EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000200/2023

Held in Dundee on 16, 17, 18, 19, 22, 23, 24, 25 and 26 April 2023

Employment Judge W A Meiklejohn
Tribunal Member Mrs L Brown
Tribunal Member Mr A Matheson

Ms Gail Lauder	**Claimant** **Represented by:** **Ms E Matheson - Solicitor**
Tayside Health Board	**Respondent** **Represented by:** **Mr D James - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows –

(a) The claims brought by the claimant under sections 15 and 26 of the Equality Act 2010 relating to the description of her as an "antivaxxer" succeed.

(b) All of the other claims brought by the claimant do not succeed and are dismissed.

(c) If the parties are unable to agree compensation, the case will be listed for a remedy hearing.

REASONS

1. This case came before us for a final hearing dealing with liability only. Ms Matheson appeared for the claimant and Mr James for the respondent.

Nature of claims

2. The claimant alleged that she had been constructively dismissed by the respondent and that her dismissal was unfair. She also alleged that she had suffered unlawful discrimination, the protected characteristic being disability. Her disability discrimination claims were brought under section 15 (**Discrimination arising from disability**), sections 20/21 (**Duty to make adjustments/Failure to comply with duty**) and section 26 (**Harassment**) of the Equality Act 2010 ("EqA").

3. The respondent denied that the claimant had been constructively dismissed. The respondent's esto position was that if the claimant had been constructively dismissed, the dismissal was for the potentially fair reason of capability. The respondent conceded that the claimant was disabled, the disability being a susceptibility to have allergic reactions to certain substances, but asserted that it was for the claimant to make the link between her disability and her inability to wear a surgical mask. The respondent resisted the claimant's discrimination claims.

Procedural history

4. There had been two preliminary hearings. The first took place on 10 August 2023 (before Employment Judge Sangster). Immediately before this hearing the claimant lodged an amended statement of claim. The principal outcomes were orders for (a) the claimant to produce her medical records, (b) the respondent to confirm its position on the application to amend and disability status and (c) an open preliminary hearing to determine the application to amend and disability status if these remained in dispute.

5. Following this preliminary hearing the respondent confirmed that it did not oppose the application to amend and sought leave to amend the grounds of resistance. The claimant produced her medical records and the respondent conceded disability status, but not the link between the admitted disability and the claimant's inability to wear a surgical mask. The respondent provided amended grounds of resistance.

6. The second preliminary hearing took place on 2 October 2023 (before EJ Tinnion). The principal outcomes were (a) the applications to amend the statement of claim and grounds of resistance were, by consent, allowed, (b) the respondent was ordered to set out the legitimate aims relied upon in defence of the claim of discrimination arising from disability and (c) the parties were instructed to agree a list of issues. There were also case management orders relating to productions and provision of a schedule of loss, and dates were fixed for the final hearing.

List of issues

7. The parties did agree a list of issues (59-62). This incorporated an appendix setting out the respondent's legitimate aims in relation to the claimant's section 15 EqA claims. We narrate the issues below in the Discussion section of our Judgment and so we will not rehearse them here.

Evidence

8. For the claimant we heard evidence from the claimant herself and from Ms R Reid, a friend who accompanied the claimant at some work-related meetings. For the respondent we heard evidence from Mrs M Taylor, Lead Sonographer, Mr M Conroy, Imaging Manager, and Mrs W Milne, Lead Radiographer.

9. We had a joint bundle of documents extending to 734 pages and a supplementary bundle for the claimant extending to 91 pages. We refer to these by page number, prefixed by "S" in the case of the supplementary bundle.

Preliminary matters

10. At the start of the hearing Mr James objected to two of the documents in the supplementary bundle. These were a GP report dated 22 January 2024 (S68) and a Psychological Assessment dated 6 April 2024 (S69-86). Both were included in the index under the heading "Remedy".

11. After hearing submissions we adjourned to consider this matter. We noted that, in terms of EJ Tinnion's case management orders following the second

preliminary hearing, the final hearing was to deal with liability only. As we understood that the two documents to which objection was taken related to remedy, and were not to be relied upon in relation to liability, we directed that they should not be referred to during this hearing.

12. Mr James advised us that the respondent's position had changed in respect of one matter referred to in the appendix contained within the list of issues. In response to *"Falsely labelled as anti-vaxxer"* the respondent's response per the appendix was *"Denied that this is what happened".* Mr James said that the respondent now accepted that this comment was made.

13. We were provided with a document headed *"Agreed Facts"* which set out various matters upon which the parties were in agreement.

Findings in fact

14. The claimant studied radiography and graduated in 2003. She commenced employment with the respondent on 16 June 2003. The claimant then undertook a post-graduate course and qualified as a sonographer in late 2007 or early 2008. The claimant also obtained a post-graduate certificate in musculoskeletal ultrasound in 2012.

15. At the time of the events described below, the claimant's role was Clinical Specialist Sonographer. She was a registrant with the Health and Care Professions Council ("HCPC") which sets standards of conduct, performance and ethics for a range of professions including radiographers.

16. The respondent is responsible for the delivery of NHS services across Tayside. It is based at Ninewells Hospital in Dundee, and also operates Perth Royal Infirmary, Stracathro Hospital, by Brechin, and various other facilities across the region.

Claimant's health

17. The claimant described her medical history in her disability impact statement (40-45). It is not necessary to record this in detail, apart from some key points. These are as follows –

a. The claimant is susceptible to allergic reactions to certain substances.

b. She has an awareness of substances and products, both specifically and generically, which provoke such a reaction.

c. She has been diagnosed with coeliac disease and psioratic arthritis.

d. She experienced severe anaphylaxis following childbirth in 2008. There was no definitive diagnosis of what caused this.

e. She is very cautious about what drugs and medicines she uses.

Claimant's personal life

18. At the start of 2020 the claimant was experiencing some issues in her personal life. Again, it is not necessary to record these in detail. Mrs Taylor was supportive of the claimant at this time, agreeing to a temporary change in her hours of work and supporting deferral of an audit which would otherwise have been part of her HCPC re-registration process.

Coronavirus pandemic

19. During the pandemic guidance was published on the Health Protection Scotland website on the use of personal protective equipment ("PPE"). The respondent also received guidance from the Scottish Government. This included a letter dated 23 June 2020 (158-162) headed *"COVID 19 – INTERIM GUIDANCE ON THE WIDER USE OF FACE MASKS AND FACE COVERINGS IN HEALTH AND SOCIAL CARE".*

20. This guidance included the following –

"It is now recommended that staff working in a clinical area of an acute adult (incl. mental health) or community hospital or in a care home for the elderly should wear a medical face mask at all times throughout their shift."

21. At this time the claimant and her colleagues were required to wear face masks when scanning patients but not in the office areas, the changing rooms, the canteen and when entering or leaving the hospital. They were providing a

limited service to patients who were Covid negative. The claimant wore a surgical mask while scanning then removed it while seated at a desk to write up the report. She was able to cope with that. This did not however comply with the June 2020 guidance.

22. When the claimant returned to work following a period of absence in September/October 2020 due to torn knee ligaments, she found that the workload had increased and, as a consequence, she required to wear a face mask more often. She experienced coughing and irritation in her nose, mouth, throat and eyes. The claimant was unable to ascertain the ingredients used in manufacture of the masks, but believed it to be an allergic reaction.

Claimant uses cloth masks

23. The claimant noted that her symptoms were becoming more pronounced and attributed this to repeated exposure to the face masks she was using. From some point in October 2020, she began to use cloth masks produced by Ms Reid. These contained a disposable filter which could be discarded and replaced. Mrs Reid gave the claimant information about the filter material. The claimant was already using cloth masks outside of work without reaction and felt that she was safe to do so at work.

24. There were some shortages of PPE at this time and, according to the claimant, a culture of "making do" including the use of makeshift PPE. However from the start of 2021 all PPE required to be kite marked. In early January 2021 Ms N Duffy, a colleague who was senior to the claimant, expressed concern to her about her use of cloth masks. Ms Duffy asked the claimant if she had reported her use of cloth masks to Mrs Taylor. As recorded in the agreed facts, the claimant had not done so and Mrs Taylor was unaware of the claimant's use of an alternative mask because she had been shielding and working from home.

Dialogue between Mrs Taylor and claimant

25. On or around 11 January 2021 the claimant told Mrs Taylor about her difficulty with wearing a surgical mask, and that she had been wearing cloth masks as

an alternative. This led to an exchange of WhatsApp messages (S34) on that date. Mrs Taylor asked the claimant if she had sought advice from Infection Control ("IC") and the claimant said that she had not thought to do so.

26. Mrs Taylor decided to remove the claimant from clinical duties and that she should undertake non patient facing ultrasound related duties. She submitted a referral to Occupational Health ("OH") on 12 January 2021 (172-174). Mrs Taylor also arranged that Mr S Dundas, another Lead Radiographer, and Mrs Milne would try to help the claimant to find a suitable alternative medical grade mask. Mrs Taylor told the claimant about this in a WhatsApp message of 13 January 2021 (S35).

27. Around this time Mrs Taylor began to compile a timeline of events relating to the claimant (296-324). This was not always done contemporaneously but was updated by her from time to time as matters progressed. It covered events up to November 2021.

Disciplinary meeting and outcome

28. Mrs Taylor held an Early Resolution Initial Meeting with the claimant on 19 January 2021. The title of the meeting indicated that it came under the respondent's conduct policy. The conduct issues were (a) the claimant's failure to notify Mrs Taylor as her line manager of her inability to wear a surgical mask and (b) her failure to consult with the IC team to ensure that what she was doing was appropriate and safe for the claimant herself, her patients and her colleagues.

29. At this meeting the claimant acknowledged that she had not gone through proper channels, described by Mrs Taylor as poor judgment. Outcomes were agreed which focussed on the claimant adhering to the relevant policies and procedures. These were recorded in Mrs Taylor's letter to the claimant dated 19 January 2021 (178-179). Mrs Taylor was satisfied that there was no need to take any further disciplinary action at this stage.

30. According to the claimant, whose evidence we accepted on this point, the meeting with Mrs Taylor included reference by the claimant to how she was

being treated by her colleagues. The claimant had decided not be get vaccinated. Her colleagues were aware of this and reacted negatively. Mrs Taylor discouraged the claimant from discussing the matter with her colleagues.

31. Steps were taken to identify a suitable face mask for the claimant to wear, but without success. This led to a decision that the claimant should work from home. She started to do so on or around 25 January 2021.

Occupational health advice

32. The claimant met with Ms J Hamilton, an OH Nurse, on 28 January 2021. Ms Hamilton provided a report to Mrs Taylor on the same date (183-184). She referred to the claimant having *"noticed symptoms consistent with an allergic reaction to several of the standard issue masks".* Ms Hamilton recommended that the claimant should try ultra sensitive face masks.

33. It was not initially possible to procure ultra sensitive face masks. The claimant tried other types of mask but reacted adversely to these. She had a further appointment with Ms Hamilton on 4 March 2021 following which Ms Hamilton wrote to Mrs Taylor on that date (192). Her recommendation remained that the claimant should try ultra sensitive face masks when they became available. Ms Hamilton made reference to the respondent's tightening of their policy relating to face coverings, so that as from 1 March 2021 all staff and visitors were required to a Fluid Resistant Surgical Mask ("FRSM") in both clinical and public areas.

34. The claimant and Mrs Taylor spoke via Microsoft Teams on 10 March 2021 (193). The outcome was agreement that the claimant would try an FFP3 mask. The claimant's evidence was that she was beginning at this point to feel some tension between herself and Mrs Taylor.

35. Ms Hamilton provided advice to Mrs Taylor about the claimant using a visor. She told Mrs Taylor in an email on 18 March 2021 (202) that a visor would not be suitable from an infection control point of view. While it provided some

protection to the wearer it was insufficient as a reverse barrier for other staff and patients.

36. By the end of March 2021 the claimant tried various other types of mask (including both FFP2 and FFP3) but had an allergic reaction to all of these. The claimant emailed Mrs Taylor on 30 March 2021 (204-205) stating that *"each reaction is increasingly worse with each exposure and is taking me longer to recover from".* The claimant indicated that she was unwilling to try more masks of a different design but made from the same materials. In her reply Mrs Taylor acceded to the claimant's wish not to try any more masks.

