work (give examples), impact work is having on health (give examples), reasons for long/short term absence, changes in behaviour or conduct, concerns raised by the staff member*":

> *Vanessa has been suffering pain from endometriosis and has had a three week period of absence post Christmas but has experienced problems before this point. I do not have access to her sickness records prior to joining the Trust in September 2016, but she previously had an extended absence in early 2016 following treatment associated with breast cancer. She frequently experiences fatigue and I believe Vanessa's absences have shaken her.*

184. Mr Turner based this response on information shared with him by others and his

own discussions with the Claimant (he recalled the Claimant having told him that her sleep was affected by the endometriosis). Mr Turner did not seek input from the Claimant before submitting the referral to OH that night and it would have been good practice for him to have done so (notwithstanding that we accept that he was concerned to get the referral in quickly because of the sense of urgency he had taken from the Claimant) (CB1072 – 1076).

185. It is also unfortunate that the fact that the Claimant could have self-referred was overlooked. Mr Turner accepted that normal practice would be to send the form to the employee before submitting it but said that that was where the employer requested the referral rather than the employee. On 2 March 2017 Mr Turner sent a copy of the referral to the Claimant and asked if there was anything she wanted to discuss. The Claimant replied and thanked Mr Turner for sending the form (CB1079).

186. We do not consider that Mr Turner was applying a PCP by not sending the referral form for comment to the Claimant before submitting it to OH. Whilst a one off act can amount to a PCP, his was a one off decision specific to the context in which he made it (**LOI 17 (a)**). However, if we are wrong and this was the application of a PCP we do not consider that it subjected the Claimant to a particular disadvantage as alleged. There is no evidence that the Respondent's OH team would not give an honest and expert answer to medical questions posed nor is there any evidence that the Claimant was more likely to be in receipt of an inaccurate OH report as a disabled person. The Claimant was able/entitled to:

186.1 provide her own account to OH during the course any consultation;

186.2 refuse her consent to the release of any report arising from any referral.

187. The Claimant consented to the release of the report with her comments (SB1532 and SB2257) and so did not herself suffer any disadvantage.

NHSI Secondment (summer – autumn 2018)

188. After a period of time in Ms Zaharieva's team, Ms Zaharieva found a secondment opportunity for the Claimant to work in a division called NHS Improvement ("**NHSI**"). She worked on this opportunity and discussed it with the Claimant over the summer of 2018. The Claimant wanted any such arrangement to be clearly documented in a contract amendment letter and some time was spent working on that. Ms Sood confirmed to Ms Zaharieva that the Claimant's terms and conditions remained the same (CB1099-1101). On 4 July 2018 Ms Zaharieva texted the Claimant about the vacancy stating: "*No commitment from me or pressure, and honestly not pushing you into it at all*" (CB485).

189. There was also discussion about what would happen at the end of the NHSI secondment and on 13 September 2018 (CB1106) and Ms Zaharieva confirmed that she would remain the Claimant's line manager during the secondment, her permanent role would remain in SHB and that at the end of the 12 month secondment, or if the secondment ended at any point prior to that, the Claimant

would return to her permanent role in SHB and from that point Mr Turner would be her line manager.

190. On 3 October 2018 Ms Zaharieva sent an email to the Claimant saying (CB1117):

> *Vanessa*
>
> *Following our discussion earlier, I just wanted to confirm that:*
>
> *1. My commitment to you is to remain on a secondment in my team until 31st March 2019. This hasn't changed in any way based on your decision to go on secondment to Nhsi. Your permanent role is still held in specialist hospitals board*
>
> *2. You do not have to take the secondment to Nhsi. I genuinely thought that you would be interested in working there and my intentions were only to support you with this opportunity. However, it is your choice, I would just ask you that we make a commitment to them one way or another by end of tomorrow given that our "working" start date for the secondment is 8th October. I was really disappointed that you felt this is being "pushed" at you as the only option for a role - many others would be really grateful for having this opportunity*
>
> *3. The 12 month fixed term 8c role was advertised openly internally and externally. I have not changed my commitment to you which is 31st March 2019, and currently there is plenty of work in the team if you decided not to take up a secondment at Nhsi*
>
> *Please feel free to discuss anything further or any support you feel I may be able to provide.*

191. In the event the Claimant did not take the NHSI secondment and remained in Ms Zaharieva's team but remained concerned about the security of her role. The Claimant alleged that Ms Zaharieva mislead the Claimant (because of her disability related sickness absence i.e. the 'something' arising in consequence of her disability) by saying if you do not accept the secondment role there will be no role for you my (Ms Zaharieva's) department **LOI 9(d).** On the balance of probability and taking into account that Ms Zaharieva is no longer employed by the Respondent and as such was not available to give evidence, we do not find that she gave the Claimant this ultimatum or mislead the Claimant as alleged and the Claimant was not subjected to unfavourable treatment as alleged (whether or not because of the alleged 'something' - being her sickness absence). We accept the Respondent's submission that the contemporaneous evidence shows that this allegation is wrong. On 31 August 2018 the Claimant herself set out a clear understanding of what she was being told about the secondment (CB1098) – that there would be no change to her position on Ms Zaharieva's team and the Respondent the same day confirmed that her terms and conditions remained the same (CB1099-1101) and Ms Zaharieva's communications are consistent with that message. On 4 July 2018 Ms Zaharieva texted the Claimant about the vacancy as referenced above (CB485).

Notification of other roles in 2018

192. The Claimant complained (**LOI 9 (e)**) that she was subjected to discrimination arising from disability because, she said, her sickness absence arose in consequence of her disability and because of that sickness absence Ms Zaharieva failed to notify her of suitable alternative roles.

193. The Claimant clarified at the hearing that paragraphs 51(a) and (c) of the ET1 (CMB 175) referred to the same role which initially arose in March 2018 but ended up being advertised in June 2018 ("**Role 1**") and that Para. 51(b) of the ET1 describes a more junior (8B) role being advertised on 18 September 2018 ("**Role 2**").

194. The Claimant accepted in evidence that she had received emails from the Respondent informing her about both of these vacancies.

195. As regards Role 1:

195.1 This was a grade 8c role which was advertised as a fixed term 12 month contract on Friday 22 June 2018. The Claimant discussed the role with Ms Zaharieva on 25/26 June (CB480) and the Claimant could have applied for the role but decided not to.

195.2 We find on the balance of probabilities that the Claimant was worried about how the creation of this role might affect her own and this is why she raised it with Ms Zaharieva (rather than because the Claimant was interested in the role).

195.3 We do not consider that it is probable that Ms Zaharieva would fail to personally notify the Claimant of the role or deliberately coincide the launch of the advertisement with the Claimant's holiday because of the Claimant's sickness absence. Ms Zaharieva had supported the Claimant in the secondment into her team (after the Claimant had has significant sickness absence) and in the summer of 2018 put effort into exploring the opportunity for the Claimant with NHSI (an opportunity which Ms Zaharieva did not push the Claimant into or force her to accept despite having taken personal effort to champion the Claimant for it with other stakeholders).

195.4 In any event, the Claimant not having been personally notified by Ms Zaharieva of the role did not constitute unfavourable treatment because the Claimant was aware of the role.

195.5 We do not agree with Ms Grewal's finding (CB114) that given that the Claimant's role in Ms Zaharieva's team was to come to an end in March 2019 and because this Role 1 would have lasted to September 2019 and the role subsequently became permanent it would have given the Claimant greater security. The Claimant could have applied or asked for the role and did not and it was not known in the summer of 2018 that the role would become permanent. The Claimant's substantive SHB role was not at risk of redundancy. In evidence the Claimant was asked why she thought, with respect to Role 1, she had been denied a more secure post. She replied that her role in her team was not formalised, she had a good

working relationship with Ms Zaharieva but Role 1 would have been an opportunity to take on a real 8C role with an actual job description. However, the Claimant could have applied for the role and, when she was then questioned at the hearing if she had at that time asked for more formality at, she said she did not.

196. As regards Role 2:

196.1 We do not agree with Ms Grewal's conclusion that in "*light of the concerns raised by Vanessa, the organisation could have had an open and honest dialogue about whether Vanessa would be interested in the context of seeking a permanent role in a team she is more comfortable in or the insecurity of returning/called back to Mark's team*".

196.2 It was advertised in September 2018 and the fact that the launch of the advert again coincided with the Claimant being on holiday is just coincidence and was not deliberate (for the reasons we explain above).

196.3 The Claimant is intelligent and was well able to assess whether the role might offer her what she wanted (in terms of security and role responsibilities). She could have applied for the role or initiated a discussion with the Respondent about the role but she concluded that it did not offer her what she wanted or needed and she therefore did not apply or initiate a discussion with the Respondent.

196.4 We accept the Respondent's submission that, given the Claimant's frequent complaints about the lack of 8(c) level work, it is not probable that the Claimant had any genuine interest in this more junior role. Given that she knew about the role and could have applied she was not subjected to any unfavourable treatment. In any event, we do not consider that it is probable that Ms Zaharieva would fail to personally notify the Claimant of the role because of the Claimant's sickness absence.

196.5 At that time, both Ms Zaharieva and the Claimant were discussing the potential opportunity for the Claimant to be seconded to NHSI (which, had the Claimant accepted the secondment, would have started at the beginning of October 2018) (CB 1106 and 1117). We also note that Ms Clarke at the time checked and confirmed with Mr Turner that the creation of this role would not impact on the Claimant's ability to return after the NHSI secondment to her SHB role in his team.

October 2018 – October 2019

197. In early October 2018 Ms Zaharieva told the Claimant that there was plenty of work for the Claimant to do in her team until the end of March 2019 and that her permanent role remained in SHB (CB 1117) and, as referenced above, the Claimant then decided not to take the NHSI secondment.

198. On 8 October 2018 the Claimant sent Ms Zaharieva an email which included the following:

1) I have been pushed out of UCLH.

a) There is no viable position for me in my previous department. This was made clear to me through my experience of marginalisation, bullying and discrimination, from which I have still not fully recovered. I have started proceedings to have this formally recognised and will be entering mediation with Mark Turner. However the risk to my health if I did re-join this team without significant steps being taken to protect me from such an unsafe and threatening environment are too high for me to currently consider this as an option.