Annual appraisal 2021

37. Mrs Taylor conducted an annual appraisal meeting with the claimant via Teams on 22 February 2021. Mrs Taylor recorded the following in her timeline (297) –

"I highlighted that I had had informal reports that some assistants were concerned Gail was telling patients she was choosing not to have the vaccine. I suggested that although Gail clearly feels this is a fairly benign statement it may not be helpful to say such things to patients as sounds a little counter to public health vaccination programme drive"

"Gail felt she should be allowed to have a voice and I agreed but she is contracted to work for the NHS and her views are not in line with NHS and public health."

Ultra sensitive face masks

38. On 19 April 2021 Mrs Taylor emailed the claimant (213) to advise that the ultra sensitive face masks had arrived. The claimant trialled these between 20 and 22 April 2021 and found that she experienced discomfort in her mouth and throat and swollen glands. The claimant accepted in her email to Mrs Taylor on 22 April 2021 (307) that she would not be able to wear them for prolonged periods without detrimental effect.

Other options

39. The respondent worked collaboratively with the University of Dundee and had equipment located there. Mrs Taylor made an enquiry as to whether the claimant could access that area to train first year radiology trainees. However, as reported by Mrs Taylor in her email to Ms Hamilton on 29 April 2021 (308), this was not possible because the University were not happy with a cloth face covering and required a FFP2 face mask to be worn.

40. Thereafter Mrs Taylor engaged with Ms G Keith, a senior member of staff within the University, by email on 16/17 June 2023 (313) with a view to the claimant providing training on the clinical skills simulator. The response was positive but by the time Mrs Taylor fed this back to the claimant she had been medically certified as unfit for work.

41. There was discussion on 20 May 2021 amongst Mr Dundas, the claimant, Ms J Donaldson and Ms M Kennedy, reported to Mrs Taylor in Mr Dundas' email of 25 May 2021 (220), about a *"more pragmatic solution".* The suggestion was that the claimant might wear a cloth mask with a filter plus a visor. It was noted that a respirator hood or a full-face mask would not be appropriate. The claimant was in any event unwilling to try a respirator hood until she had information about the filter material.

Provision of equipment

42. When the claimant first worked from home a laptop was not available (reflecting the prioritisation of available equipment) and she purchased her own. She was later provided with a mobile phone which allowed her to have contact with patients. The claimant described finding it difficult to work from home. She had no home office and had to set up on her dining table. She said she did not have enough to do and struggled to fill her time productively. She began a research project of her own.

43. The claimant was unable, using her own laptop, to access the programme which showed ultrasound images. This meant that she could not do audits, peer reviews or mentoring of trainees remotely. She also found that the

remote connection was intermittent and she had to contact the respondent's IT support desk, causing her considerable frustration.

Mrs Taylor was aware that the work allocated to the claimant did not allow her to utilise her skills as a sonographer. In her email to Ms Keith of 17 June 2021 (313) Mrs Taylor said of the claimant –

"She is at home doing fairly mundane remote admin tasks – neither ideal for her level of expertise nor for her mental health."

44. The claimant emailed Mrs Taylor and others on 25 May 2021 (310-311) asking again if an NHS laptop was available. Mr Conroy responded on the same date, advising her that there was now a laptop which she could borrow.

Claimant certified unfit for work

45. On 18 June 2021 the claimant began a period of sickness absence. Her Fit Note dated 21 June 2021 (222) gave the reason for absence as *"Stress related problem"* and contained the comment *"stress at home".* Mrs Taylor understood this to relate to one of the claimant's children having health issues.

46. The claimant attended an OH review appointment with Ms Hamilton on 1 July 2021. Ms Hamilton reported on this to Mrs Taylor by her letter of the same date (223-224). The outcome was a referral to Dr S Ghaffar in Dermatology, with a view to the claimant undergoing patch testing for specific allergies to the masks she had tried unsuccessfully to use.

47. The claimant provided further Fit Notes dated 22 July 2021 (225) and 13 August 2021 (226) in which the reason for absence was stated as "Stress at home". The claimant provided a further Fit Note dated 9 September 2021 (253) where the reason for absence was stated as *"Stress related problem".* This Fit Note also contained the comment *"attending mental health support".*

Referral to Dermatology

48. The claimant was seen in the Patch Test Clinic on 6 August 2021. Dr Ghaffar provided a report to Ms Hamilton dated 18 August 2021 (675-676). This advised that the claimant had shown a positive reaction to mercury and

ammoniated mercury which suggested an allergy to amalgam fillings. She did not show a reaction to the other substances tested including various brands of FRSM. Accordingly her surgical mask reaction remained unexplained.

49. Dr Ghaffar suggested that the claimant should consult her dentist to discuss removal of amalgam fillings (which the claimant duly did and had her fillings removed and replaced). Dr Ghaffar also copied her report to Prof B Lipworth, a Respiratory Consultant, to get his opinion on whether measurement of the claimant's lung function might assist in explaining her reaction to surgical masks.

Further OH advice

50. The claimant had a further appointment with Ms Hamilton on 30 September 2021. Ms Hamilton reported to Mrs Taylor on the same date (274-275) in terms which included –

"….it is my opinion, that were it not for the requirement to wear FRSM within the workplace, a return to work would be feasible within the next few weeks. Gail would require a phased return over a four week period with regular meetings with management to discuss her progress and any concerns that arise."

51. Ms Hamilton also advised that the claimant *was "awaiting investigations for a condition that she believes has made the process of home working very challenging. For this reason it may be difficult for Gail to resume home working without the strategies and support that would be expected following such a diagnosis".* Ms Hamilton did not disclose that the condition in question was autism, and Mrs Taylor did not at this point know to what condition she was referring.

Attendance meeting on 28 October 2021

52. Mrs Taylor conducted an attendance meeting with the claimant via Teams on 28 October 2021. The claimant was accompanied at this meeting by Ms Reid. We had a transcript generated through Teams (S3-33). Mrs Taylor wrote to

the claimant on the same date (278-279) summarising the discussion and actions agreed.

53. The claimant took issue with the reference in Mrs Taylor's letter to a *"new diagnosis".* What she told Mrs Taylor was that she was being referred for an autism assessment. Mrs Taylor referred to a discussion about the claimant returning to work in a patient facing role, but the claimant was sceptical about this.

54. Mrs Taylor also referred to a discussion about the claimant returning in a role which was not patient facing. She told the claimant –

"….we have identified a safe area for you to come on site, at Stracathro Hospital. This would not require transferring through patient areas so a cloth mask could be worn. We would ensure your welfare was supported with access to toilets, etc. We have identified a substantial and important project you would be able to project manage, which is commensurate with your skill set and senior grade."

55. The claimant in her evidence to us was critical of this proposal. She would need to be admitted to the building by a fire door and the arrangements for her to access a toilet and break area had not been thought through. At the time the claimant said *"Stracathro seems like a reasonable solution"* (S24). In our view it was a genuine effort by Mrs Taylor to facilitate a return to work for the claimant.

56. The claimant told Mrs Taylor that she did not yet have the respiratory clinic appointment which had been discussed at her most recent meeting with Ms Hamilton. Mrs Taylor agreed to take this up with Ms Hamilton, and did so. Ms Hamilton responded to Mrs Taylor by email on 28 October 2021 (280) advising that she could not influence the progress of the respiratory referral.

Claimant diagnosed with Covid

57. A few days later the claimant began to experience symptoms of Covid. She had a PCR test on 7 November 2021 which was positive. She postponed an attendance meeting with Mrs Taylor scheduled for 10 November 2021. In the

course of an exchange of WhatsApp messages with Mrs Taylor on 9-11 November 2021 (S41) relating to this, Mrs Taylor reminded the claimant that she was about to go onto half pay.

58. The claimant contacted her GP as she was struggling for breath. A further Fit Note was issued on 12 November 2021 (283). This stated the reason for absence as *"Disease caused by 2019-nCoV (novel coronavirus)".* Unfortunately the claimant's condition deteriorated and she was taken by ambulance to Ninewells Hospital on 14 November 2021. According to her medical records (671) she was diagnosed with "severe Covid". She was treated with oxygen therapy and steroids, and discharged on 17 November 2021.

Attendance meeting on 16 November 2021

59. Mrs Taylor wrote to the claimant on 12 November 2021 (284-285) to reschedule the postponed attendance meeting for 16 November 2021, via Teams. When Mrs Taylor and Ms Suttie logged on to start the Teams meeting, they were unaware that the claimant had been admitted to hospital. When the claimant joined the meeting, Mrs Taylor was taken aback to see that she was in hospital. Mrs Taylor offered to rearrange the meeting but the claimant wanted to proceed.

60. In so finding we preferred the evidence of Mrs Taylor to that of the claimant, who denied that she had said that she was happy to proceed. It seemed to us more likely that the claimant, having elected to join the Teams meeting while in hospital, would choose to proceed.

61. Mrs Taylor wrote an outcome letter to the claimant on 16 November 2021 (286-287). In this letter Mrs Taylor recorded the claimant saying that –

- Her personal and family issues were still ongoing and were stressful. Her illness was ongoing and she did not feel it was realistic to return to work in the short term.

62.

- She felt she would be off work regardless of having Covid.
- The idea of working at Stracathro appealed to her, but it was difficult to think about at present.
- She had a new diagnosis of autism – this was clearly incorrect as the claimant had only been referred for assessment.

63. The claimant submitted a further Fit Note dated 19 November 2021 (288). This gave the same reason for absence as her previous Fit Note (see paragraph 59 above) and included the comment *"stress at home".*

Special leave (1)

64. The Scottish Government wrote to the respondent (and other Health Boards) on 9 November 2020 - DL(2020)30 (533). Under the heading **"COVID SPEACIAL LEAVE"** this stated –

"1. The Cabinet Secretary for Health and Sport has confirmed that all employees who have contracted COVID-19 and are off sick should be on COVID Special Leave and should receive full pay until they return to work for as long these arrangements are in place.

2. If any employee who falls into this category has been transferred to half pay, Boards must reinstate full pay for employees who qualify for COVID-19 Special Leave under the current guidance. Any arrears of pay should be paid no later than the end of December 2020.

3. These arrangements will be subject to review in partnership by the Scottish Terms and Conditions Committee (STAC) and will remain in place until further notice …."

65. STAC wrote to the same group of recipients on 28 September 2021 in these terms –

"LONG COVID SICK LEAVE

Questions have been raised about the position with regard to staff who are on long term absence from work with COVID-19 related sickness. STAC is

conscious of the difficulties which arise in relation to this issue and the position is being monitored and discussed at a national level. However, we write to clarify that until further notice the provisions of DL(2020)30 will continue to apply."

66. Mrs Taylor sought advice from Ms Suttie on 24 November 2021 (292) as to how the claimant's leave should be recorded. Mrs Taylor said that she *"was quite clear when the 3 of us met that she would still be off anyway COVID aside".* In her reply of the same date, Ms Suttie told Mrs Taylor that *"this should be recorded as what is on the sick line so if Covid is being stated as the reason should move to special leave – long covid".*

67. Before Mrs Taylor had received Ms Suttie's reply, she referred the same issue to Mr Conroy who responded, still on 24 November 2021 (290) –

"She stays as sick, as the rationale for being off also notes she has stress which is the same as previous lines."

Nothing was done at this point to move the claimant from sick leave to special leave, and nothing was said to the claimant about her eligibility (or otherwise) for special leave. Mrs Taylor told us that this was a decision taken by Mr Conroy and herself, and that they decided to gather more information because they did not think that the special leave policy should be applied to someone off on long term sickness absence such as the claimant.

Attendance meeting on 14 December 2021

68. Mrs Taylor, along with Ms Suttie, conducted a further attendance meeting with the claimant via Teams on 14 December 2021. The claimant was accompanied by Ms Reid. Mrs Taylor sent an outcome letter to the claimant on the same date (337-338). This referred to the claimant having long-Covid symptoms.

69. The claimant criticised the respondent for not making a mental health referral but, Mr James having objected, we did not allow Ms Matheson to pursue this as it was not a matter of which fair notice had been given in the statement of

claim. In any event we noted that Mrs Taylor told the claimant that *"these are self referral services".*

70. In terms of the claimant's ability to return to work in some capacity, Mrs Taylor recorded the claimant as saying that this would not be possible as she was *"nowhere near well enough to be back at work".* Ms Reid's evidence was that the Stracathro role had been discussed at this meeting but there was no reference to this in Mrs Taylor's outcome letter and we were satisfied that Ms Reid was mistaken about this.

OH review on 17 December 2021

71. The claimant attended a review appointment with Ms Hamilton on 17 December 2021. In her letter of the same date (339) reporting to Mrs Taylor, Ms Hamilton said that she had referred the *claimant "for further professional support"* and that the claimant now had an appointment with Respiratory Medicine in February 2022 *"for assessment regarding the ongoing mask issues".*

72. The claimant was issued with a further Fit Note dated 17 December 2021 (340) which stated the same reason for absence as the previous one and contained the comment *"awaiting resp review".* The claimant was signed off until 11 February 2022.

Attendance meeting on 8 February 2022

73. The claimant attended a further attendance meeting with Mrs Taylor, accompanied by Ms Suttie, via Teams on 8 February 2022. The claimant accepted that Mrs Taylor's outcome letter to her of the same date (343-344) was broadly accurate. The claimant told Mrs Taylor that she had long-Covid. Although not expressly mentioned in Mrs Taylor's letter, we accepted the claimant's evidence that she also spoke about her distress that her hair had fallen out and her difficulties with money.

74. The claimant submitted another Fit Note, dated 11 February 2022 (345). The reason for absence remained as before (Covid). The GP's comment was "awaiting further investigation".

Annual appraisal 2022

75. Mrs Taylor's comments about the claimant in the appraisal document (353-358) (which we understood to be dated on or around 22 February 2022 and which was signed off by the claimant on 1 March 2022) reflected her positive views about the claimant's abilities as a sonographer – *"Gail's work is overall of a very high standard and she is well respected."* The claimant's decision not to be vaccinated and how this impacted on her relationships with her colleagues was reflected in both her own comments and those of Mrs Taylor.

76. The claimant said *"I employ various personal strategies to ensure my respect and appreciation for the differences of others, that I do not feel is always reciprocated. While I fully understand that being in a minority can provoke intolerance in others, I certainly do not agree that silence is the preferred course of action for minorities generally. However, going forward, I intend to consciously depersonalise my work in an effort to safeguard any disquiet. I look forward to seeing how this topic of tolerance, respect and kindness will be addressed within the team as a whole."*

77. Mrs Taylor had this to say – *"Gail and I had a long conversation around the difficulties that the COVID-19 pandemic has created around differing opinions on such things as the vaccine. It is important that as a team we have tolerance and respect for each other, accepting differing values and beliefs. This has caused an undercurrent of disquiet within the team as a whole and we must all try to be more aware of this as a team going forward."*

78. We detected a degree of tension between Mrs Taylor and the claimant here. The claimant was asserting her right to speak out while Mrs Taylor was implying that, in doing so, she had created or at least contributed to the *"disquiet".* Mrs Taylor told us that the claimant *"had a very binary view. Her view was not the issue, but how she put forward that view was unhelpful".*

OH review on 24 February 2022

79. The claimant attended a further OH appointment with Ms Hamilton on 24 February 2022. Ms Hamilton wrote to Mrs Taylor on the same date (359-360).

In her letter Ms Hamilton reported that the claimant had now had an appointment with a Respiratory Technician for initial tests. She had not been advised of the results, nor referred for a consultant review. Ms Hamilton said that the claimant *"remains unfit for work in any capacity at this time".*

80. Ms Hamilton responded to the question *"It would be helpful for any IC risk assessment to know Gail's vaccination status"* by declining to answer *"for reasons of medical confidentiality".* The claimant believed that it had been inappropriate and insensitive for Mrs Taylor to get Ms Hamilton to ask about her vaccination status. According to the claimant, Mrs Taylor already knew the answer. The claimant did not accept that the question had any relevance for IC because the respondent's policies and procedures applied irrespective of a person's vaccination status.

81. Mrs Taylor defended the vaccination status question. She said that there would always be a risk assessment when an employee came back from illness, and she had asked the question (through OH) *"to better understand the risk".* She denied that it had been a *"deliberate dig"* at the claimant. We were satisfied that the enquiry about the claimant's vaccination status was driven by IC and, seen in that context, it was not an unreasonable thing to ask.

82. The claimant made reference in her evidence to the lack of cards or flowers from her colleagues while she was absent from work. In that context, we considered it appropriate to record comments within an exchange of emails between Mrs Taylor and the claimant on 4 March 2022 (366-368). Mrs Taylor told the claimant *"take care, Gail and also just to mention, many people both from the team and wider radiology are asking kindly about you and wanted me to pass on their best wishes".* The claimant responded *"And please thank everyone for their kind wishes".*

83. Within the same email exchange the claimant said this –

"Following the OHSAS appointment with Julie last week it is clear that returning to work will not be possible for me at this time due to my ill health. My eternal optimism has at last sadly had to be replaced with pragmatic

realism since I will not be physically or mentally fit to do my job for the foreseeable future ….

I know there is a meeting scheduled for next week with HR but I would like to know what the options are and what the next step in the process is in order to prepare …."

Attendance meeting on 9 March 2022

84. The claimant, accompanied by Ms Reid, attended a further attendance meeting with Mrs Taylor on 9 March 2022. Ms Suttie was also present. The outcomes were recorded in Mrs Taylor's letter to the claimant of the same date (373-374). These included the following –

"We discussed your salary. I outlined that we have been investigating your situation in more detail. Scottish Government and Scottish Terms and Conditions Committee (STAC) guidelines do not differentiate between staff absent due to a COVID related illness as a primary cause of absence and those absent due to a COVID related illness as a secondary cause of absence.

Taking everything into consideration, we have concluded that your absence should be recorded as COVID special leave and this will be backdated to 12 Nov 2021, which is when your GP first started to mention this on your fit-notes.

I apologise this was not changed sooner but you will understand the complex nature of your absence and investigation was required to ensure we were adopting correct process for you. To date the primary reason for your absence, was being recorded.

This means that you will be paid at full rate, backdated to 12 Nov 2021 …."

85. Mrs Taylor described this as a "positive loophole". She did not recall saying that there had been a "mistake" in how the claimant's absence had been recorded, but accepted that she might have done so. We found that it was more probable than not that Mrs Taylor had referred to either a *"mistake"* or an *"error"* during this meeting. She also accepted that the claimant had not

been told about what had been going on behind the scenes in relation to her eligibility for special leave.

86. The claimant said that this news *"threw me completely".* She was in financial difficulty and had required to apply for benefits. She became *"angry, incredulous. How could they make such a mistake?".* The claimant described Mrs Taylor's delivery of this news as *"flippant".* She referred to Mrs Taylor as being *"clearly irritated"* and *"quite short".*

87. The meeting on 9 March 2022 included a discussion about (a) redeployment if the claimant was not fit for her own role and (b) what a stage 3 competency hearing was – the claimant understood that this would involve termination of her employment. There was also reference by Mrs Taylor to another colleague who was absent due to cancer treatment and would shortly be moving to no pay.

88. We noted that there was background to the references to redeployment and stage 3 of the respondent's attendance policy in an exchange of emails between Ms Suttie and Mrs Taylor on 25 February 2022 (615). Ms Suttie said to Mrs Taylor –

"….While redeployment can be discussed, this would be with the expectation that Gail is fit to return to work in a different capacity to her substantive post. However, while we can certainly get Gail's thoughts on this, I don't think that this is currently an option, as she is unlikely to be able to return in any capacity currently. We would also need advice from occ health that this is a viable option, and as they have highlighted, she is unable to return in any capacity I don't think they would be recommending this.

Again, in absences that are non-covid related, redeployment would be explored in circumstances that an employee is fit to return in a capacity that is not their substantive post. When all options have been explored (adjustments/redeployment where necessary), and there is not a likelihood of return in the near future and the absence has been prolonged, then there would need to be a decision on whether to progress to a stage 3 hearing, as per attendance policy."

89. Mrs Taylor responded –

"can you define prolonged in "absence has been prolonged"

You are basically telling me that she may never return to work but yet I can never fill her position to have someone else do the job, that currently the rest of the team are picking up extra to cover."

90. The claimant provided a further Fit Note dated 11 March 2022 (375). This again gave the reason for absence as Covid related. No other comments were made.

Mrs Taylor's involvement ceases

91. The claimant emailed Ms Suttie on 9 March 2022 (546) stating that she did not want *"to go through Margaret after today's revelations".* The claimant said that she was *"devastated to hear that I should have been financially supported by the Trust over these last few months and haven't been due to the error of my line manager".* The claimant also said *"This is a huge breach of trust and I cannot express how let down I feel by another system failing me".*

92. In her email to Ms Suttie on 17 March 2022 (544) the claimant asked where, how and by whom the incorrect recording of her sickness absence had been discovered. She queried the relevance of OH being asked to question her about her vaccination status. The claimant asked that Mr Conroy contact her regarding a change of manager.

93. Mrs Taylor subsequently emailed the claimant on 21 April 2022 (550-551) in terms which included –

"….I do regret my outward irritation at the last meeting we had – but please believe that was not personal, I felt irritated at the inequality of the situation as had just left a very difficult other attendance meeting with someone else on no pay and not knowing how they were going to make ends meet. Not an excuse just a reason, and I really am angry at myself I took that frustration into our meeting and used inappropriate language.

I also regret not informing you I was awaiting clarification on the special leave and if that was relevant to you – I should have mentioned this and totally got that wrong. Like everything in the NHS that took a lot longer to get clarification than was ideal …."

Mr Conroy becomes involved

94. As we describe below, Mr Conroy was already involved in the special leave issue but his first direct interaction with the claimant in relation to her absence was his telephone call to the claimant on 30 March 2022. The claimant's evidence about this call focussed on her feeling let down by Mrs Taylor. She said that Mr Conroy told her it was more than just the discovery of an *"error"* by Mrs Taylor; it was a policy investigation to make sure the guidance was correct.

95. Mr Conroy recorded his recollection of the call in an email to Ms Suttie of 30 March 2022 (376) sent shortly after the call ended. He referred to the claimant's preference for stage 3 of the attendance policy rather than being put on special leave, as this left her in limbo. She had made reference to lack of support from her staff group and her manager. She had complained about not knowing what was happening (regarding special leave).

96. We regarded any differences in the evidence of the claimant and Mr Conroy about this call as matters of emphasis rather than conflict. The claimant believed (correctly) that Mr Conroy knew more about the special leave issue than he disclosed to her at this time.

Special leave (2)

97. Mr Conroy was not happy with the advice from Ms Suttie on 24 November 2021 that the claimant should move to special leave. As noted above (at paragraph 67) he directed that the claimant should be recorded as remaining on sick leave. Mr Conroy was dubious about someone who was already on sick leave moving to special leave because they had contracted Covid.

98. There was an exchange of emails between Mr Conroy and Ms Suttie on 15 December 2021 in the course of which Mr Conroy said this –

"I fundamentally disagree, as it is not special leave – she is off sick with stress. She would not and will not be back at work until her underlying condition is sorted. Covid had muddied the waters, but its fundamentally incorrect."

99. Mr Conroy also insisted on escalating the special leave issue to Ms Suttie's manager, Ms I Henderson. Ms Henderson emailed Mr Conroy on 21 December 2021 (598) in effect confirming the advice Ms Suttie had given, ie that the claimant should be placed on special leave.

100. Mr Conroy decided to seek clarification. He contacted STAC but did not get a response. He then contacted the Society of Radiographers for advice. It took some time to get a response. When Mr Conroy did get a response, it was that the claimant should be moved to special leave, and should receive back pay.

Attendance meeting on 28 April 2022

101. The claimant submitted a further Fit Note on 11 April 2022 (378). This stated the same reason for absence (Covid). It contained the comment *"fatigue, poor memory post covid".*

102. Mr Conroy, accompanied by Ms Suttie, held an attendance meeting with the claimant via Teams on 28 April 2022. Ms Matheson made the point that the letter inviting the claimant to this meeting had not (in contrast to the earlier letters from Mrs Taylor) made reference to being accompanied by a friend, but we noted that Ms Suttie emailed the claimant on 26 April 2022 (390) to confirm that she could be accompanied by her friend.