I have been made aware of no changes to the situation in SHB where my substantive post is held. Mark had created a very difficult working environment for me by stating he saw no point to me in the team, questioning my skills and abilities on numerous occasions, and allocating work that was fundamental to my role to other individuals in the team. He threatened that I would be performance managed and he lied about me on the formal occupational health form. There are a number of other things but I will be presenting these outside of my discussions with you. I appreciate you are aware of much of the detail of this as I had spoken with you personally about it and also in writing in my appraisal in 2017.

b) Information given to me about my position in your team.

You have given me contradictory information about the security of my post within your team. These were both in response to direct questions from me. On 31st August 2018 I had asked if I were not to take the secondment would there be a position for me in your team. You replied 'No'. During our meeting on 3rd October 2018 and in your subsequent email dated 3rd October 2018 you stated that there would be a post until 31st March 2019. You also stated that this date would be the point at which the role would be made redundant and I would be expected to return to Mark Turner's team.

In addition to this when the role of Senior Manager - Productivity & CIP was created in your team, I questioned you directly about it (27th June 2017) and was told that it was in addition to my role as there was 'so much work to do'. I also emailed you to ask about it in my email dated 26th June 2018 and in your reply dated 26th June 2018 you stated that this was a separate role. I was concerned because the majority of the tasks detailed in the job description were the same as my own.

Traditionally the requirement for existing roles within your team is assessed around December and then reconfirmed for the following year. This had been standard practice and I was given no indication that this would change. Taken in context with the information above the inference is that both roles would be likely to be reconfirmed for 2019/2020. Had I known that this would not be the case I would have applied for the newly created Senior Manager - Productivity & CIP role. I was not given the correct information regarding the future structure of the team that would have allowed me to make significant choices about my future in the

organisation. This is why I felt that the secondment was the only option available to me.

Furthermore, despite two new posts being created internally, the only option that was presented to me was an external position within NHSI. The two other posts (Senior Manager 8C and Finance Manger 8B) that had both aligned to my skills and experiences, were both advertised whilst I was away from the office on annual leave (in June and September 2018), and you presented neither one to me. I learned about each role because I was told about them by other people. Both recruitment campaigns in June and September appear to have been strategically advertised for the periods I had planned leave, and so I could not be aware given I had no prior consultation.

199. This was the start of what became a very lengthy, time consuming, complex and no doubt costly set of grievances raised by the Claimant. The Respondent had sought to address concerns raised by the Claimant on 18 April 2017 informally but without success. The Claimant raised further concerns in October 2018 which together were treated as the first grievance (or in the Respondent's parlance "employee led complaint" (each an "**ELC**")). The Claimant submitted her second ELC in February 2020 and her third in August 2022 (LP 2 WSB 30).

200. On 7 January 2019 the Claimant started sick leave with stress, IBS and headaches (CB 1177). She remained off until 2 February 2019. However the Claimant then started sick leave again on 22 February 2019 with stress and anxiety (CB 1187) which continued until 30 September 2019.

201. On 17 May 2019 Ms Grewal, an external HR Consultant, was appointed to investigate the first ELC raised by the Claimant (CB 1314).

202. On 16 September 2019 the Claimant confirmed to the Respondent that her GP would support a phased return (CB 1355) from 30 September 2019. That day Ms Clarke wrote to the Claimant and amongst other things said the next step would be to meet to discuss an OH report that had been obtained and how the Respondent could best support her in a return to work (CB 1356- 1359).

203. On 30 September 2019 Ms Clarke sent the Claimant a letter (under cover of an email at CB 1383 and 977) summarising her discussion with the Claimant at a meeting that day (CB 1384-1385). The letter said, amongst other things: "*I discussed the possible options for the type of work you might undertake and we agreed that a return to your role in Specialist Hospital Board or a secondment to the PMO was not appropriate. I explained that I am keen to ensure that the work you are allocated is appropriate to your banding, is something that can be accomplished at home and that you did not feel any sense of threat to your well-being. I said I would consider and let you know the available options*.".

204. In her cover email Ms Clarke suggested the following (CB 1383 and 977):

1. Sustainability and Transformation Programme provider productivity project work. Specific project work would vary (there are frequent STP CEO and FD level meetings that may prioritise/de-prioritise areas of

work) but in a working from home capacity, this would likely involve analysis of the sector wide position and deficit drivers, helping prepare presentations for the executive level meetings, summarising the financial benefits of collaboration opportunities etc. The deadlines on some of this work are, in places, more flexible than in some of the other areas of finance so this may suit the phased return well. Peter Sharpe works for the STP now, but based out of UCLH as Head of Finance for Provider Productivity so in this work, he would be the direct line of report. In this scenario though, I would like to keep in regular contact with you, just to ensure things are working well.

2. Finance Improvement and Transformation Programme. We have recently launched a programme aimed at improving (and in some cases transforming) financial processes. We have workstream leads set up for each area (e.g. AP, AR, month-end, financial reporting, systems) and are working through how to make their processes more visible, how to unblock blockages in their processes, areas where systems or processes need to change etc. A lot of this is likely to require working with the teams in e.g. workshops – mapping processes, discussing issues, fixing processes or redesigning training/comms – but there are probably some parts I can separate out away from the main workstreams. For example, refreshing/redesigning the budgetholder training provision, researching best practice elsewhere. I think this would be an option for the shorter term but after a while, would require more face to face contact with the teams involved in the processes and/or with the training.

205. On 10 October 2019 (CB 976) the Claimant replied to say:

For me the productivity connection of your first suggestion aligns most with the work I was involved in since I returned to the Trust after my cancer treatment and so is an area I am probably better suited to from that perspective - ie in relation to my most recent experiences and knowledge.

However I am open to working on items that relate to both of the below if this supports the UCLH agenda and is something that you would find helpful.

I am happy to speak with you and / or Peter though I don't have any specific questions currently as I think for me these would arise more in relation to specific work requests, when I expect I would have questions to ensure I am clear on what is wanted so I can best achieve it.

206. On 17 October 2019 Ms Clarke told the Claimant that she would be in a similar role to the one before albeit within STP/project finance rather than SHB. The Claimant replied that she would continue on this basis but indicated that she was not clear there was enough work for this to be a permanent role and made it clear she was not accepting this as a permanent position and would seek advice (VC 53 WSB 104 CB 983). The same day the OH team said the Claimant's symptoms remain unchanged (albeit her depression /anxiety had improved) and suggest a further 4-6 weeks phased return (SB 2265).

207. On 24 October 2019 Ms Grewal issued her outcome on the Claimant's first grievance (CB75 – 132 but with supporting documents running to CB 618). The Claimant appealed this outcome.

Extending phased return to work October 2019

208. The Claimant complained (**LOI 13**) that the Respondent applied the PCP of requiring her to take annual leave following the exhaustion of full time sick pay to facilitate a phased return to work from 1 October 2019. She said this applied to both herself and those who were not disabled but put disabled people at a disadvantage when compared to non-disabled people. This claim was also framed as a failure to make reasonable adjustments claim in **LOI 21** but with slightly different phrasing of the PCP which we do not consider to be material. We deal with that claim separately below.

209. The Respondent's Sickness Absence and Attendance Policy & Procedure (CB 2050) provides:

> *1. Phased return to work*
>
> *1.1 A phased return to work consists of an employee returning to work on reduced hours and gradually increasing their working hours up to their contracted hours.*
>
> *1.2 An employee may return to work on a reduced number of days per week, and/or a reduced number of hours per working day. The Occupational Health Service can advise on how the phased return should be planned.*
>
> *1.3 The phased return will normally take place over a period of up to four weeks. In exceptional circumstances, this may be extended dependant upon the medical condition and length of the absence. The employee will remain on full pay during this period. If an employee has accrued annual leave that they would like to take, the manager may authorise an employee to use their annual leave to accommodate a longer phased return to work.*

210. On 30 October 2019 Ms Clarke wrote to the Claimant to say that if the Claimant wanted an extended phased return she could use her annual leave to extend the phased return (VC 55 CB 1408). On 27 September 2019 Ms Clarke in a letter (CB 1385) had said "[…] *I am keen to ensure that the work you are allocated is appropriate to your banding, is something that can be accomplished at home and that you did not feel any sense of threat to your well-being. I said I would consider and let you know the available options[.] Launa proposed you taking annual leave with effect from 1st October 2019 whilst options for your return to work were being considered but you were clear that you such an option would amount to you being penalised."* Given Ms Clarke's 30 October 2019 response the Claimant said (CB 1408):

> "*On this basis I will have to use my annual leave to support an extended phased return. I would propose the following: - I would like to initially continue with 6 half days each week in work, meaning 2 annual leave*

days each week which I will take as 4 half days. I propose I continue this until I see Dr Williams again (scheduled 28th November 2019 as in her most recent report). - I as yet am unclear on how much annual leave I have and I will need to find this out. As I have not used any for some time due to my sick leave absence I am hopeful the amount available is adequate. However if it is not, then I may need to amend the 2 days per week leave. I will notify you of this immediately if this is required. My four week phased return ended on Monday 28th October and the fifth week began yesterday Tuesday 29th. I worked a full day yesterday and today as I was unsure of the alternative given the agreed four week period had ended. However now I can determine this for the upcoming weeks in November and so I will map out the exact days that this will mean I take as annual leave so this can be accurately recorded"

Indirect discrimination LOI 13 – use of annual leave

211. The Respondent argued that because the Claimant was not required to take annual leave (it was an option offered to her) the Respondent did not therefore apply the PCP alleged. The Claimant does not appear to have been asking for part time pay for part time hours – she wanted to continue the phased return arrangement for longer than four weeks working part time hours for full time pay. However, we consider that the Respondent did apply the PCP – the only way the Claimant could continue to receive full pay but work part time hours was for her to take annual leave.

212. We consider that a disabled person would be more likely to require a longer phased return than 4 weeks than a non-disabled person. However, we accept the Respondent's submission that the application of the PCP did not put disabled people or the Claimant at a particular disadvantage as alleged (i.e. the need to use annual leave entitlement which could not then be used for its designated purpose). The claim fails on this basis.

213. We accept the Respondents submissions that the Claimant is essentially arguing that she should have been given more sick pay. The Respondent had a generous (compared to many private sector employers) sick pay policy offering full sick pay for 6 months and half sick pay for 6 months. We accept that was a proportionate means of achieving a legitimate aim of providing a reasonable safety net to any employee who found him or herself unable to work because of ill health. We also accept that this is the standard sick leave entitlement for the public sector that has been negotiated by the Respondent in consultation with relevant unions.