103. Mr Conroy sent an outcome letter to the claimant on 28 April 2022 (393-394). The claimant was also provided with a transcript (398-427). The claimant highlighted a number of points in the transcript –

- She had not been aware that Mr Conroy had any involvement in the management of her absence prior to the phonecall on 30 March 2022.
- She wanted it noted that she had continued to engage after being medically certified as unfit for work on 18 June 2021 – she had done

mask testing, patch testing, breath tests and had undergone dental treatment.

- When the claimant said that there was *"no option for me to come back clinically"* she was making the point that it was not her illness which had stopped her from working but the policy which prevented her doing so without a mask. No option had been presented which allowed her to work in a clinical capacity.

- She had used the word *"devastating"* to describe how she felt to be told at the meeting on 9 March 2022 that there had been a mistake because she *"felt let down",* and could have been *"spared the stress of those few months".*

- She had used the word *"orchestrated"* because there had been an active decision not to follow policy. Mrs Taylor knew about her financial difficulties and could have alleviated her suffering by allowing her the support of full pay. The claimant stressed that it had been a decision and not a mistake. She said *"Trust was gone at this point".* There had been a *"cover up"* and it felt *"personal".* She thought she had been a *"liked and respected member of the team"* and *"to have lost that completely was really shattering".*

- Later in the meeting the claimant was recorded as saying *"OK, so I won't be returning to work because I can't. I can't trust the organisation. I can't trust the people that work there. The managers have failed me …."*

- Thereafter the claimant said *"Absolutely no way that mentally and emotionally I will ever be able to work for radiology".* She told us that she felt *"the whole stable safe base I thought I had in my career and job had been pulled from under me".*

- The claimant also said that she *"could resign".* The claimant explained that she felt there was no way she could *"get across to sick leave".* She was *"caught"* by which she meant she was *"held in post with people I*

could not trust". However, she told us that resigning was not an option because it would impact on her benefit entitlement. It was for the respondent to find a way out.

- Short after this the claimant was recorded as saying *"I don't see why I should".* Her evidence about this was *"I was trying to express [to Mr Conroy] that there must be some procedural way to deal with this. I did not feel I was fit to make a decision. It was the respondent's responsibility to sort."*

104. The claimant submitted another Fit Note dated 9 May 2022 (429). This again recorded the reason for absence as Covid. It contained no further comment, and covered a period of two months.

Mrs Milne becomes involved

105. After the meeting on 28 April 2022 the claimant decided that she did not want to deal with Mr Conroy. Mrs Milne, MRI Lead Radiographer, was appointed to take over the management of the claimant's absence. The claimant was happy about that.

106. An attendance meeting which was to have taken place on 25 May 2022 did not proceed. It was rescheduled to 7 July 2022. The claimant provided a further Fit Note dated 5 July 2022 (443). The reason for absence remained Covid. This Fit Note covered a period of three months from 5 July 2022.

Claimant submits grievance

107. The claimant submitted a letter of grievance on 7 July 2022 (444-445). In this the claimant asserted that the actions of management had *"produced a complete breakdown of trust and confidence".* She also asserted that there had been discrimination *"due to suffering with mental health".*

108. The claimant referred to management failing to follow correct procedure in the recording of her absence, despite explicit HR advice. She also referred to the lack of communication and delay in the application of special leave. She

alleged that being questioned about her vaccination status was irrelevant, unjustifiable, inappropriate and stress-inducing.

109. Mr T Chima, Diagnostics Clinical Care Group Manager, held an Early Resolution meeting with the claimant on 1 August 2022. The outcome was that the grievance proceeded to an investigation, to which we refer below.

Attendance meeting on 7 July 2022

110. Mrs Milne, accompanied by Ms Suttie, held an attendance meeting with the claimant via Teams on 7 July 2022. She recorded the outcome in her letter to the claimant dated 8 July 2022 (449-450). Mrs Milne told the claimant that Covid Special Leave was to end on 31 August 2022 (generally and not just for the claimant). Mrs Milne undertook to find out where the claimant stood in relation to sick pay.

111. In the course of this meeting the claimant made reference to her lawyer, indicating that she had sought legal advice by this point. There was discussion between Mrs Milne and the claimant about whether matters should proceed to a stage 3 hearing under the respondent's attendance policy. The claimant was to discuss this with her lawyer.

112. There was also discussion around the breath test results for which the claimant was still waiting. The claimant was recorded as saying that, while it would have been helpful to have the results, she did not want to progress this any further.

Attendance meeting on 20 September 2022

113. Mrs Milne conducted a further attendance meeting with the claimant via Teams on 20 September 2022. Mrs Milne was accompanied on this occasion by Ms D Carr, HR Business Advisor. Mrs Milne recorded the outcome in her letter to the claimant of the same date (455-456). One of the points covered was a reference by Ms Carr to the option of redeployment, which could be explored at stage 2 of the absence management policy.

114. Mrs Milne's evidence to us was that the claimant was at that point at stage 1 of the absence management policy. We found this surprising as, before going onto special leave, we understood the claimant to be stage 2 (based on the references to what might happen at stage 3). However, in answer to a question from the Tribunal, Mrs Milne confirmed that the process was starting again at stage 1 (although the clock was not re-set in terms of the claimant's entitlement to sick pay).

115. The claimant told us about a conversation she had with a locum GP where she had been told that she did seem to be fit to work, and that she should *"separate out"* the masks issue as it was not her problem. This and Ms Carr's reference to redeployment gave the claimant *"a real boost".*

116. The claimant provided another Fit Note dated 4 October 2022 (458) where the reason for absence was again stated as Covid. The comment was "poor memory post covid". This time the Fit Note was for a period of 28 days.

Attendance meeting on 24 October 2022

117. Mrs Milne, accompanied by Ms Suttie, conducted another attendance meeting with the claimant via Teams on 24 October 2022. Her outcome letter to the claimant was dated 25 October 2022 (470-471). As it sets the scene for what happened next, we will record Mrs Milne's summary of the outcomes –

- *Your Long Covid symptoms have improved and you have had discussions with your GP today to focus on the things you can do rather than the things you can't do at work. You are still on medication but feeling more positive.*
- *You are being given support for your autism from a charity called SWAN which you find really helpful.*
- *You are no longer focussing on not being able to return to work clinically at the moment and your GP has said that you are fit to consider coming back to work in some capacity. You both felt doing*

some work, gave you purpose and was better for your mental health although you still get very tired physically and need rest.

- *You discussed this with your GP and you feel you could probably do some office based work building up hours. Your contract is currently 27 hours but you would need a phased return to build up to your hours.*
- *You currently don't feel you can work in Radiology because of the ongoing grievance so would be willing to work outside Radiology until the outcome of the grievance is determined.*
- *I informed you that there has been no change to the requirement to wear masks in the hospital and from previous correspondence, there is still no resolution for a suitable face mask you can wear at work.*
- *I will make contact with Infection Control and Occupational Health to see what options there are going forward to allow you to come back into the workplace.*
- *Your current sick line runs out on 1st November 2022 but your GP is happy to give you another line with added adjustments to get you back to work.*
- *Emma explained that we would need to make contact with TC to find out if there are any roles in Diagnostics/Access outside Radiology that you could do in the interim, exploring what the options are for you.*
- *You said you had previously been given work to do from home but had not gone so well as you had not had the right IT equipment provided and no clear direction of what to do.*
- *We agreed that I will contact you by email to let you know the outcome of discussions about the masks and a possible temporary non clinical role before meeting with you again later. I will let you know as soon as I can.*

118. Mrs Milne did the things she said she would do. She made an OH referral on 25 October 2022 (472-474). She engaged with IC, as confirmed by her email

to the claimant of 24 October 2022 (467-468). She also engaged with Mr Chima on 24 October 2022 seeking a role for the claimant outside Radiology (463-465). This led to a suggestion that the claimant might be able to work from Kings Cross Hospital.

119. The claimant emailed Mrs Milne on 26 October 2022 (475-476) providing information on what she might be able to do outside of Radiology. The claimant said that she should be returning to her post as a sonographer from 1 November 2022, but set out the reasons that she could not do so. She said that, while awaiting the outcome of her grievance, she would *"consider all alternative posts suggested".*

120. The claimant submitted a further Fit Note dated 2 November 2022 (487). This stated the reason for absence as *"Covid 19. Ongoing fatigue".* The duration of the Fit Note was two months. The Fit Note also stated that the claimant *"may be fit for work taking account of the following advice"* which was *"a phased return to work".*

121. Mrs Milne also reached out to Ms J Bownass, Administrative Services Manager, Diagnostics Clinical Care Group, who was to look at whether there might be something the claimant could do in blood sciences or bowel screening. Ms Bownass gave Mrs Milne some contact numbers which she followed up. The upshot of this was that Ms Bownass identified work which might be suitable for the claimant.

Events of 21/22 November 2022

122. Mrs Milne emailed the claimant on 21 November 2022 (496). She told the claimant that the requirement to wear a face mask on hospital premises remained in force. She advised the claimant that Ms Bownass –

"has identified some work in relation to the CRIS system and the Non Medical referral register that would be within the scope of what you said you might be able to do.

This is work that you could potentially do working from home with the correct support in place. Janette is happy to be the contact for you for this admin

work, directing you and contact for any queries/checking in with you as I would if you were happy to work from home.

If the mask guidance changes soon or if we get different information from Occupational Health on the 30th November that may allow you back into the workplace non clinical, then there has been a desk identified for you to allow you to work in Bowel Screening office in Kings Cross.

These are interim measures only but would get you back doing some work as you build up to a return to work."

123. Mrs Milne's reference to 30 November reflected that the claimant had an OH appointment on that date (488). The claimant responded promptly to Mrs Milne's email on 21 November 2022 confirming the Teams meeting the following day.

124. In evidence to us, the claimant described her meeting with Mrs Milne on 22 November 2022 in these terms –

"She was telling me what had happened since our last discussion. I was still not allowed on hospital premises without a mask. That was a hard hit. She talked about work I could do – CRIS system and Non Medical referral register. This would mean that I would see the names of persons in Radiology and would be reporting to someone there. She went on to say that I could work from home. I just felt no-one was listening. My concerns and difficulties were not being taken seriously. I'd explained why I could not work from home. For that to be suggested – it felt like all my concerns were being dismissed. They were still saying –

- *There was a need to wear masks – I could not meet that.*
- *I would be dealing with Radiology – I thought I'd been explicit with my reason for that – I found it traumatic.*
- *The suggestion of working from home – when I'd told them this was impossible for me.*

This was the point that broke me completely. This was the best they had come up with – three things I could not do."

125. Mrs Milne prepared a contemporaneous note shortly after her meeting with the claimant (503-505). We found that this was an accurate record of the conversation. It did not contradict the claimant's evidence, but set out the full discussion in an orderly way.

126. Mrs Milne recorded that she had told the claimant that Health and Safety had indicated that there might be moves in the future to allow medically exempt staff to come into work and, if this was the case, a desk had been identified for her. She explained that what she was proposing was an interim arrangement and not redeployment. The claimant said that the work proposed was not challenging for her and that she required stimulating work. The type of work, and working from home, was not conducive to her mental health. Mrs Milne told the claimant that she would have support from Ms Bownass and herself to help her set up and adapt to working from home, but the claimant was not willing to try. The claimant said she could never work with her team or managers again. The claimant became emotional and said she would hand in her notice and sue the organisation.