214. We also accept the Respondent's submission that advantageous treatment (the provision of a 4 week phased return to work on full pay for part time work) does not become unfavourable merely because it might have been more advantageous (**Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65**) and that in **Cowie v Scottish Fire and Rescue Service [2022] EAT 121**, the EAT addressed a similar factual scenario. In that case the Respondent applied a requirement that anyone applying for special leave over Covid must have first used up any accrued holiday or TOIL. The relevant treatment was the requirement to use up holiday and TOIL. That

requirement only arose when the claimants sought access to paid special leave. It was wrong to separate the conditions applicable to the benefit from the benefit itself. The relevant treatment was therefore the granting of paid special leave. That was clearly favourable treatment. The treatment could have been more favourable if the conditions were removed, but it did not become unfavourable simply because it could, hypothetically, have been more favourable.

Reasonable adjustments LOI 21 – use of annual leave

215. As referenced above, the Claimant said (**LOI 21**) that the Respondent applied the PCP of requiring the Claimant to use annual leave to facilitate a return to work from 1 October 2019 which put her at a substantial disadvantage as a disabled person and that the Respondent then failed to make reasonable adjustments.

216. This claim fails for the same reasons as the corresponding indirect disability discrimination claim in that whilst the PCP was applied, it did not put the Claimant at a substantial disadvantage as compared to non-disabled employees (the Claimant asserting here that the substantial disadvantage was that she was likely to require extended periods of sickness absence and therefore was more likely to be in a position where she had to use her annual leave). We do not agree that the Claimant was put at a substantial disadvantage and, whilst the law protecting disabled employees can necessitate more favourable treatment of them, we consider that what she was asking for was an enhancement to the standard sick pay entitlement which was already generous.

217. If we are wrong and the Claimant was substantially disadvantaged by the PCP, we find that the Respondent ought reasonably to have known of the substantial disadvantage. However, we nonetheless do not consider that the adjustment that the Claimant argues should have been made was reasonable in the circumstances (i.e. extending the period of sick pay stated in the Respondent's Sickness Absence and Attendance Policy and Procedure – CMB 184). We accept the Respondent's submission that paying additional sick leave would not ordinarily be a reasonable adjustment or proportionate (see **O'Hanlon v Commissioners of HM Revenue & Customs [2006] IRLR 840**) and that it would not have been in this case. The Claimant's claim is not that she asked for and was denied part time hours for part time pay to allow an extended return to work.

218. We would finally comment that the Respondent's policy could be clearer as regards the provision that a phased return to work will normally take place over a period of up to four weeks but that *"In exceptional circumstances, this may be extended dependant upon the medical condition and length of the absence"*. It is not clear what exceptional circumstances might be. The policy does appear to open the door to the potential for an extended phased return being on full pay (notwithstanding the subsequent comments on employees taking annual leave). However, we do not consider that this is a case where there were exceptional circumstances (such as, for example, where the employee's illness or injury had been caused by the employer).

Complaint about failure to implement Ms Grewal recommendations

219. The Claimant's case (**LOI 25 s and 26 s**) was that the Respondent, specifically Ms Clarke, failed to implement recommendations from the First Grievance made by Ms Grewal that staff changes including transfers or secondments (no matter how minor) must be formalised and in writing including, any internal changes, in the form of an "Amendment to contract document" and written documentation from the employee accepting the move should be on file" ("**the Amendment to Contract Recommendation**"). The Claimant said that the alleged failure to do so amounted to:

    219.1 a detriment that she was unlawfully subjected to because the Claimant had raised her second ELC on 28 February 2020; and

    219.2 unwanted conduct related to the Claimant's disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

220. We note here factors relevant to all of the Claimant's allegations of unlawful victimisation under Section 27 EqA:

    220.1 The Respondent does not contest that the 28 February 2020 second ELC constituted a protected act;

    220.2 The same protected act is relied upon by the Claimant in respect of each alleged detriment.

221. Ms Grewal's Amendment to Contract Recommendation, may have been what the Claimant wanted but it was extremely broad and lacked clarity on how it should be adopted practically.

222. We accept the Respondent's submission that the interim agreement with Mr Sharpe was not a secondment, it was a temporary measure that was documented to the extent necessary and proportionate (CB 977).

223. We also accept the Respondent's position that the documentary recording of any subsequent post could only take place once that post was taken up and a review of the SHB post could only take place if the Claimant returned to it and went through the process with Mr Turner. We find that the Claimant did not want to return to the SHB role with Mr Turner. Any failure to document matters in more detail was not because the Claimant raised her second ELC. This was also not conduct that either related to disability or had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect it was not reasonable for it to have had that effect. The Claimant demanded an unreasonable level of certainty and precision. We address further below the Claimant's complaint about the Respondent's response Ms Grewal's recommendation that there be a review of the senior finance manager projects role in SHB in the context of where it aligned within the business and that it should be formalised via the relevant HR process.

224. We note here that the Claimant wanted to remain on the work arrangement with Mr Sharpe until her appeal against the decision in her first ELC had concluded (CB1428 / 1450). That appeal was concluded by Dr House on 27 November 2020 (723 – 730). However, in July 2020, Mr Sharpe changed roles and so Ms Clarke decided to take on a "quasi-line" management role but with Mr Sharpe continuing to speak to the Claimant on a regular basis.

The Claimant's work with Mr Sharpe

225. Mr Sharpe had experienced challenges with allocating work to the Claimant between October 2019 and July 2020 and had found discussions about work difficult which meant that a lot of their regular conversations had become about providing pastoral support and listening. We accept Mr Sharpe's evidence that:

225.1 he felt he had to be careful not to upset the Claimant (for example she could be defensive and suspicious even if he asked "how are you").

225.2 they agreed they would not discuss the Claimant's ELC's but despite that agreement the Claimant kept turning discussions round to her substantive role and the matters that were the subject of her ELC's and it became difficult to have a meaningful conversation with her (CB 1486).

225.3 whilst he sought to ensure that the Claimant was kept in the loop regarding key areas of interest and attempted to delegate work to the Claimant and she never explicitly refused to carry out a task she regularly questioned how the tasks he was delegating related to her substantive SHB role and needed too much input from him given she was a senior manager.

225.4 he saw almost no output from the work that he asked her to undertake.

226. Of course by March 2020 the Respondent was under enormous pressure as a result of the pandemic and this not only impacted front line medical staff but also all the Respondent's support functions, including finance. This was clearly explained by Ms Arnett in her evidence.

227. The Respondent appears to have hoped that, by following the ELC process, the difficulties with the Claimant might be resolved and Mr Sharpe was clearly under the direction not to manage the Claimant robustly to get work product from her to avoid the risk of upsetting her and exacerbating the difficulties the Respondent had in trying to manage the Claimant back into performing an effective role for it. This clearly put Mr Sharpe in a difficult position (PSWS 14).

228. We accept Ms Clarke's evidence (VCWS 88) that allegations and the process that followed the Claimant's ELCs caused Ms Zaharieva significant distress and she ultimately decided to leave the NHS and work generally to prioritise her health and wellbeing. We also accept Ms Grewal's evidence (she interviewed Ms Zaharieva as part of the Claimant's first ELC) that Ms Zaharieva had acted with the best intentions towards the Claimant and that Ms Zaharieva had been very much affected by the allegations of bullying and harassment which the Claimant had made against her and which were completely unsubstantiated.

229. As we say, this was an extremely challenging period for the Respondent

because of the pandemic, Mr Sharpe was having difficulty getting the Claimant to do anything meaningful and the Claimant was not pressing to be given more. The Claimant appears to have been putting a lot of her energy into her ELC's. As noted by Mr Rawlinson and Mr Sharpe in an interview undertaken with Mr Sharpe on 20 October 2022 (CB 963-964):

> "*everybody being extremely polite, co-operative, helpful and professional, but long periods of time, but very long periods of time between communications, and that is really RR's criticism of the Trust, but even then, there doesn't seem to be any one individual responsible for anything other than benign neglect, which seems to be a position of "oh my goodness, I don't know what to do".*
>
> *[…] PS agrees strongly that VS has turned neglect into conspiracy. He goes on to say that he cannot triangulate his discussions with VS in 2019 and 2020 with wanting to go back to the SHB role. PS says he doesn't think that is good for her.*
>
> *[…] RR goes on to say that the issue seems to have been that she wasn't going to go back until the appeal from Complaint 1 was completed, but there was a huge period of time between the appeal hearing in March 2020 and her receiving the outcome of the appeal, which wasn't upheld, in November 2020.*
>
> *[…] PS says he can't see how she can come back to the SHB role. He says they can talk about alternatives given an effective team. She's a bright person, she's smart, she wants to do well but he asks how someone can do well where the relationships are broken.*
>
> *RR says that, if PS saw her 127 page complaint, PS would know where VS's energies have been directed over the last few months. It is a fourteen-thousand-word document, hugely detailed, but hardly mentioning a single person, so it is an impossible document to analyse, so somebody needs to advise her to get a new start somewhere, but that is not where her energies are devoted.*
>
> *RR thanks PS and JB for their time, but also acknowledges the important PS has played in holding this thing together for three years*."

230. We consider that benign neglect is an apt description of what was happening. The strains caused by the pandemic coupled with the Claimant's approach to her work and the ELC's she raised meant (as we have said above) that it was often not possible for the Respondent to understand what the Claimant really wanted or needed or to understand why.

Claimant's emails Ms Clarke of August and October 2020

231. The Claimant says **(LOI 25 r and 26 r)** that the Respondent, specifically Ms Clarke, subjected her to unlawful victimisation and harassment by failing to address the concerns raised by the Claimant on:

231.1 28 August 2020 (page SB 4553); and

231.27 October 2020 (page SB 4550)

232. We find that there was no such failure. Ms Clarke respondent to the 28 August 2020 on 17 September 2020 in a reasonable manner saying (SB 4553):

> *Many thanks for your email.*
>
> *Please do send across your summary of our appraisal discussion when you're ready and we can review and hopefully agree an accurate account.*
>
> *With regards to your substantive role, this does still exist. Your post is budgeted and held within the specialist hospitals board and is unfilled and will continue to be unfilled, pending the outcomes of the current complaint process.*
>
> *The investigation report however outlined that a return to SHB and reporting to Mark Turner would be detrimental to your health and well-being. We have discussed that role with Peter, supporting on the STP work would not be a permanent arrangement, rather a temporary arrangement outside of any of the individuals or teams involved in the investigation, while the investigation progressed. As discussed I'm keen to explore with you suitable alternative roles so that you can undertake a full remit at an appropriate level. My understanding from you up until now has been that you have wanted the investigation and appeal to be completed first before considering alternative substantive roles but if you are ready to start exploring these options, please do let me know.*
>
> *Best wishes*
>
> *Vicky*

233. The Claimant replied on 7 October 2020 (page SB 4550) saying:

> *Dear Vicky*
>
> *I write further to your e-mail of 17 September 2020.*
>
> *Substantive role*
>
> *Thank you for your response. However, you have not provided a full response to my original question. I understand there is still financial budget for my SH B post. I recognise that the budget will sit in the SHB finance team 'establishment', As I appreciate that typically, unless a role is formally made redundant (and so 'dis-established'), then technically that budget has to stay somewhere. However, my original question was whether the role still exists. Therefore, please confirm the following:*
>
> *1. Does the role still exist?*
>
> *If so:*

2. Is there any intention to make it redundant in the future; and

3. When would I be free to return to it?

My 2 grievances fully particularise why I have doubts about whether the role does still exist. Notwithstanding, I provide some examples below:

1. I have seen emails from mark Turner, who was my line manager between late 2016 to early 2017, discussing the intention to dis-establish the post (make it redundant);

2. I have seen this view repeated within the outcome report for my first grievance in which Jhoti Grewal (Investigator) made observations following review of the evidence, including witness statements, in which senior managers refer to a reduced need for my contractid post due to organisational drivers. For example: Gill Gaskin, Tim Jaggard and Mariyana Zaharieva all stated to Jhoti Grewal in 2019 that departmental changes diminished the need for my substantive post in SHB in 2016. For the avoidance of doubt, this was never communicated to me directly;

3. Mark Turner repeatedly told me that he did not value the post in his team;

4. Mark Turner said he wanted me to transfer to the Corporate Board team and for his finance managers to be responsible for the duties that had been allocated to my contracted role;

5. Turner stated in his evidence for the 2019 grievance investigation that my substantive role was one that he struggled to understand how it fitted within the team structure; also mark Turner stated that it was his intention for me to be moved to the Corporate Board team with a view to be appointed to an expected 8c vacancy coming up in that team;

6. Jhoti Grewal reference is that the post no longer seems to exist within the outcome report, and in conclusion states: "Considering this [evidence is referred to immediately prior], it would have been appropriate to look at where Vanessa's role would have aligned (within the Business) upon her return from sick leave in 2016. (.) It is accepted but these are difficult conversations to have with employees - change can create anxiety, but employees are more likely to accept change to be receptive if involved from the outset and discussions are open and transparent. A formal consultation process and the Managing Organisational Change policy would have enabled for the process to be formalised and remove any objections/doubt/misunderstanding. This would've offered Vanessa more certainty about the role."

7. No-one has occupied my substantive role during any of my periods of absence; and

8. The equivalent role in Surgery and Cancer Board was not recruited to when the incumbent left in mid-2017; the post was dis-established at that point and in the Outcome Report senior management confirmed the post

was no longer needed. It has not at any point been re-instated.

Give given the above, it is clear that the continued existence of the post has been under significant question for a significant period of time and yet the clarity I have sought has not been given. This has very much contributed to my sense of insecurity and instability dating back to 2016. If the organisation continues to avoid answering my renewed attempts to have a clear answer to this question - does my contracted role actually exist anymore? - I will continue to be in the limbo that I had spoken of in May and the opportunity to resolve one core aspect of my current situation, is being deliberately overlooked.

Conclusion of the investigation

My understanding of your position from your previous correspondence is that whether or not I will be allowed to return to my substantive role will be dependent on the investigation being concluded. Therefore, that the investigation conclusions and recommendations should entirely determine if you will support my return to the post or not. If that is correct, surely one potential outcome is that you would not allow me to return to my substantive post even if it does still exist.

Please confirm whether this understanding is correct.

For the avoidance of doubt, I do not agree that there is such dependency. I do not agree that the investigation should be concluded before the employer confirms whether my substantive role still exists and if I am free to return to it. You are already aware of the excessive delays in investigating and resolving my grievances which have significantly exacerbated the symptoms of my various disabilities and caused me severe, unnecessary stress and anxiety.

Therefore, I would ask that you confirm the position on my substantive role as requested above. If you are not prepared to do so, please state as such by return and provide confirmation of the following:

1. What is the rationale for your position;

2. Are you suggesting that both grievances must be concluded before this information can be given; and

3. If so, what are your proposals for resolving the grievances given they have been on-going for such a long time?

I have repeatedly pressed for the grievances to be concluded. I am yet to receive an explanation for the delays. I am also yet to receive updated timelines. This information should now be provided to me forthwith.

I agreed with the employer on 27 September 2019 (which was around the time of my return to work) that discussions in respect of my substantive post in SHB and my return to it, could be postponed while the appeal hearing for my first grievance was completed. However, that

was on the strict proviso that the first prevents would be fully concluded within a reasonable period of time and in accordance with the employers grievance policy. The employer failed to do so and that failure is on-going. That agreement did not constitute an indefinite extension of time for the employer to consider my grievance. In any event, it would appear that no further consideration has been given to it as I cannot see that it has been progressed at all. To proceed in that way with not my preference at the time but I did so in order to try to progress the matter swiftly. Had I known that the delay would have been this long, I would have vehemently opposed the suggestion.

Appraisal Discussion – 22 May 2019

Following summer rises the key points from our meeting. I have highlighted where I am unclear or view inaccuracies with your summary. I would be grateful to receive your comments on the below:

- *I informed you that there had been considerable uncertainty since I came back to work in 2016. Although my job title has stayed the same the employer had repeatedly failed to provide me with work appropriate to my substantive role. This was despite my frequent requests to be allocated such work;*

- *I had said how the significant delays in the grievance investigation, combined with the 2nd grievance still not having been heard, have also contributed negatively to how I feel. The employer's dealing of my grievances has significantly and fundamentally damaged the relationship of trust and confidence;*

- *When we discussed matters on 22 may 2020, i believe my grievances would have been concluded sometime prior in accordance with the employer's grievance policy;*

- *I said that a clear process is something I would value in the organisation's approach moving forwards as the structure provides clarity and helps to alleviate the stress, anxiety and other symptoms of my disabilities;*

- *I informed you how low my confidence in the employer is and that allowing a clear process to take place would alleviate some of my anxiety;*

- *when you raise the chance to speak about my future substantive role, I said that I was absolutely keen to have a discussion about this given I have been keen to have clarity on this for a very long time. But I am not happy with this delay and I am finding this very difficult;*

- *My understanding from what you said was that you thought a high-level overview might be helpful, to allow me to have an idea of how the department has changed. Further, that we could*

discuss what possible options there are if I cannot return to my substantive role in SHB. I appreciate we did speak about the changes in the team but we did not discuss this matter any further.

- *In relation to your proposal to have this high level conversation, I said I wanted to wait to the investigation to conclude before such an initial conversation exploring possible options if I cannot return to my substantive post in SHB. However that was my position in the context of your saying that you would not be able to enter into a full discussion (one that would formally progress my situation and provide me clarity on the organisation position in relation to my substantive post) until the investigation was concluded. I feel it may be helpful to clarify that it was not my position that I wanted the investigation to conclude first simply for his own sake, rather that based on what you said, I understood there to be no alternative option for me. I was also agreeable at that time to awaiting the investigation conclusion on the basis that (a) I wanted to know the outcome recommendations and conclusion; (b) I was motivated to wait a little longer if that meant you were then in a position to follow a clear process; (c) I genuinely thought it would only require need to wait just a little longer further to the recent communication I had received and so I thought its conclusion was imminent;*

- *I was disappointed to be informed that you were waiting on the grievances to be concluded before having any meaningful discussions with senior management in relation to my substantive role in SHB. As stated above, I can see no reason why this should be the case;*

- *I would like to stress that this delay is not something that benefits me nor is it my preference. This delay has been solely down to the employer. How do I been aware of the considerable delay that would continue after we had spoken in May, I would have raised a concern about this then and formally withdrawn my prior agreement to the postponement of this discussion;*

- *you did not speak about senior management meetings in general, just the one meeting only ('FLT');*

    - *you had explained that the frequency of this meeting had now changed and had widened its audience (now including SFMs and FMs), that it was still chaired by Tim Jaggard and that I could join this if I wanted to. I was grateful for you're making me aware; You had said it was optional but you wanted to make me aware in case I wanted to log in to it and I could do so anonymously;*

        - *I explained that I would attend if it was required;*

- *you said it was fine not to, and that it was genuinely optional; and*
- *I have previously spoken to Peter Sharpe about feeling awkward in meetings because of the uncertainty with my substantive post.*

My understanding from our phone call was that it was important to record an appraisal on the ESR system to be sure I would not suffer negative consequences in relation to national changes to the appraisal process, and that our conversation constituted an appraisal in this regard. That is, as a result of our conversation you would then formally log an appraisal on the system (ESR) ask completed, with a note relating to mandatory training so that this would not be a problem. Please can you confirm what the position is and whether I need to take any further action.

Arrangement with Peter Sharpe

We also discussed my temporary arrangement with Peter Sharpe.

I do not agree that we discussed the work I had completed for Peter other than you confirmed receipt of the summary I had sent you (the summary of work requested on the appraisal form, outlining the work I had completed for Peter) and I understood you were happy with the detail I provided with this. You said it was difficult to appraise me in relation to my work with Peter given the absence of formal objectives, which I understood as being the reason we did not discuss the work I completed for him.

I informed you that I have not been allocated work that is equivalent to my substantive role with Peter despite requesting it. Whilst I had been happy to accept undertaking work for Peter (even if at a lower level to my substantive role) that had been a temporary arrangement only to allow my grievances to be resolved and for the position regarding my substantive position to be resolved. The employer has failed to resolve these matters and I must stress to you, for the avoidance of doubt, that I am not agreeable to this arrangement continuing indefinitely. Further, I do not agree that my substantive role has been varied in any way by this arrangement or at all.