Claimant resigns

127. Mrs Milne recorded the outcome of the meeting on 22 November 2022 in terms of arranging a meeting with Ms Suttie. However, before she could do so, the claimant emailed Mr Chima, Ms Suttie and Mrs Milne to intimate her resignation (502). The claimant said this –

"I have stated numerous times previously that I am unable to return to my post after sickness absence because of discrimination by Radiology managers Margaret Taylor and Michael Conroy and bullying, harassment and latterly neglect by the other Ultrasound team members during the covid-19 pandemic and no suitable alternative employment has been found by the organisation due to the "complex" nature of my case. Although I have engaged fully with the system and its processes, I feel there has been a fundamental failure to hear and address my concerns. In particular, repeated failure to acknowledge

that regardless of the outcome of the grievance investigation recently undertaken, the negative behaviours exhibited towards me at work have fundamentally damaged my ability to trust and been of direct detriment to my mental health, also contributing to the delay in my return to physical health, and that the continuing pretence by management of a return to my clinical post in the future is particularly damaging. I have made it clear on several occasions that the delays and execution of the system and processes have placed me under additional strain to the point that it has been increasingly detrimental to my health, warning that it was unsustainable. As far as I am concerned further communication is pointless, and I am left with no option but to submit my resignation and be released from further harm."

128. There followed an exchange of letters between Mr Chima and the claimant on 26 November 2022 (506) and 29 November 2022 (508). Mr Chima wanted to meet with the claimant to discuss her concerns but the claimant was not willing to do so. Mr Chima then wrote to the claimant on 1 December 2022 (511-512) accepting her resignation.

Grievance outcome

129. The only complaint advanced by the claimant in relation to the grievance process was the *"anti-vaxxer"* comment (see paragraph 12 above) so we can deal with this aspect of the case briefly.

130. The grievance investigation was conducted by Ms A McPherson, Clinical Laboratory Manager, and Ms E Brazenaite, HR Officer. The investigation took place between 29 August and 25 November 2022 and the report (514-633) was submitted on 9 December 2022. In the course of the investigation interviews were held with the claimant, Ms Suttie, Mr Conroy and Mrs Taylor.

131. Mr Chima held a Stage 1 Grievance Hearing with the claimant on 2 February 2023 and wrote to the claimant on the same date (634-636) with the outcome. In summary, he upheld the grievance so far as relating to (a) management's failure to follow correct procedures in respect of the claimant's sickness absence and (b) inadequate communication with the claimant about the recording of her absence. However, he found no evidence of discrimination

and did not agree that the questioning of the claimant's vaccination status was irrelevant. Mr Chima proposed actions to address the management failings identified by him.

132. For the sake of completeness, we noted that the claimant submitted a Stage 2 Notification Form dated 20 February 2023 (637-640). The Stage 2 process was conducted by way of paper review by Ms J Henderson, Associate Director of Patient Access and Assurance, and Ms C Miller, Associate HR Business Lead. The outcome was communicated to the claimant by letter dated 31 March 2023 (643-649). The only material matter in the outcome was that action against Mr Conroy was proposed *"in relation to the use of inappropriate language in the work place and his failure to follow Scottish Government and HR advice".*

"Anti-vaxxer"

133. In the course of his investigation meeting with Ms McPherson on 7 October 2022 (588-591), Mr Conroy was recorded as saying this –

"Margaret met with Gail on 9th March 2022 where she noted she felt unsupported by staff and management. Gail has different views on Covid and is an antivaxxer, on occasion telling patients they didn't need to wear masks which caused colleagues distress …."

134. As recorded at paragraph 12 above, the respondent accepted that Mr Conroy referred to the claimant as an *"anti-vaxxer".* The claimant became aware of this when she read the grievance report, which post-dated her resignation. She was upset by this. She said that it reflected what colleagues had been saying, which she described as bullying and harassment, within the department.

Comments on evidence

135. It is not the function of the Tribunal to record every piece of evidence presented to it, and we have not attempted to do so. We have focussed on those parts of the evidence which we considered to have the closest bearing on the issues we had to decide.

136. All of the witnesses were credible, and there were relatively few conflicts in the evidence. Where there were, it was a matter of perception rather than contradiction. The claimant saw herself as the victim of poor treatment by her colleagues and management. That was the prism through which she gave her evidence. She regarded the consequences of her inability to wear a face mask as management's problem to resolve.

137. Ms Reid's evidence was supportive of the claimant as a friend and provided insight into the problems facing the claimant both in her family life and in relation to work. Those problems were broadly acknowledged by the respondent.

138. Mrs Taylor gave her evidence in a straightforward manner and enhanced her credibility by making appropriate concessions, for example willingly accepting that the decision not to place the claimant on special leave when she was first diagnosed with Covid had been wrong.

139. Mr Conroy was a confident witness. He clearly believed he had been right to question the claimant's entitlement to special leave. We felt that his sense of injustice at the claimant getting the benefit of special leave while others on long term sick leave were less fortunate might have affected his judgment over this.

140. Mrs Milne came across as sympathetic towards the claimant, and doing her best to find a resolution to the issues preventing the claimant from returning to work at a time when she (the claimant) was expressing a wish to do so. She tried to act in what she saw as the claimant's best interests.

Submissions

141. We were provided with written submissions, supplemented orally at the hearing, by Ms Matheson and Mr James. We are grateful to both for the evident care taken in the preparation of these.

Claimant

142. Ms Matheson dealt firstly with the discrimination claims. In relation to discrimination arising from disability, she referred to ***Basildon and Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14.*** The Tribunal should determine (a) whether the claimant's disability caused, had the consequence of, or result in, *"something"* and (b) whether the respondent treated the claimant unfavourably because of that *"something".*

143. In this case, the impairment was the claimant's susceptibility to reaction to various common substances. The *"something"* was her inability to wear a face mask. Notwithstanding the negative patch test results, Ms Matheson argued that it was more likely than not that the claimant had experienced the adverse reaction because of her inability to wear a face mask. Ms Matheson reminded us of the approach we should take as set out in ***Pnaiser v NHS England and another 2016 IRLR 170.***

144. Ms Matheson submitted that OH found that the claimant would have been fit to return to work but for her inability to wear a mask. This established the connection between (a) the claimant's impairment, her inability to wear a face mask due to the reaction she experienced, and (b) her inability to work clinically.

145. The unfavourable treatment, Ms Matheson contended, was the decision not to place the claimant on special leave when she was diagnosed with Covid. This impacted negatively on the claimant's pay.

146. Turning to the harassment claim, Ms Matheson argued that the special leave decision was also unwanted conduct towards the claimant which was related to her disability. She referred to ***Tees Esk and Wear Valleys NHS Foundation Trust v (1) Aslam and (2) Heads UKEAT/0039/19.***

147. Ms Matheson submitted that Mrs Taylor's instruction to OH to ask about the claimant's vaccination status was unfavourable treatment. It overstepped the established boundary that medical information should remain confidential. It

could not be justified because the approach to risk did not change according to vaccination status.

148. It was also, Ms Matheson argued, unwanted conduct related to the claimant's disability. She was seen as an anti-vaxxer. The asking of the vaccination status question was related to her inability to wear a face mask. That in turn was related to her disability. It was because of her disability that the claimant declined to be vaccinated.

149. Ms Matheson characterised as unwanted conduct the respondent's covering up of the process regarding the claimant's eligibility for special leave. Also unwanted, Ms Matheson contended, was the fact that the claimant received conflicting accounts from Mrs Taylor and Mr Conroy.

150. Ms Matheson submitted that giving the claimant mundane administrative work to do from home was unfavourable treatment. This happened because the claimant could not work clinically, which was because she could not wear a face mask. Ms Matheson argued that this was also an act of harassment. Mrs Taylor's treatment of her conveyed to the claimant that she was no use if she could not work clinically.

151. Moving to the reasonable adjustment claim, Ms Matheson submitted that the provision, criterion or practice ("PCP") of the respondent's was the policy that all staff had to wear an approved face mask. The substantial disadvantage to the claimant was that this prevented her from carrying out her role. The failures had been (a) the lack of further respiratory tests and (b) the identification of only one alternative work location (Stracathro) where the claimant's basic welfare requirements were not considered.

152. Ms Matheson then addressed the claimant's constructive dismissal claim. She identified, by reference to paragraphs in the claimant's statement of claim, the alleged breaches of contract by the respondent as –

- Para 11 - misrepresenting the special leave position to the claimant.

- Para 17 - not recording the claimant's Covid related absence as special leave, which was less favourable treatment than other members of staff.

- Para 18 - covering up the failure to follow HR advice.

- Para 23 - causing damage to the claimant's mental health by failing to support her effectively.

- Para 25 – describing her as an anti-vaxxer.

Ms Matheson also referred to paragraphs 29-34 of the claimant's statement of claim but these did not contain any additional allegations of breach of contract.

153. Ms Matheson reminded us of the approach we should take, under reference to ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***, per Underhill LJ at paragraph 55 (to which we refer below). She also referred to ***Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19.***

154. On the question of whether the claimant had waited too long to resign and had affirmed the contract, Ms Matheson referred to ***Williams v William Morrison Supermarkets Ltd UKEAST/0201/13*** where Langstaff P said this (at paragraph 27) –

"An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force."

Ms Matheson submitted that the claimant's health, her complex family life and the fact that she considered herself to be *"in limbo"* were significant factors pointing against affirmation of the contract. Also significant was the fact that the claimant raised a grievance.

155. Without seeking to blame Mrs Milne, Ms Matheson contended that her proposal that the claimant should do Radiology admin work from home had been the last straw for the claimant, in response to which she resigned.

156. In support of her contention that the claimant's constructive dismissal had been discriminatory, Ms Matheson referred to ***De Lacey v Wechseln Ltd t/a The Andrew Hill Salon UKEAT/0038/20*** and ***Greenhof v Barnsley Metroplitan Borough Council UKEAT/0285/05.***

Respondent

157. In relation to the claimant's constructive unfair dismissal claim, Mr James referred to ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, Leeds Dental Team Ltd v Rose [2014] ICR 94, Malik v Bank of Credit and Commerce International SA [1998] AC 20, Omilaju v Waltham Forest London Borough Council [2005] ICR 481, Kaur*** and ***Chandok v Tirkey [2015] ICR 527.*** We refer to some of these cases below in our summary of the applicable law.

158. Mr James highlighted that paragraph 21 of the claimant's statement of claim, relating to the actions of Mrs Milne, was not pled or relied upon as a breach of contract. When he raised this point during the hearing, Ms Matheson had confirmed that the claimant was not seeking to go beyond the pleadings or the list of issues. Mr James submitted that Mrs Milne's email of 21 November 2022 and/or the meeting on 22 November 2022 could only amount to a last straw if it or they were discriminatory.

159. Turning to the alleged breaches of contract, Mr James made these points –

- Para 11 – Mrs Taylor's reference to a *"positive loophole"* was factually correct. It was not, nor did it contribute to, a breach of contract. Mrs Taylor did not misrepresent the position.

- Para 17 – This did not specify an act or omission of the respondent. It referred to the claimant submitting a grievance which could not amount to a breach of contract by the respondent.

- Para 18 – Mr Conroy did not hide his part in the process. He did not force the claimant to resign – he specifically told the claimant that she was not being asked to do so. Beyond this there was an absence of specific allegations in this paragraph.

- Para 23 – This paragraph contained no specific allegations relating to the claimant's health. It could not give rise to a breach of contract.

- Para 25 – The claimant only learned of Mr Conroy's description of her as an "*antivaxxer"* after she resigned. It could not be relevant to her constructive dismissal claim.

160. In relation to the claimant's pay and special leave, Mr James argued in effect that Mr Conroy had been entitled to question her entitlement to special leave. To do so did not amount to a breach of the implied term of trust and confidence. In any event, trust and confidence could not be affected by something of which the claimant was unaware. What the respondent did was not objectively significant enough to amount to a breach of the ***Malik*** term.

161. If the Tribunal chose to consider whether Mrs Milne's conduct amounted to a breach of contract (and did not accept the respondent's primary position that it could only do so if discriminatory), Mr James submitted (a) that conduct was not serious enough to be a breach of the ***Malik*** term and (b) it was not even significant enough to amount to a last straw.

162. Mr James said that the concerns the claimant had about working from home had been expressed by her to Mrs Milne in terms of lacking the right equipment and direction. Mrs Milne had sought to address those concerns. Objectively this added nothing to any alleged breach of contract.

163. Mr James submitted that the claimant could not have been under any misapprehension that what Mrs Milne was proposing was redeployment. That process had been explained and required OH input. It had been made clear to the claimant that the role being proposed was interim.

164. In relation to the face mask issue, Mr James argued that the respondent was put in an impossible position. The claimant could not work from home and

could not wear a mask. The respondent had no office space outwith a hospital setting. There was simply no right answer because there was nowhere the claimant could work.

165. Mrs Bownass and Mrs Milne had done the best they could within the time available to find work which the claimant could do. Easing the claimant into work with which she was familiar was entirely appropriate. The claimant would have had no contact with anyone in Radiology (and it was not objectively reasonable for the claimant to have thought otherwise). The claimant did not resign in response to any last straw but due to the prevailing circumstances.

166. If the Tribunal found that the claimant was constructively dismissed, Mr James submitted it was a fair dismissal by reason of capability. The claimant was unable to work from home. She was unable to wear a mask. She was unable to do any work or perform any role for the respondent. That situation was not likely to change for the foreseeable future. Accordingly, dismissal was within the range of reasonable responses.

167. Mr James moved on to the discrimination claims. He referred to various cases which we mention below. In relation to the claim of discrimination arising from disability, Mr James argued that there was no basis for even an inference that various acts occurred because of the claimant's inability to wear a face mask. She had not made out any link between her protected characteristic and the treatment about which she complained.

168. Mr James noted that the same acts were relied on by the claimant as unfavourable treatment (for the purpose of the discrimination arising from disability claim) and unwanted conduct (for the purpose of the harassment claim) and he therefore dealt with these together, by reference to the relevant paragraphs of the claimant's statement of claim. We adopt the brief narrative given by Mr James to each paragraph –

- Para 6 – *Attempting to dismiss the claimant earlier* – There was no specific allegation, and the claimant was not dismissed. If the claimant was relying on Mrs Taylor's frustration as expressed in her email to Ms

Suttie of 25 February 2022 (615), the claimant did not see this until after her resignation. That frustration related in any event to Mrs Taylor being a member of staff down and being unable to do anything about it.

- Para 9 – *Vaccination status question* – The question was not asked because the claimant could not wear a mask but because IC felt it was relevant to a risk assessment. It was a proportionate means of achieving a legitimate aim. The question was unrelated to the claimant's disability.

- Para 11 – *Margaret Taylor's comments at the March 2022 meeting* – The *"positive loophole"* comment was accurate and was unconnected to the claimant's disability. If Mrs Taylor did refer to an *"error"* there was no basis to infer that this was because of the claimant's inability to wear a mask.

- Para 14 –*Stracathro Hospital being discussed in December* – other options being discussed – The claimant's ET1 was incorrect in that (a) Stracathro was discussed at the October 2021 meeting but not in December 2021 and (b) a phased return to work was subsequently discussed (by Mrs Milne in October 2022) with the claimant.

- Para 16 – *OH recommendation re respiratory tests* – there was no such recommendation. The breath test was not progressed because the results were not available prior to the claimant's resignation. The claimant herself said in July 2022 that she did not want this to be followed up.

- Para 18 – *Mike Conroy's actions at the meeting in April 2022* – The ET1 was incorrect. Mr Conroy did not hide his involvement, nor try to force the claimant to resign.

- Para 20 – *A suggestion that the claimant return to her old department* – Mr James said this was covered elsewhere in his submissions.

- Para 21 – *Wendy Milne* – Mrs Milne provided clear explanations for her actions. None of these was challenged in cross-examination as being because of the claimant's inability to wear a mask. None was related to the claimant's disability.

- Para 25 - *Antivaxxer comment* – Mr Conroy's evidence was that this related to the claimant's behaviours in the workplace which he considered unprofessional, and contrary to the public health messaging at the time. It was not connected to her inability to wear a mask. In any event, the claimant had left the relevant environment by the time she became aware of the comment and so it could not create a *"state of affairs"* for her. The context – a grievance investigation – was also relevant.

169. Mr James then addressed the reasonable adjustments claim. The relevant PCP was the requirement to wear an approved mask at work. The claimant's colleagues were the relevant comparators. The substantial disadvantage was the claimant's inability to do patient facing work. The PCP did not disadvantage the claimant in relation to working from home. The reasons for her inability to work from home did not arise because of the PCP.

170. In relation to the proposed adjustment of alternative work locations, Mr James submitted that this would not alleviate the substantial disadvantage. Only a change to the requirement to wear masks could achieve that. It was not pled that the respondent should have found a non-hospital work location for the claimant. It would not, in any event, have been a reasonable adjustment since the respondent did not have office space outwith hospitals.

171. Mr James noted that the proposed adjustment per the list of issues was to look at alternative work locations. The claimant had accepted in evidence that the respondent had done so – University of Dundee, Stracathro Hospital and Kings Cross Hospital. Accordingly, the respondent had made the adjustment and therefore met the case against it.

172. In relation to the proposed adjustment of commissioning further respiratory tests, Mr James argued this would not have been reasonable because the

claimant had accepted in evidence that there was no reason for OH to make a further referral when she was still awaiting the outcome of the tests undertaken in February 2022. It was unlikely that the claimant could have had an appointment prior to her resignation and, in any event, the claimant said in July 2022 that she did not want the matter progressed.

Oral submissions

173. Both Ms Matheson and Mr James made oral submissions, largely in response to each other's written submissions. We invited both representatives to address us on the burden of proof. They did so with reference to the claim of discrimination arising from disability.

174. Ms Matheson argued that there was *"something more"* than the alleged unfavourable treatment. She referred to the comparison of the claimant with the employee who was long term absent due to cancer treatment, and who had been considered more deserving. There was also a general pattern of behaviour towards the claimant. The burden of proof should therefore shift to the respondent.

175. Mr James urged us to find that the claimant had not proved facts from which the Tribunal could conclude, absent any other explanation, that discrimination had occurred. There was no basis upon which the Tribunal could infer that the respondent's treatment of the claimant was due to her inability to wear a mask.

Other matters covered in submissions

176. Both representatives also made submissions on time bar. We deal with time bar in our discussion below.

177. Having noted the terms in which disability had been conceded, we raised with Mr James the matter of whether knowledge of disability at the relevant time was also conceded. Mr James sensibly acknowledged that the terms of Mrs Taylor's OH referral on 16 September 2021 (256-257) (which referred to the claimant's *"mask allergy"*) were consistent with the respondent having knowledge of the claimant's disability at that time. What was not conceded

was the pled connection between the claimant's inability to wear a face mask and her disability.

Applicable statutory provisions

178. The right not to be unfairly dismissed is set out in section 94(1) of the Employment Rights Act 1996 ("ERA") –

An employee has the right not to be unfairly dismissed by his employer.

179. The circumstances in which an employee is constructively dismissed are found in section 95 ERA which, so far as relevant, provides as follows –

(1) For the purposes of this Part an employee is dismissed by his employer if …. –

(a) ….

(b) ….

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

180. The fairness or otherwise of a dismissal is dealt with in section 98 ERA which, so far as relevant, provides as follows –

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection 2(a) -

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to own by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case ….

181. Section 15 of the Equality Act 2010 ("EqA") (**Discrimination arising from disability**) provides, so far as relevant, as follows –

(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 ….

182. Sections 20 and 21 EqA provide, so far as relevant, as follows –

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

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

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

183. Section 26 EqA (**Harassment**) provides, so far as relevant, as follows –

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

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

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

(i) violating B's dignity, or

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

(2) ….

(3) ….

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are –

…. disability ….

184. Section 123 EqA (**Time limits**) provides, so far as relevant, as follows –

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

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

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

(2) ….

(3) For the purposes of this section –

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

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

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

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

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

185. Section 136 EqA (**Burden of proof**) provides, so far as relevant, as follows –

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

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

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

(4) ….

(5) ….

(6) A reference to the court includes a reference to –

(a) an employment tribunal ….

Applicable case law

186. Mr James provided within his written submission a summary of the law with reference to decided cases and we largely adopt that here.

Constructive unfair dismissal

187. To give rise to a constructive dismissal claim, the employer must be guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract (***Western Excavating***).

188. The assessment of whether conduct meets the threshold of seriousness set out in ***Western Excavating*** is objective (***Leeds Dental***).

189. In relying on the implied term of mutual trust and confidence, an employee requires to show that the employer, without reasonable and proper cause, conducted themselves in a manner intended or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (***Malik***).

190. The assessment of whether conduct meets the threshold of seriousness set out in ***Malik*** is objective.

191. Where a last straw is relied upon, it must contribute something to the breach (***Omilaju***).

192. If the purported last straw is not a last straw, there can be no cumulative breach (***Kaur***).

Discrimination arising from disability

193. A section 15 EqA claim requires an individual to show both that there was "something" arising in consequence of disability, and that any unfavourable treatment arose because of that *"something"* (***Pnaiser***).

194. The first of those questions, as to the *"something"* arising in consequence, is objective; the second requires the Tribunal to enquire as to the decision maker's subjective decision making process (***Pnaiser***).

195. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire [2012] ICR 704***).

196. In assessing proportionality, the Tribunal must weigh the reasonable needs of the employer against the effect of the treatment (***McCulloch v Imperial Chemical Industries plc 2008 IRLR 846***).

Harassment

197. The conduct itself must actually be related to a protected characteristic to be harassment (section 26(1)(a) EqA); simply because conduct occurred in the context of a protected characteristic does not mean the two are related (***Private Medicine Intermediaries Ltd v Hodkinson and others UKEAT/0134/15***).

198. It must be objectively reasonable for conduct to have had the requisite effect; it is important not to impose legal liability in respect of every unfortunate incident (***Richmond Pharmacology v Dhaliwal [2009] ICR 724***).

199. An individual cannot be harassed by conduct they do not know about (***Greasley-Adams v Royal Mail Group Ltd 2023 EAT 86***).

200. An "environment" means a state of affairs (***Weeks v Newham College of Further Education UKEAT/0630/11***).

Reasonable adjustments

201. The necessary comparators will generally be identifiable from the PCP (***Fareham College Corporation v Walters 2009 IRLR 991***).

202. The proposed adjustment must be capable of alleviating the disadvantage (***Environment Agency v Rowan [2008] ICR 218***).

203. What is reasonable is an objective concept, determined according to the circumstances and with a focus on practical outcomes (***Royal Bank of Scotland v Ashton [2011] ICR 632***).

Discussion

204. We approached our deliberations by working through the agreed list of issues, with the exception of disability status (in view of what we have recorded at paragraph 177 above).

Constructive dismissal

205. We reminded ourselves of what the Court of Appeal said in ***Kaur*** (per Underhill LJ at paragraph 55 –

"….In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the ***Malik*** *term? If it was, there is no need for any separate consideration of a possible previous affirmation ….*

(5) Did the employee resign in response (or partly in response) to that breach? …."

Viewed objectively, were the acts complained of at paragraphs 11, 17, 18, 23, 25 and 29-34 of the amended statement of claim breaches of the implied term regarding trust and confidence by the respondent?

206. We considered each of these paragraphs to determine whether there had been a breach by the respondent of the implied term of mutual trust and confidence (the "implied term").

Paragraph 11

207. This related to the meeting between Mrs Taylor and the claimant on 9 March 2022. Our findings in relation to this meeting are set out at paragraphs 84-87 above. We noted that in the outcome letter following this meeting (373-374) Mrs Taylor apologised and explained that, due to the complex nature of the

claimant's absence, *"investigation was required".* Mrs Taylor's description of the claimant's position as a *"positive loophole"* whereby she became entitled to full pay on special leave rather than the applicable level of sick pay was not inaccurate.

208. With the wisdom of hindsight, it might have been better if Mrs Taylor had given the claimant more information as to why she had not been placed on special leave when first diagnosed with Covid. However, the failure to do so was not sufficiently significant as to amount to a breach of the implied term.

Paragraph 17

209. We noted Mr James' argument that this paragraph did not specify an act or omission of the respondent. While it was couched in terms which referred to the claimant's grievance, we believed it could reasonably be understood to relate to Mrs Taylor and Mr Conroy not recording the claimant's absence correctly. Our findings at paragraphs 97-100 describe the background to this.