Please note that whilst I remain working for the employer, I do so under protest at my treatment as detailed above and more fully in my grievances.

I look forward to hearing from you.

234. Ms Clarke sent an email to the Claimant on 9 December 2020 (SB 4550) making the following clear:

1. The role's continued existence

Yes, the role still exists and no, there is no intention to make it

redundant. You would be free to return to it with the caveat that if following completion of the appeal process, the recommendation still stands that a return to working in SHB and for Mark Turner would be detrimental to your health and that we should consider alternatives, then we should do so.

My view is that there is always more finance project work across the department, both around efficiency and productivity and on Trustwide projects than there are individuals to undertake this work. We very often have to choose which priorities to progress and which to put on hold because we do not have the staff to do everything we want to or need to do. So it is not uncommon for someone to go for example on maternity leave, their role not to be covered but for them to be very much needed and deployed back on projects on their return as we flex the scope of the projects we can progress. Following a 9 month pause on productivity during the first phase of COVID, I am aware that the agenda is about to be relaunched at a national level and this will inevitably place more pressure on us to progress more of this agenda than we have over the last 9 months/year. So I have no concerns about us finding you a suitable alternative role outside of SHB, be that in the corporate team, the project finance team or a different clinical board and thus there is no intention to make such a role redundant.

2. Appraisal discussion

Thank you for your reflections of the appraisal discussion which I understand are different from mine which I sent across to you. The simplest way to resolve this I think is for me to upload a basic appraisal form for you which confirms completion of the appraisal for the purposes of HR processes. That will separate the appraisal issue which I think is technical one from your other concerns which are being addressed separately through the employee-led complaint process.

235. We agree with the Respondent that Ms Clarke responded to each email in the best way she could. As regards the length of the ELC processes, the Claimant unreasonably lacked any sort of practical appreciation of the amount of time it would take to look into them properly (given the complexity and volume of documents she brought into those complaints and the self-evident impact of the pandemic) or the impact that they may have on her colleagues. As regards the 7 October 2020 email (and as the Respondent submitted), it came on the cusp of the Second National Lockdown and stay at home order that started in the winter of 2020 on 05 November 2020. A winter covid spike had been widely anticipated and the Respondent was frantically busy with preparations.

236. In any event, if we are wrong and Ms Clarke's responses did fail to address the concerns raised by the Claimant on 28 August 2020 and 7 October 2020, there was no evidence that this was because the Claimant had raised her second ELC on 28 February 2020 and we do not agree that it related to the Claimant's disability or had the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect then it was not reasonable for it to have had that effect.

237. As we have said, it had been agreed with the Claimant that she would work in her role within STP on a temporary basis until her First ELC and appeal was concluded but when the outcome was sent to the Claimant in November 2020 (CB 723 - 730) Ms Clarke was not sent a copy or told it had concluded. The Claimant's role in SHB role still existed and was not disestablished. The post was still in the Respondent's budget but Mr Turner did not have anyone doing the role.

Ms Grewal recommendation – review of SHB role

238. Another aspect of the Claimant's case was that the Respondent, specifically Ms Clarke **(LOI 27 (s))** failed to implement recommendations from the First Grievance made by Ms Grewal that the Claimant's SHB role should be reviewed in the context of where it aligns within the business and formalised via the relevant HR process. She said this amounted to a detriment that she was unlawfully subjected to because the Claimant had raised her second ELC in February 2020 to unwanted conduct related to the Claimant's disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

239. We note that a further comment that Ms Grewal made in respect of this recommendation was that "*Based on the investigation and written complaints from Vanessa it is evident that a return to SHB and reporting to Mark Turner would be detrimental to her health and wellbeing and should be considered as a factor*".

240. Ms Grewal in her findings on the First ELC was satisfied that there was no evidence to suggest that the Claimant did not hold a formal role in the organisation. She acknowledged that the Claimant had a permanent contract of employment with the Respondent. The SHB remained in the organisational structure and therefore there was a substantive post for the Claimant if she was able to return to it. Ms Clarke's email to the Claimant of 9 December 2020 (quoted above) had been entirely clear on this. It was clear from the Claimant's evidence and what she said at the hearing that she did not believe the Respondent that the SHB role was there for her because of concerns over her sickness absence and capability. The Claimant had unreasonably misinterpreted Mr Turner's uncertainties about the SHB role and what purpose it might serve into a concern about <u>her own abilities</u>. She then, quite some time after the event, had unreasonably turned against Mr Turner, making allegations against him that were serious and not well founded. She seems to have then considered that if the SHB role were put through the Respondent's managing change process then that would have given rise to a secure position that would have given her more certainty. Ms Clarke in evidence (quite reasonably in our view) did not at the time understand that the Claimant wanted the managing change process to be followed with the SHB role to give her certainty (which we accept would only be used if a restructuring was being carried out).

241. The Claimant at the hearings seemed to criticise the Respondent for having concluded that she could not go back to the SHB role. We consider that the Respondent was entirely reasonable to reach that conclusion. As the Respondent submitted, the Claimant had repeatedly and adamantly described a

return to work at SHB with Mr Turner as detrimental to her health (CB 199-201, 507-508, 1159). During the course of her grievance the Claimant informed Ms Grewal that:

> *"I have said to everyone I have ever talked to about the issues I had within Mark's team (so Unison in 2017 and again in 2018, ER also in 2017 and 2018, and Mariyana on multiple occasions throughout 2017 and again in 2018, and HR primarily Palwasha and Chris in 2018) to greater or lesser extents depending who it was and how detailed the conversation was, that I could never return to work for Mark as such a move would be hugely damaging to my health and I honestly would not expect to survive it…I have made it clear time and time and time again how genuinely destructive that would be for me on the most basic level of health and safety.*" (CB 507)

242. We also reference above a comment that Ms Grewal made in her recommendations after hearing the Claimants first ELC.

243. It was not conceivable that the Respondent would suggest that the Claimant return to the SHB role (albeit the role had clearly been kept open for the Claimant). This meant that there was no purpose to the SHB role being reviewed "in the context of where it aligns within the business and formalised via the relevant HR process" (whatever that is intended to recommend). As Ms Clarke commented in oral evidence, reviewing where the SHB role would sit would have likely had the same outcome given the Respondent's devolved structure. The conclusion would have been that an SHB project role should sit in SHB under Mark Turner. Clinical boards want to resolve their own problems not for it to be done centrally for them.

244. There is no evidence that any failure to review the SHB role in the context of where it aligned within the business or formalise it via the relevant HR process amounted to a detriment or, if it was a detriment, that this action not being taken was in any way connected to the Claimant raising her second ELC. The Claimant's victimisation claim in this regard is not well founded. This also did not amount to conduct related to the Claimant's disability and did not have the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect then it was not reasonable for it to have had that effect.

Allocation and structure of work, duties and objectives and Sparrowhawk Role

245. As we have explained, from February/March 2020 the Claimant remained under the arrangement with Mr Sharpe and we have explained the difficulties he had in getting the Claimant to do productive work. The COVID pandemic then had a very significant impact on the Respondent, including the finance functions. Any failure to allocate work to the Claimant was because of the practical difficulties we have described in giving work to the Claimant, the practical difficulties associated with working through the Claimant's very lengthy and time consuming ELC's and the impacts the COVID pandemic (including its impact on the availability of project work). However, it was principally the Claimant's own obstructive conduct (including but not limited to her failure to engage in a

discussion about the Sparrowhawk Role which we detail below) and the difficulties she created in allocating her work that meant she was allocated so little work over this period. The failure was not because the Claimant had taken sick leave (the 'something' that she relies upon in her Section 15 EqA claim) (**LOI 9(a)**).

246. The Claimant also alleges that she was unlawfully victimised and subjected to disability harassment on the basis that from May 2020 to the end of the Claim Period she was not provided with any or any suitable structure in her role in that she did not have clear duties or objectives and was allocated ad hoc work which was unstructured to the point where she was not allocated any work at all (**LOI 25 cc, 26 cc 25 dd and 26 dd**). There is no evidence that the lack of structure or defined work or objectives was because the Claimant had raised her second ELC on 28 February 2020 and this also did not amount to conduct related to the Claimant's disability and did not have the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect then it was not reasonable for it to have had that effect (not least because of the Claimant's own contribution to the circumstances that arose).

247. What was needed was for there to be a discussion with the Claimant to be had as to what other substantive roles she could do. That is what Ms Clarke sought to achieve when on 5 February 2021 she emailed the Claimant and attached a letter dated 3 February 2021 (1498 - 1500). We accept Ms Clarke's evidence that the purpose of her letter was to explore redeploying the Claimant into a suitable alternative role given the fact that one of the recommendations of the ELC had been that it would be detrimental for her to return to SHB. She informed the Claimant that she had identified a potential opportunity for the Claimant to work within the project finance team in what we term "**the Sparrowhawk Role**". This involved management of a Trust wide efficiency programme and providing financial support to large projects. She felt there was a similar skillset requirement and similar project focus. Project Finance tended to focus on Trust wide projects and efficiency programmes whereas the Claimant's SHB role had focused on those for SHB only and her PMO role had focused on productivity and efficiency. This meant that Ms Clarke felt the roles were aligned and could be a good fit for both the Claimant and the team because it would build on the Claimant's existing skills and involved issues across finance that she thought the Claimant would find interesting.

248. We accepted Ms Clarke's verbal evidence at the hearing that, had there been a productive conversation with the Claimant about her taking the Sparrowhawk Role then the job descriptions and other formalities would have been completed and it would have been a permanent role playing to a project skill set. We also accept her evidence that the Sparrowhawk Role could have been more challenging than the SHB role because John Sparrowhaw reported to a more senior person (the CFO). We further accept Ms Clarke's verbal evidence that because Mr Turner's scope of responsibility had broadened, that had a corresponding narrowing effect on the roles that could be allocated to the Claimant (as we explain in this judgment, the Claimant could not have reported to Mr Turner).

249. Part of the Claimant's claim (**LOI 35 z and 26 z**) is that Ms Clarke's email of 5 February 2021 and its accompanying letter was an attempt to impose redeployment without considering allowing the Claimant a return to her contracted SHB post and without any justifiable grounds (CB 1498-1500) and that this amounted to unlawful victimisation and disability harassment. We do not agree that it was an attempt to impose redeployment on the Claimant or that, given what the Claimant had said about the likely impact on her of being required to return to the SHB role (which we address in more detail below), that there was any basis on which the Respondent could have considered returning her to her contracted SHB post at any point during the Claim Period. To have returned the Claimant to her SHB post in Mr Turner's team may well have amounted to a detriment and, in fact, unwanted conduct and the Respondent rightly and understandably did not take that course. We do not accept that any of these things complained of amounted to a detriment or that there was any evidence that it was because of the Claimant raising her second, 28 February 2020, ELC. We also do not consider that the Respondent's alleged conduct or alleged failure related to disability or had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect it was not reasonable for it to have had that effect.

250. A further part of the Claimant's claim (**LOI 25 aa and 26 aa**) is that Vicky Clarke then failed to follow due process as regards her proposal to redeploy the Claimant to the Sparrowhawk Role and failed to provide suitable alternative roles and consultation. She says this amounted to a detriment because the Claimant had done the protected act of raising her second ELC on 28 February 2020 and amounted to disability harassment. We do not agree that the Claimant was subjected to any such detriment, Ms Clarke had sought to engage the Claimant in a discussion about the proposal and the Claimant delayed and then shut that opportunity for a discussion down.

251. Ms Clarke's letter suggested a meeting to discuss her proposal in greater detail with the Claimant and to understand what her position was and whether redeployment was, in fact the best option. We accept that following conclusion of the First ELC appeal, this was an attempt by Ms Clarke to explore a permanent working arrangement for the Claimant. However, the Claimant gave it a brief reply on 11 February 2021 saying *"[…] I am currently seeking advice and will reply to you with my full response in due course.*"(CB 1501).

252. We accept Ms Clarke's explanation that she was on secondment from around December 2020 to March 2021 but her expectation was that she and the Claimant would meet to discuss what outcome the Claimant was looking for and potential redeployment in order to agree a constructive way forward. Ms Clarke expected that once she and the Claimant had met, they would be able to agree a permanent role for the Claimant relatively quickly. As a result of that belief, and the fact that Mr Sharpe had moved to a new role, Ms Clarke did not arrange for the Claimant to be assigned further work pending a discussion. We accept that this was not as a result of either the Claimant's disability nor the fact she had raised ELC's.

Claimant's 30 July 2021 response to Ms Clarke

253. It is clear that the Claimant was doing no meaningful work over this period but her regular 'pastoral support' conversations continued with Mr Sharpe. The Claimant did not reply substantively to Ms Clarke's proposal until 30 July 2021 when she sent a response of 30 or so pages (CB 1521 – 1551). Her response would reasonably have left the Respondent entirely perplexed about what it could do to take things forward.

254. A further part of the Claimant's claim (**LOI 25 r and 26 r**) is that Vicky Clarke then failed to address the concerns raised by the Claimant in her 30 page 30 July 2021 letter of the detrimental impact of the Respondent's actions and inactions on her health. She says that this amounted to a detriment because the Claimant had done the protected act of raising her second ELC on 28 February 2020 and amounted to disability harassment.

255. Ms Clarke accepted that she did not (understandably in our view) know what to do about the Claimant's letter and passed it to Ms Sood for guidance. She admitted that it then went without response. We accept the Respondent's submission that the Claimant's letter is an incomprehensible 30 page objection to what should have been the beginnings of an obvious and straightforward redeployment process. The Claimant continued to assert that her substantive SHB role did not actually exist (despite constant reassurances from the Respondent that it did and despite clear evidence that it would not be appropriate for the Respondent to return the Claimant to it). We agree with the Respondent that the Claimant then took that erroneous view to make incomprehensible and illogical demands for the SHB role to be put through a change management process. We agree with the Respondent that such a demand ignored the fact that such a request would require the Claimant to return to work with Mark Turner and that that was neither a realistic option nor one that she actually wanted. It was particularly nonsensical for the Claimant to conclude her 30 July 2021 letter by stating that the Respondent had not provided a clear answer to whether her role existed. The Respondent had repeatedly told her that it did exist. The truth is that the Claimant's role was budgeted for and she was getting paid, without any suggestion of her capability or performance being managed, and yet she was doing little if anything which constituted useful work for the Respondent.

256. The failure to respond to or address the concerns raised by the Claimant in her correspondence of 30 July 2021 was not because the Claimant had raised her second ELC and did not constitute unlawful victimisation. Nor was it disability related unwanted conduct. It did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect it was not reasonable for it to have had that effect.

Mr Rawlinson seeking to progress second ELC investigation – September 2021

257. By this time Mr Rawlinson was trying to progress investigation of the Claimant's second ELC. On 27 September 2021 he asked her for a meeting (SB 1929). The Claimant replied on 12 October 2021 (1928) saying:

I was diagnosed with hyperparathyroidism which is caused by an overactive parathyroid gland (located behind the thyroid at the bottom of the neck) for which I underwent surgery on 9 August 2021. Unfortunately, the surgery was not as successful as had been anticipated and as a result, I have developed some post- operative complications. The complications include issues with my voice and the length of time which I can speak. In addition, I am also experiencing severe gastric reflux which is extremely unpleasant. Both conditions are currently being reviewed by my medical team.

The impact of the ongoing complications is that I am avoiding talking where possible to minimise the discomfort and the strain on my vocal chords. […] I have therefore been advised to try and avoid any additional stressful situations where possible to maximise recovery. I anticipate that going through my complaint with you will be stressful as I re-live the events which have caused me to end up in this position. I am therefore not in a fit state to do this at this time.

I would however draw your attention to the two written grievances which I have submitted and which I feel sets out my concerns in detail as these should provide sufficient information for you to commence investigation. If you still wish to discuss my complaints after reviewing the documentation which I have already provided, I would be obliged if you would contact me again in eight weeks' time, when I anticipate my recovery should be more progressed and I can give you an indication as to whether I am in a position to proceed with the investigation.

258. Mr Rawlinson thought it best to give the Claimant time and he followed up with her on 8 December 2021. However on 13 December 2021 the Claimant told him that she remained unable to meet and had a medical appointment arranged for February 2022. Mr Rawlinson reasonably felt it important to meet with the Claimant. Mr Rawlinson updated the Respondent (Ms Sood) who understandably was concerned to hear what Mr Rawlinson told her about the Claimant's state of health and reasonably wanted to check her own understanding that the Claimant had not been signed off sick.

259. The Respondent was not pressing the Claimant to do productive work (it was essentially paying the Claimant to focus her energy on her ELC's) and the Claimant was not in any meaningful way asking for work. Had the Respondent been managing the Claimant more closely and seeking to ensure that it was getting work product in return for the salary and benefits being paid to the Claimant then the position as to the Claimant's state of health and ability to work might have been more apparent. The Claimant cannot reasonably say that she was pressing for work because she wanted a clearly defined, budgeted and secure position. She had not engaged with Ms Clarke's proposal of February 2021 and her subsequent response was obstructive and unreasonable.

260. On 8 December 2021 Ms Clarke sent the Claimant and email as follows (CB 1568):

[…]

I hope you are recovering well following your surgery. Please could you confirm you are now fit to work or else let me know if you are still unwell and have any further sick notes or periods of sickness I need to record on ESR?

If you are not still unwell, it would be helpful to pick up on my February email regarding next steps and redeployment. This offer was made in good faith and if it is not acceptable, it would be helpful to meet and talk through this.

[…]

261. The Claimant replied on 13 December 2021 as follows (CB 1567):

[…]

Thank you for your email however it contains quite a lot of inaccurate information.

With reference to your request about my sick leave and availability to work, this has already been clarified and concluded as you can see from the attached email chain (dated 25 October 21) in your reply to me where you confirm you have all the information that you need. Also, my conversations with Peter Sharpe about this had fully closed the matter of my sick leave and my return to work on 24 August 21. I have had no sickness absence at all since then.

I have reattached my fit note, which was attached to the email I had sent to Peter Sharpe and to you, on 13 August 21.

I am confused as to why you are asking me about this as clearly it has already been dealt with. It feels like an issue is trying to be made of my health situation where none exists and this feels very threatening to me.

The unusual level of scrutiny that's been applied to this, when I've followed Trust procedure throughout as required and I've confirmed separately with both yourself and Peter that no further information was needed, is something I find deeply troubling and unsettling, and I feel really threatened by it.

With reference to your February email regarding next steps, I replied to you on 30 July 21 and am currently awaiting your response.

[…]

Referral to OH December 2021 to March 2022

262. Ms Clarke replied to the Claimant on 22 December 2021 (1581):

[…]

The reason that I asked for an update was because I understand you have informed both the grievance investigator and, separately, the Employment Tribunal that you are currently unable to engage in either of those processes due to ongoing complications following your recent surgery.

In light of this, I need to make sure the Trust is giving you enough support and so I propose to make an Occupational Health referral. The purpose of this referral is to understand whether there are any steps the Trust can take to support you in general but also in terms of progressing your grievance and facilitating discussions around redeployment. I have prepared the attached referral and should be grateful if you would let me have any comments by 4th January 2022.

Once you have met with Occupational Health, it would be helpful for us to discuss redeployment options. As you will be aware, I will be leaving the Trust in January and have asked another senior manager, Jenny Townsend to act as your formal line manager in the same way that I have been doing, until the new Deputy CFO arrives (probably March). I will introduce you to each other by email before I leave and will ensure she is briefed on our redeployment conversations so far so that she can pick up this conversation with you.

I hope you have a lovely Christmas and look forward to catching up with you in the New Year.

263. The Claimant, on 4 January 2022, sent Ms Clarke an 11 page response (CB 1582 – 1593) which was strong and unreasonable. We note that the OH are there to support and employees referred to OH have the opportunity to comment on and/or refuse to allow the release of a medical report.

264. Ms Clarke's enquiry of the Claimant was entirely reasonable in the circumstances (given that the Claimant told Mr Rawlinson she was not well enough to meet with him) and it did not in any way amount to an unusual level of scrutiny. It was not a reasonable response for the Claimant to have felt troubled, unsettled or threatened by it. As we have said, the Claimant was not actually doing any work and she was not pressing to be given any work in the way that could reasonably have been expected had she genuinely wanted to be given it.