210. We found that it was Mr Conroy who decided that the claimant should not be moved onto special leave when she was first diagnosed with Covid in November 2021. He did so in the face of HR advice from both Ms Suttie and Ms Henderson, the latter somewhat presciently warning that *"a Grievance may be raised and ultimately an Employment Tribunal may occur".*

211. Our view of this was that Mr Conroy was looking for a reason not to put the claimant on special leave. We did not believe, on the balance of probability, that he would have acted in the same way if the issue had arisen in the case of the employee who was on long term sickness absence following cancer treatment. We found that the claimant had an entitlement to be placed on special leave, and paid accordingly, when she disclosed her Covid diagnosis.

212. We considered that the respondent's failure to act in accordance with that entitlement was a significant matter. It meant that the claimant did not receive the full pay to which she was entitled for a period of some four months. It was in our view a breach of the implied term.

Paragraph 18

213. This was the allegation that there had been a cover up in respect of the decision to go against HR advice by referring to it as an *"error",* and that Mr Conroy had concealed his part in the process. Our findings at paragraphs 94-96 relate to the telephone conversation between Mr Conroy and the claimant on 30 March 2022, and those at paragraphs 101-103 relate to their meeting on 28 April 2022.

214. It did not seem to us unreasonable that Mr Conroy waited until his first face-to-face meeting with the claimant on 28 April 2022 to tell her what had happened in relation to her special leave. He did not at that meeting conceal his involvement. We also did not believe that Mr Conroy had, as alleged, tried to force the claimant to resign. The transcript of the meeting disclosed that it was the claimant (at 419) who referred to a grievance and continued *"I've had advice about that and I know, I know pretty much what I can do …. I could resign".*

215. We could understand that the claimant would be upset to be told what had been going on in relation to special leave, but this was Mr Conroy being truthful with her. We did not find here any conduct of the respondent which was in breach of the implied term.

Paragraph 23

216. This paragraph referred to the claimant's mental health being impacted by her diminishing trust that the respondent would support her effectively, her being diagnosed with anxiety after her meeting with Mr Conroy, and feeling forced to resign. It did not contain any specific allegation of conduct on the part of the respondent said to amount to a breach of contract. Accordingly there was no *"act complained of"* here.

Paragraph 25

217. This related to Mr Conroy's description of the claimant as an *"antivaxxer".* We deal with this at paragraphs 133-134 above. As recorded there, the claimant

became aware of this after her resignation. It could not therefore have played any part in her decision to resign.

Paragraphs 29-34

218. As stated above (at paragraph 152) these paragraphs, although referenced in the list of issues, did not contain any additional allegations of conduct of the respondent said to amount to a breach of contract.

Did this conduct on the part of the respondent, by means of a single act or cumulatively, fundamentally breach the claimant's contract of employment?

219. Having found that only the failure of the respondent to record the claimant's absence correctly was a breach of the implied term, we considered whether this was a fundamental breach of the claimant's contract of employment. We decided that this was a serious breach. It was a deliberate decision by the respondent not to place the claimant on special leave in the face of HR advice that this should be done. It was done in the knowledge that the effect was that the claimant would not move back to full pay, but would remain on sick leave and would continue to use up her entitlement to sick pay. Accordingly, we found that this conduct did amount to a fundamental breach of contract by the respondent.

If so, did the claimant resign in response to the above breaches or for some other reason?

220. Our starting point here was the claimant's letter of resignation of 22 November 2022 (502). This did not refer directly to the special leave issue, but focussed on *"a fundamental failure to hear and address my concerns".* The claimant did allege discrimination by Mrs Taylor and Mr Conroy. We interpreted this as a broad complaint about how the claimant perceived she had been treated by her managers.

221. Although in her letter of resignation the claimant made only a passing reference to her grievance, it clearly formed part of the background to her decision to resign. Within her grievance (at 444), the claimant (a) referred to the special leave issue and (b) alleged correct procedure had not been

followed *"because of discrimination and personal prejudices of the management team regarding my previous sickness absence and inability to work clinically"*. We did not believe that the claimant was using "discrimination" in a strict legal sense.

222. Part of the treatment of the claimant by her managers was the special leave issue. We believed that, although not articulated expressly in her letter of resignation, that treatment was part of the reason for her decision to resign. Accordingly, we found that the claimant did resign due, in part, to the breach of contract recorded in paragraph 219 above.

Did the claimant affirm the contract and waive the breach by delaying too long?

223. We noted what the claimant said about her meeting with Mr Conroy on 28 April 2022 (see paragraph 103 above). Her comments included *"trust was gone at his point"* and *"I won't be returning to work because I can't".* At this time there had been, as we have found, a breach of the implied term which amounted to as fundamental breach of contract. If the claimant had resigned then, or shortly afterwards, we would have had no difficulty in deciding that she had been constructively dismissed.

224. We considered whether the claimant had, by not resigning but continuing in the respondent's employment, affirmed the contract. We noted what Langstaff P said in ***Williams*** (see paragraph 154 above). We found that –

a. The factors in favour of the claimant not having affirmed the contract were her continuing Covid diagnosis and the fact that she submitted a grievance which had not yet been determined.

b. The factors in favour of the claimant having affirmed the contract were her acceptance of full pay while on special leave and her knowledge that Mrs Milne was seeking a way forward for her. We also had evidence that her health was improving to the point that her GP was stating that she *"may be fit for work"* with *"a phased return to work"* (see paragraph 120 above).

225. We decided that the factors which indicated affirmation of the contract outweighed those which pointed the other way. To enjoy the benefit of the *"positive loophole"* of full pay while her absence was Covid related, the claimant had to remain employed by the respondent. She did so beyond the expiry of the special leave arrangement at the end of August 2022. By then, in our view, it was too late for her to rely on the earlier breach of the implied term. She affirmed the contract.

226. We considered whether the events on 21/22 November 2022 could be regarded as a *"last straw".* We reminded ourselves of what Dyson LJ said in ***Omilaju*** –

> *"19. ….The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he relies is entirely innocuous, it is not necessary to examine the earlier conduct to determine that the later act does not permit the employee to invoke the final straw principle."

227. In a claim of constructive dismissal, the focus is on the conduct of the employer. That is what section 95(1)(c) ERA requires. In this case, in relation to whether there was a last straw event, that meant the conduct of Mrs Milne on 21/22 November 2022.

228. We noted the criticisms which the claimant stated in evidence (see paragraph 124 above) about what Mrs Milne said in her email of 21 November 2022, but we did not regard these as indicative of conduct on Mrs Milne's part which either amounted or contributed to a breach of the implied term. We say that because –

a. Telling the claimant that the requirement to wear masks remained in place was simply a statement of fact.

b. Working with Ms Bownass, Mrs Milne had identified work for the claimant outside of the Radiology department. The claimant would report to Ms Bownass. The nature of the work was dictated by what the claimant had told Mrs Milne she could do.

c. What the claimant told Mrs Milne about working from home (during the attendance meeting on 24 October 2022) related to the provision of the correct IT equipment and having clear direction in her work, and

Mrs Milne took this on board – she referred to *"with the correct support in place".*

229. We found nothing in the events of 21/22 November 2022 which caused us to revisit our view that the claimant had affirmed the contract following the breach of the implied term relating to the recording of her absence. The consequence of that was that the claimant's claim of constructive unfair dismissal could not succeed.

If the claimant was dismissed by the respondent:

(a) was there a potentially fair reason for dismissal?

(b) was the dismissal fair and reasonable in all the circumstances?

230. In light of our decision that the claimant had not been constructively dismissed, these questions became academic.

Discrimination arising from disability

231. We moved on to the questions in the list of issues relating to the claim under section 15 EqA.

Was the claimant's inability to wear the type of mask which the respondent required her to wear at work without suffering medical problems "something arising" from her impairment of a susceptibility to have allergic reactions to certain substances?

232. In ***Pnaiser*** Simler HHJ (as she then was) set out the proper approach a Tribunal should take when determining claims under section 15 EqA (at paragraph 31). Within her written submission Ms Matheson distilled this in these terms –

- *The Tribunal must identify whether the claimant was treated unfavourably and by whom.*
- *It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that*

person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant.

- *The Tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

- *The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.*

233. The respondent did not concede that there was, as pled, a connection between the claimant's inability to wear a face mask and her disability. The patch testing of material from the face masks worn by the claimant had proved negative.

234. The Equality and Human Rights Commission: Code of Practice on Employment (2011) says this –

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

235. The question we had to determine was whether the *"something arising",* being the claimant's inability to wear a face mask, arose in consequence of her disability, being her susceptibility to have allergic reactions to certain

substances. The Cambridge Dictionary definition of an allergy is *"a condition that makes a person become sick or develop skin or breathing problems because they have eaten certain foods or been near certain substances".*

236. We did not regard the scientific evidence (the patch testing results) as conclusive proof that there could be no link between some substance present in face masks and the claimant's reaction to wearing such a mask. We noted that when the claimant suffered anaphylaxis in 2008, there was no definitive diagnosis.

237. It seemed to us that the fact that no particular substance within the face masks had been identified, so as to explain the claimant's reaction when wearing one, did not mean that there could be no link between her disability and her reaction. When she wore a mask, she suffered a reaction. We regarded that as sufficient to allow us to find that, on the balance of probability, the claimant's reaction was linked in some way to her disability.

If so, were the acts and omissions set out at paragraphs 6, 9, 11, 14, 16, 18, 20, 21 and 25 of the amended statement of claim unfavourable treatment because of this?

238. We considered each of these paragraphs to identify whether there had been unfavourable treatment. In doing so, we had regard where appropriate to the respondent's objective justification appendix which formed part of the list of issues. We also considered whether section 136 EqA (**Burden of proof**) was engaged.

Paragraph 6

239. This related to frustration on the part of the claimant's managers, with specific reference to Mrs Taylor's email to Ms Suttie of 25 February 2022 (615). This was an expression of frustration by Mrs Taylor, but we did not regard it as unfavourable treatment of the claimant. It was no more than a statement about the situation which existed at that time, ie that the claimant was off on long term sick leave, could not be replaced and others were covering the work the claimant would otherwise have done. In the absence of a finding of unfavourable treatment, section 136 EqA was not engaged.

Paragraph 9

240. This related to Mrs Taylor requesting that OH should ask the claimant about her vaccination status. Our findings are at paragraphs 80-81 above. The question was driven by IC and, given our finding that, in context, it was not an unreasonable question to ask, we did not regard it as unfavourable treatment of the claimant.

241. If we had found that this was unfavourable treatment, we would also have found that it was a proportionate means of achieving a legitimate aim. That aim was to alleviate the infection control risk in respect of the claimant being unable to wear a face mask. On that basis, we would also have been satisfied that the respondent did not contravene section 15 EqA so that section 136(3) would apply.

Paragraph 11

242. We found that Mrs Taylor's reference to a *"positive loophole"* was not unfavourable treatment of the claimant. It was no more than a shorthand, and accurate, description of the impact of the special leave policy on the claimant. We were more concerned about the misrepresentation to the claimant which lay behind the reference by Mrs Taylor to a *"mistake".*

243. We took the view that an employer does not have to tell an employee everything, in any given situation. The employer has a discretion as to what is said, how it is said and when. There can be valid reasons for withholding information. What the employer should not do is be untruthful.

244. In one sense there was a *"mistake".* That was the delay in implementing special leave for the claimant when she had Covid. We decided, not without hesitation, that it would be overly harsh to regard what Mrs Taylor said to the claimant on 9 March 2022 as unfavourable treatment when she was actually telling the claimant something which was to her benefit. In the absence of a finding of unfavourable treatment, section 136 was not engaged.

Paragraph 14

245. This paragraph alleged that Stracathro was discussed at the meeting in December 2021. That was incorrect. Accordingly, it could not amount to unfavourable treatment.

Paragraph 16

246. This paragraph referred to the failure to implement an OH recommendation for further respiratory tests. This was incorrect. The referral for respiratory tests was made by Dr Ghaffar in Dermatology. It was not the responsibility of OH to follow this up. There was no unfavourable treatment of the claimant as alleged, and section 136 EqA was not engaged.

Paragraph 18

247. This was the allegation of a "cover-up" regarding HR advice. As noted above (at paragraph 215) Mr Conroy was truthful with the claimant in relation to this. We did not believe that, in doing so, Mr Conroy was treating the claimant unfavourably. Telling an employee something they find unwelcome is not necessarily unfavourable treatment.