265. We conclude that this response to Ms Clarke, her response to Mr Rawlinson, coupled with the Claimant's 30 July 2021 correspondence were an attempt by the Claimant to delay. It was reasonable for the Respondent to then think about getting guidance from OH.

266. The Claimant (**in LOI 25 ll and 26 ll**) says that she was subjected to unlawful victimisation and disability harassment in late December when Ms Clarke "*sought to refer the Claimant to Occupational Health without justification given the limited issues the Claimant had at that time with hyperparathyroidism*". The Claimant says that the Respondent was not justified in broadening their referral to reference her mental health concerns and suggesting that they needed OH advice in order to speak about the Claimant's ongoing employment.

267. The Respondent (both Ms Clarke and subsequently Ms Townsend) did have good reason to make a referral to OH. The Claimant had been off sick for substantial periods (some of which were linked to poor mental health) and she had informed Mr Rawlinson that she was suffering from ill health including stress and that this was making her unfit to attend meetings. We note that she had also told the Tribunal, in respect of these proceedings, that she was not fit to attend a hearing. The Respondent felt understandably obliged to refer her to OH so that it could ensure that it was complying with its duty to take care for her safety and make any necessary adjustments.

268. On 20 Jan 2022 Ms Townsend (Ms Clarke had by this point left the Respondent), replied to the Claimant's email of 4 January 2022 saying (1610)

> *As previously mentioned, Vicky has now left the Trust and so I will be your line manager going forward. Given you have an existing relationship with Peter Sharpe, I propose that you continue to have weekly calls with him but please do contact me separately if you feel this would be helpful.*
>
> *Your email raised various issues; however, this reply deals only with the proposed Occupational Health referral and Vicky's reference to redeployment, which I acknowledge has caused you some concern.*
>
> *To explain, one of the conclusions from your 2019 grievance, was that a return to SHB and reporting to Mark Turner would be detrimental to your health and well-being. In addition, we believe that there was a breakdown to the working relationship and for that reason do not believe a return to your previous role is a pragmatic way forward. It is for these reasons rather than any other that I would therefore like to explore redeployment with you in order to assess whether there is an appropriate alternative to your return to SHB.*
>
> *[…] It would be helpful for us to meet, either virtually or in person, in order to explore the options for redeployment. However, I understand that you have experienced complications following your surgery in August 2021 and these mean you can find it tiring to speak for long periods of time. The purpose of an Occupational Health referral at this stage is to ensure that I have appropriate advice in order to understand what steps the Trust could take to support your engagement with these meetings.* ***I agree that your input into the support you require would be helpful and hope you would feed this into your discussions with Occupational Health so that it can be included in their report. I understand that you are concerned about the Trust's request for a referral; however, I would seek to reassure you that this is an entirely normal and appropriate step to take in the circumstances - it is important that I obtain an up to date report in order to properly understand your current needs****. I have therefore considered your comments on the draft referral sent to you in December and attach an updated version. I am intending to send this to Occupational Health in the week commencing 31 January 2022. If you have any further comments on the referral please let me know by 27 January 2022. I will*

consider those comments but will not ask you to approve a further draft before making the referral. Alternatively, if you feel able, and would like a short call to discuss your comments on this draft, I am available to speak on either the 25 or 26 January 2022. Please let me now, in advance, if you would like to speak at this time.

For completeness, I also agree with your suggestion that an Occupational Health referral would be helpful once there is more clarity about your role and anticipate that we may make a further referral in due course.

269. The Claimant sent another detailed response (1602-1610) which ended with: "*Finally, I would like to say that your email constitutes yet another example of where the employer has not recognised my concerns and has continued with a pattern of behaviour which is highly suggesting of the employer attempting to remove me from my legitimate role and disenfranchise me of my employment rights*.". We do not consider that there is any reasonable basis for the Claimant to have considered that the Respondent was attempting to remove her from her legitimate role and disenfranchise her of her employment rights.

270. The Claimant's response included the following wording which she wanted to be included in the OH referral (albeit she did not agree that there should be any such referral):

Dear Occupational Health,

Further to an operation I had last August, a hyperparathyroidectomy, I experienced complications that minimised my ability to use my voice for a prolonged period of time. The stated remedy by my medical team was the need for time, as they had not been aware of any permanent damage occurring during the operation and it was considered that this was significant bruising of the nerves, and so a temporary complication that extended the recovery time, rather than being permanent damage. They have referred me to their specialist team also, in order to conduct tests of my throat and vocal nerves, to allow a clinical review of the issue and to ensure no permanent damage has occurred and to provide support where this is needed. To this end I have an appointment on 3rd February 2022 which I hope will provide resolution and conclude the matter.

Therefore the current interim period has been one of uncertainty where I have been unable to provide further clarification until information is made available as a result of my early February appointment.

I have informed the employer about this appointment, and that the current uncertainty will be removed after this point. I have explained that I will then be in a position to provide clarity after this appointment and, if an issue remains with my voice moving forwards, I would then be in a position to discuss a referral to Occupational Health about this matter and to provide the information that would be essential to ensure the Occupational Health form could be properly and accurately completed and the appointment could appropriately and correctly focus upon that

issue.

The notion that attendance at Occupational Health would support me in regards to this specific issue is an inappropriate approach to deal with this matter, especially given it is one that may be relatively short term at this point. Therefore whilst I genuinely recognise the value of the Occupational Health process where relevant, appropriate and proportionate, the singular nature of this particular limitation is clearly not something that Occupational Health could support or advise on as there is no adjustment available to allow me to speak where I cannot.

Additionally there are three sickness absence periods listed on the form. Two in 2019, as well as this one in 2021. The form asks only about sickness absence in the last 12 months and it is only the most recent absence that is relevant to my operation.

There is a comment on the form relating to my mental health which links my mental health to the department's temporary working arrangements. This is entirely inaccurate and not relevant to the issue with my voice.

The requirements on the referring manager to ensure that prior to referral 'this referral has been discussed with the employee and they understand the reasons for and possible outcomes of the referral to Occupational Health; the employee is aware they may be assessed for fitness to continue in their current employment; the sickness absence records for the past calendar year are attached' – None of these conditions have been met. It has not been discussed with me and the stated reason for the referral is to engage in a series of meetings; not to assess my fitness to continue in my current employment.

In summary – the stated reason for the referral may be redundant after my appointment with the clinical team on 3rdFebruary 2022. However it appears the employer is seeking to broaden this referral to other matters without justification and for which it is entirely inappropriate.

[…]

271. The version sent to the OH team included the following additional comment highlighted with text underlined (CB 1614) "*Working remotely but as part of the temporary arrangements for the majority of the finance team due to the pandemic. Finance teams are just now making plans for hybrid working (part onsite, part offsite) when appropriate. Vanessa feels unclear and anxious as to how these working arrangements will be taken forward. We would like to understand what further steps and adjustments the Trust can take to support Vanessa in reducing this anxiety*." It is regrettable that the Respondent did not included the comment that the Claimant asked to be included with the form.

272. We do not consider that the Claimant was subjected to unlawful victimisation and disability harassment either in late December by Ms Clarke or subsequently in 2022 by Ms Townsend in the OH advice they sought **(LOI 25 ll and 26 ll)**. The Respondent did not act as it did because the Claimant had raised her

second ELC. Nor did the Respondent's conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it did have that effect it was not reasonable for it to have had that effect.

273. The Claimant also claims that by referring her to OH between January and March 2022 the Respondent subjected her to unlawful indirect disability discrimination **(LOI 17 (b))**. She says that this was the application of a PCP that put those sharing the Claimant's disability at a disadvantage when compared to those not sharing the disability because, she says, she was more likely to be in receipt of an inaccurate OH report. As per our findings in respect of Mr Turner's referral of the Claimant to OH (**LOI 17 (a)**), we do not consider that Ms Townsend was applying a PCP by not sending the referral form with the Claimant's comments. Again, whilst a one off act can amount to a PCP, this was a one off decision specific to the context in which she made it. However, if we are wrong and this was the application of a PCP we do not consider that it subjected the Claimant to a particular disadvantage as alleged. There is no evidence that the Respondent's OH team would not give an honest and expert answer to medical questions posed nor is there any evidence that the Claimant was more likely to be in receipt of an inaccurate OH report as a disabled person. We refer to our other findings on the claim raised in **LOI 17 (a)**.

274. The Claimant ultimately confounded Ms Townsend's attempts to refer her to OH and, given how clear it had become that the Claimant did not feel comfortable meeting OH and following a discussion with HR, Ms Townsend decided not to press for the OH referral. Given the Claimant's unreasonable and disproportionate response to it she decided it would be counter-productive. Ms Townsend's initial aim had been to work with the Claimant to discuss her return to work. That was delayed by the discussions about an OH referral. She subsequently discussed how to facilitate the Claimant's return to work and Ms Townsend agreed that she would provide Vanessa with work (albeit starting after the Claim Period).

275. Ms Sood liaised with the Claimant and told Mr Rawlinson on 17 March 2022 that he could progress with the grievance investigation but when he contacted the Claimant that day to arrange a meeting with her, the Claimant responded on 21 March 2022 to say that she was not yet able to meet. Mr Rawlinson replied on 22 March 2022 and confirmed that he would wait for the Claimant to contact him (CB 1630 – 1631).

276. On 13 June 2022, Mr Rawlinson received an email from Ms Pettigrew and he then sent her a timeline of the sequence of events to that point (CB 1642). On 29 June 2022 Ms Pettigrew asked Mr Rawlinson to contact the Claimant himself to continue the investigation (CB 786) which he did (CB 790 - 791). Mr Rawlinson's subsequent steps in respect of the investigation fall outside the Claim Period.

277. Given that we have determined that none of the Claimant's claims are well founded, we have not gone on to decide whether they had been brought in time.

_____

Employment Judge Woodhead

Date 15 April 2024

Sent to the parties on:

26 April 2024

.....

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For the Tribunals Office

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix

AGREED LIST OF ISSUES

Jurisdiction

1) Do the discrimination claims (insofar as they succeed) amount to a continuing course of conduct, the last act of which is in time? The last act in respect of the claims is as follows (i.e acts before these dates may be out of time):

   a) ET1 - 1 December 2019 (ET1) (includes ACAS conciliation)

   b) Amendment application made 4 July 2022 therefore acts complained of before 5 April 2022 may be out of time.

   2) If not, would it be just and equitable to extend the time limit to allow the Claimant to rely on any allegations that are out of time?

Section 6 Disability

   3) The Respondent accepts that at all material times, from August 2015, the Claimant was disabled by reason of cancer and from September 2015, she was disabled by reason of endometriosis, and the Respondent had knowledge of the same.

   4) The Respondent accepts that from April 2017, the Claimant was disabled by reason of depression and anxiety.

   5) Over what period, if any, did the Claimant meet the definition of disability under s.6 Equality Act 2010 for post-traumatic stress disorder ('PTSD')? The Claimant alleges she met from January 2019 (the Respondent accepts the Claimant's PTSD met the definition of disability from January 2020).

6) When, if at all, did the Respondent know, or ought reasonably to have known, that the Claimant was disabled by reason of PTSD and/or depression and anxiety? The Claimant alleges:

   a) PTSD 4 March 2020 after the formal diagnosis (the Respondent says that this is only relevant as regards Ms Clarke's evidence and that knowledge of PTSD is denied);

   b) Anxiety Feb 2019 signed off with work related stress and anxiety;

   c) Depression July 2019 by Occupational Health Consultant (the Respondent accepts that it had knowledge of depression from July 2019).

Section 13 Direct Disability Discrimination

   7) Which, if any, of the following acts occurred:

a) On 25 January 2017, did Mark Turner inform the Claimant that there was no longer a role for her in his department and/or that she was not good at reporting and basic accounting?

b) – not taken forward

c) – not taken forward

d) On 13 February 2017, did Mr Turner:

i) Tell The Claimant that she was “different” following her return to work;

ii) That the Claimant there was no role for her in SHB;

iii) Suggest that the Claimant might move to a Corporate Board Role;

iv) Tell the Claimant that her performance was being monitored;

v) Imply that Claimant would be performance managed;

vi) Imply that the Claimant should resign;

vii) Tell the Claimant that the Respondent was considering making her redundant.

[See paragraphs 41 - 44 of the Amended ET1]

7. Were any of these acts less favourable than treatment that would have been afforded to a hypothetical comparator?

8. Was any such less favourable treatment because of the Claimant’s disability or disabilities?

Section 15 Discrimination Arising from Disability

9. Which, if any, of the following acts occurred:

a. From around February/March 2020, was the Claimant not allocated any work?

b. Did Mr Turner insist on holding ad hoc meetings in early September 2016 when Mr Turner first joined, 23 November 2016, 23 January 2017, 25 January 2017 and 13 February 2017 along with 2 or 3 other meetings in the period between October and December 2016 with the Claimant despite having been informed that she required structure and advanced warning to properly prepare for meetings?

c. Did the Respondent repeatedly refer to the Claimant being performance managed in a meeting on 13 February 2017?

d. In August 2018 did Mariyana Zaharieva mislead the Claimant by saying that if she did not accept the secondment role, there would be no role for her in Mariyana’s department.

e. Did Ms Zaharieva fail to notify the Claimant of suitable alternative roles? This is dealt with at para 51. a to c. of the particulars of claim (page 175 CMB) with a. and c. of that paragraph referring to the same role and paragraph b.’s reference to 18 September 2019 being an error – the date referred to should be 18 September 2018.

[See paragraphs 93 and 94 of the Amended ET1]

10. Did any of these acts or omissions amount to unfavourable treatment of the Claimant?

11. Was any such unfavourable treatment afforded to the Claimant in consequence of something arising out of the Claimant's disability or disabilities? The Claimant alleges that the "something" arising in consequence of her one or both of her disabilities was her sickness absence (see para.95 of C's Amended ET1).

12. If so, has the Respondent proved that any such treatment was a proportionate means of achieving a legitimate aim?

Section 19 Indirect Disability Discrimination

13. Did the Respondent apply the following PCP to the Claimant: was the Claimant required to take annual leave following the exhaustion of full time sick pay to facilitate a phased return to work from 01 October 2019? (see paragraph 91 & 74(c)(ii) of the Amended ET1)?

14. If so, did that PCP put those sharing the Claimant's disability at a particular disadvantage when compared to those not sharing the disability? The alleged disadvantage is the Claimant having to use her annual leave entitlement which cannot then be used for its designated purpose.

15. Did the PCP put the Claimant at that disadvantage?

16. Has the Respondent proved that any such treatment was a proportionate means of achieving a legitimate aim?

17. Did the Respondent apply the following PCP to the Claimant: referring the Claimant to Occupational Health without any employee input :-

    (a) Mark Turner in or around January 2017 to March 2017

    (b) Jenny Townsend from around January 2022 to around March 2022

    (see paragraph 92 of the Amended ET1)

18. If so, did that PCP put those sharing the Claimant's disability at a disadvantage when compared to those not sharing the disability? The alleged disadvantage is that she was more likely to be in receipt of an inaccurate OH report.

19. Did they put the Claimant at that disadvantage?

20. Has the Respondent proved that any such treatment was a proportionate means of achieving a legitimate aim?

Section 20 Reasonable Adjustments

21. Did the Respondent apply the following PCP to the Claimant: requiring the Claimant to use annual leave to facilitate a return to work from 01 October 2019? (see paragraph 74 c (iii) of the Amended ET1)?

22. If so, did the PCP place the Claimant at a substantial disadvantage? The alleged disadvantage is that the Claimant is more likely to require extended periods of sickness absence and therefore is more likely to be in a position where she has to use her annual leave.

23. Did the Respondent know, or ought it reasonably to have known, of the substantial disadvantage to the Claimant?

24. Would it have been reasonable for the Respondent to have taken the steps identified in paragraph 97 of the Amended ET1, namely extending the period of sick pay stated in the Respondent's Sickness Absence and Attendance Policy and Procedure?

Section 27 Victimisation

25. Did the Respondent subject the Claimant to the detriments listed para. 27 r-ll below?

26. If the Respondent did subject to the Claimant to any of the alleged detriments in the Amended ET1 was this because the Claimant had submitted her second grievance?

Section 26 Disability Harassment

27. Which, if any, of the following acts occurred:

    h. MT (Mark Turner) informing the Claimant on 13th February 2017 that she should consider resigning;

       Alleged link to disability: Mark Turner wanted the Claimant out of her post because he did not think she was capable of doing the job because of her cancer and endometriosis and their effects on her (i.e. her number of absences and the fact that she had spoken about fatigue).

    r. The Respondent's (Vicky Clarke) failure to address the Claimant's concerns which were raised by the Claimant on 28 August 2020 (**page SB4553),** 7 October 2020 (**page SB4550**), 30 July 2021 **(page CB1521)** of the detrimental impact of their actions and inactions on her health in spite of being aware of this impact;

       Alleged link to disability: The actions were connected to my disability and having a significant impact on me and they continued. There was a failure to act (they could have stopped it) – but they did not want to resolve my situation because they did not want me to return to appropriate employment and there was resistance to me returning to work.

    s. The Respondent's (Vicky Clarke) failure to implement any recommendations from the first grievance outcome report. Specifically the following:

       10.4.1 Process and Procedures

       - Staff changes including transfers or secondments (no matter how

minor) must be formalised and in writing. These includes any internal changes in the form of an “Amendment to contract” document.
- Written documentation from the employee accepting the move should be on file.

10.5

- The Senior Finance Manager, Projects role in SHB should be reviewed in the context of where it aligns within the business and formalised via the relevant HR process. Based on the investigation and written complaints from Vanessa it is evident that a return to SHB and reporting to Mark Turner would be detrimental to her health and wellbeing and should be considered as a factor.

Alleged link to disability: The recommendations were for things that should be put in place (records kept / things that should be put in writing / structure that should be documented) where an employee is doing an interim role. There was also a recommendation for the review of where her SHB post sits in the organization.

z. On 5 February 2021 - Vicky Clarke of the Respondent attempting to impose redeployment (by way of email and letter) without considering allowing her a return to her contracted SHB post and without any justifiable grounds **(page number 1498-1500).** The failure to return the claimant is said to last until 4 July 2022 and latterly Jenny Townsend was responsible for this**.**

Alleged link to disability: The reasons given for it were flawed and were linked to my health;

aa. The Respondent (Vicky Clarke) failing to follow due processes with regard to the proposal to redeploy in February 2021 including the provision of suitable alternative roles and consultation;

Alleged link to disability: Held a 8C level position – Vicky Clarke concluded that I was not reliable and because I was disabled decided I was not capable in a post at that level and therefore wanted to redeploy me. An appropriate procedure would have put me into a senior post;

cc. The Respondent's (Vick Clarke as the responsible person) failure from May 2020 to 4 July 2022 to provide any or any suitable structure in the Claimant’s role in that she did not have clear duties or objectives in her role and the Claimant was allocated ad hoc work which was unstructured to the point where she was not allocated any work at all (see dd);

Alleged link to disability: Considering me to be impaired due to the perception of how my disabilities affect me and therefore giving me ad hoc work or not giving me work and not wanting me in a responsible position.

dd. The Respondent (Vicky Clarke) from May 2020 to 4 July 2022 failed to provide the Claimant with any work at all;

Alleged link to disability: Considering me to be impaired due to the perception of how my disabilities affect me and therefore not giving me work.

ll. Vicky Clarke in late December 2021 and Jenny Townsend from January to 17 March 2022 sought to refer the Claimant to Occupational Health without justification given the limited issues the Claimant had at that time with hyperparathyroidism and they were not justified in broadening their referral to reference her mental health concerns and suggesting that they needed OH advice in order to speak about her Claimant's ongoing employment. C1573-7 ('Quick check in'), C1601 ('OH Referral') C1610-17 ('OH Referral'), S1942 ('Management Referral Telephone Appt')] and S1948 ('Postponement of Management Referral Appointment)

Alleged link to disability: as above

27. Was that conduct related to the Claimant's disability or disabilities?

28. 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?

Remedy

28. In the event of a successful claim, should compensation be awarded and if so what are the appropriate awards, if any, for:

    a. Compensatory award

    b. Injury to feelings

    c. Personal Injury claim

    d. ACAS uplift

    e. Interest

    f. Declarations and Recommendations the Employment Tribunal deems appropriate.