248. We did not agree with the assertion in this paragraph that the claimant had been *"viewed as a problem employee"* nor that she had not been *"listened to or considered in any reasonable way that would be possible of supporting a return to work".* These were broad accusations which did not specify with sufficient particularity what was said to be the unfavourable treatment. That meant that, once more, section 136 EqA was not engaged.

Paragraph 20

249. It was said here that *"the respondent did not consider any reasonable alternatives"* and that a return to the claimant's old department *"was the only option that was presented".* These statements were incorrect. Efforts were made by the respondent to find a solution, but it was difficult to identify a reasonable alternative while the rule requiring masks to be worn on hospital

premises remained in force. We found no unfavourable treatment here, and section 136 EqA was not engaged.

Paragraph 21

250. We understood the main thrust of this paragraph to relate to Mrs Milne's proposal in November 2022 that the claimant should work from home. We were satisfied that Mrs Milne was not aware of the difficulties the claimant had previously encountered when working from home. She knew only what the claimant told her in terms of not having the right IT equipment and clear direction of what she was to do. Against that background, this was not unfavourable treatment of the claimant by Mrs Milne and section 136 EqA was not engaged.

Paragraph 25

251. This related to the *"antivaxxer"* comment by Mr Conroy. We found that this was self-evidently unfavourable treatment of the claimant. It drew on a stereotypical view that someone who was not vaccinated against Covid must be an *"antivaxxer".* We then considered whether the unfavourable treatment was because of the *"something arising"* (the claimant's inability to wear a face mask) in consequence of her disability. We noted that Mr Conroy himself linked his description of the claimant as an *"antivaxxer"* to mask wearing. He referred to the claimant "on occasion telling patients they didn't need to wear masks".

252. In these circumstances we found that the unfavourable treatment (the *"antivaxxer"* description of the claimant) was because of *the "something arising"* (the claimant's inability to wear face masks) in consequence of her disability.

Can the respondent show that these steps were a proportionate means of achieving a legitimate aim?

253. The respondent's initial position was to deny that the *"antivaxxer"* comment was made. That changed at the start of the hearing, as recorded in paragraph 12 above. In terms of the respondent's objective adjustment appendix, it was

stated that the respondent did not seek to rely on any objective justification. The consequence was that this aspect of the claimant's section 15 EqA claim succeeded (and section 136(3) EqA was not engaged).

Harassment

254. We next considered the questions in the list of issues relating to the claim under section 26 EqA. The claimant was asserting that the same acts of the respondent said by her to be unfavourable treatment in terms of section 15 EqA were also unwanted conduct in terms of section 26 EqA. That meant that our views as expressed in the preceding section (paragraphs 239-252) were also potentially of relevance here.

Did the alleged acts of the respondent as set out at paragraphs 6, 9, 11, 14, 16, 18, 20, 21 and 25 of the amended statement of claim occur?

255. We considered each of these paragraphs in turn. In doing so, we reminded ourselves of the matters which required to be taken into account in terms of section 26(4) EqA – the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have the alleged effect.

Paragraph 6

256. The unwanted conduct here was expressed in terms of Mr Conroy and Mrs Taylor wanting to dismiss the claimant under the respondent's absence policy, by reaching stage 3 of that policy without applying special leave. There was also reference to Mrs Taylor's email to Ms Suttie on 25 February 2022 (615), of which the claimant became aware when she had sight of the grievance report.

257. Our view of this was that Mr Conroy and Mrs Taylor did not want to dismiss the claimant. She was recognised as a skilled Clinical Sonographer. There was a national shortage of Sonographers, so that the claimant might not have been easy to replace, particularly with her level of experience. Absent the wish to dismiss, there was no unwanted conduct related to the claimant's disability. We were satisfied that the respondent did not contravene section 26 EqA here, so that section 136(3) EqA was engaged.

258. It was also our view that, while Mrs Taylor had expressed frustration in her email to Ms Suttie, it was not unwanted conduct related to the claimant's disability for the same reason that it was not unfavourable treatment – it was no more than a statement about the situation which existed at the time. If, when the claimant became aware of this, she perceived it as unwanted, it was not reasonable for her to do so.

Paragraph 9

259. We stated at paragraph 240 above that the question about the claimant's vaccination status was driven by IC and was not an unreasonable question to ask. For the same reason, it was not unwanted conduct related to the claimant's disability. The other circumstances of the case included the Covid-19 pandemic. It was not unreasonable to regard the claimant's vaccination status as relevant to the risk assessment which would have been required, had the claimant been able to return to work. We did not believe that the claimant's perception, that the question was intrusive and unnecessary, outweighed these factors. Accordingly we found no unwanted conduct related to the claimant's disability, and section 136 EqA was not engaged.

Paragraph 11

260. This related to Mrs Taylor's references to *"positive loophole"* and *"mistake".* For the same reason as set out in paragraph 241 above, we did not find Mrs Taylor's reference to a "positive loophole" to be unwanted conduct.

261. We came to the same view in respect of Mrs Taylor's reference to a "mistake". We did so because the "mistake" related to the claimant being diagnosed with Covid. It did not relate to her disability, so that section 26 EqA was not engaged.

Paragraph 14

262. As we said above, this paragraph was incorrect. It did not identify any unwanted conduct occurring as narrated in this paragraph.

Paragraph 16

263. Again, as we said above, this paragraph was incorrect. It was not the responsibility of OH to follow up the referral for respiratory tests. The alleged unwanted conduct did not occur.

Paragraph 18

264. For the same reasons as stated in paragraphs 247-248 above (with the substitution of *"unwanted conduct"* for *"unfavourable treatment"*) we did not find here any unwanted conduct related to the claimant's disability. Telling an employee something they find unwelcome is not necessarily unwanted conduct. If that was the claimant's perception, it was unreasonable.

Paragraph 21

265. The focus here was on Mrs Milne's conduct. Mrs Milne understood that the claimant's issues with working from home related to IT equipment and direction of her work, because that was what the claimant told her on 24 October 2022 (see paragraph 117 above). A role was identified which was within the claimant's skillset. While under the umbrella of Radiology, it was different work to be undertaken (eventually) from a different location. It was not redeployment. The claimant was to be supported by Ms Bownass and Mrs Milne.

266. Mrs Milne's outcome letter of 25 October 2022 (470-471) reflected what the claimant told her about feeling that she could do some office based work, building up her hours. We noted that Mrs Milne's note made after her meeting with the claimant on 22 November 2022 (503-505) recorded the claimant's concerns about the nature of the work proposed as (a) it was not band 7 work and (b) it was not challenging for her. The claimant clearly perceived the work proposal as unwanted conduct but –

- The other circumstances of the case included the claimant's skillset (as expressed by the claimant in her email to Mrs Milne of 26 October 2022 – 475-476) and the fact that the role proposed was an interim one, and was not redeployment (as the claimant described it).

- It was not reasonable for the claimant to perceive this as unwanted conduct. It was a genuine and well-intentioned attempt to get the claimant back to work, in line with her most recent Fit Note.

Paragraph 25

267. This was Mr Conroy's description of the claimant as an *"antivaxxer".* We found that this was self-evidently unwanted conduct. It was connected with the claimant's perceived behaviours which included her inability to wear a face mask, which in turn was related to her disability. We accepted the claimant's evidence that her decision not to be vaccinated was a personal one based on her medical history. She was not against vaccination generally (although Mr Conroy believed that she had spoken to patients about mask wearing in terms which ran contrary to the public health message at the time).

268. The claimant became aware of Mr Conroy's description of her when she saw the grievance report. This was after she had resigned. She could not have a perception that it was unwanted conduct until she knew about it (per Greasley-Adams). We found that the claimant did perceive this as unwanted conduct and that it was reasonable for her to do so. Nothing in the other circumstances of the case pointed to a different conclusion.

269. Mr James reminded us that the claimant had pled her harassment case under section 26(1)(b)(ii) EqA – that the unwanted conduct had created the proscribed environment for her. He argued that, because the claimant had resigned before she became aware of Mr Conroy's use of the term *"antivaxxer",* she had left the relevant environment.

270. We reminded ourselves of what Underhill P (as he then was) said in ***Weeks*** – *"An environment is a state of affairs".* We did not agree with Mr James that the "environment" in this case equated to the workplace so that, if the claimant was no longer in the workplace, the description applied to her by Mr Conroy could not amount to harassment.

271. By the time the claimant discovered that she had been described as an *"antivaxxer",* she was no longer in the workplace. The *"state of affairs"* was

that a grievance report had been produced and was to be considered at a grievance hearing. It contained the description of her which the claimant found offensive. That, and not the workplace, was the "environment" for the purpose of the harassment claim.

272. We therefore concluded that Mr Conroy's description of the claimant as an *"antivaxxer"* did constitute harassment under section 26 EqA.

Reasonable adjustments

273. We turned next to the questions in the list of issues relating to the claim under sections 20/21 EqA.

Was the respondent's requirement that the claimant wear an approved mask when she attended work a provision, criterion or practice (PCP) which placed the claimant at a substantial disadvantage in comparison with persons who were not disabled?

274. The answer to this was self-evidently yes. The PCP was the requirement to wear a face mask. The claimant could not, at the relevant time, carry out her role as a Clinical Sonographer without wearing a face mask. Her colleagues who were not disabled were able to wear a mask and so could continue to work.

If so, was the claimant in fact placed at a substantial disadvantage because of her disability in comparison to persons who were not disabled as a consequence of the application of the PCP?

275. Again the answer was self-evidently yes. She could not wear a face mask and so could not deal with patients face-to-face. When the requirement came in that face masks had to be worn on any hospital premises, the claimant was unable to comply. Her colleagues who were not disabled were not affected in the same way.

If so, what was the substantial disadvantage?

276. Our answer to the preceding question effectively answers this one.

Were the proposed adjustments as set out in paragraph 33 of the amended statement of claim reasonable? Those proposed adjustments are (a) looking at alternative work locations for the claimant and (b) commissioning further respiratory tests.

277. We found ourselves in agreement with the arguments advanced by Mr James (see paragraphs 169-172 above). The respondent did look at alternative work locations for the claimant. It seemed that there had been a failure by the Respiratory department to advise the claimant of the results of her breath tests in February 2022 but (a) it was not the responsibility of OH to follow this up and (b) the matter became academic when the claimant indicated in July 2022 that she did not wish the matter to be progressed.

Did the respondent fail to make them?

278. Our answer to the preceding question deals with this one. In short, we did not believe that the respondent failed to make the reasonable adjustments contended for by the claimant. That meant that section 136(3) EqA was engaged.

If so, when did the respondent fail to make them?

279. Our answers to the two preceding questions made this one academic.

Time bar

280. The questions in the list of issues were as follows –

Did any of the foregoing acts occur before the period of 3 months before the claim was raised, or if the act extended over a period of time, did that come to an end before that period?

If so, is it just and equitable for the Tribunal to extend the time limit to permit this part of the claim to be presented late?

281. Our decision that the claim succeeded only in relation to the *"antivaxxer"* description of the claimant rendered these questions academic. The description was applied to the claimant during an interview which took place

on 7 October 2022. She became aware of it only when she received the grievance report. That report was *"submitted"* on 9 December 2022. The grievance hearing took place on 2 February 2023. The claimant was unclear as to when exactly she received the grievance report but it must have been between 9 December 2022 and 2 February 2023.

282. The period of ACAS Early Conciliation ("EC") commenced on 20 February 2023. The EC certificate was issued on 3 April 2023. The claimant's ET1 was lodged on 2 May 2023. Her claims under sections 15 and 26 EqA relating to the *"antivaxxer"* description were therefore not out of time. As none of her other claims succeeded, we did not require to consider the time bar questions in the list of issues.

Decision and next steps

283. Our decision is that the claims brought by the claimant under sections 15 and 26 EqA succeed so far as relating to the description of the claimant as an *"antivaxxer".* All of her other claims do not succeed and are dismissed.

284. If the parties are unable to agree on compensation in respect of the claims which succeed, the case will be listed for a remedy hearing.

Employment Judge: **W Meiklejohn**
Date of Judgment: **14 May 2024**
Entered in register: **21 May 2024**
and copied to parties