Case No: 1303977/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms M Moore

Respondent: University Hospitals Birmingham NHS Foundation Trust

Heard at: Midlands West

On: 17, 18, 19, 22, 23, 24, 25 and 26 April 2024 (by CVP on 26 April only)

Before: Employment Judge Faulkner
Mrs W Ellis
Mr D Faulconbridge

Representation: **Claimant** - Mr A Effiong (lay representative)
Respondent - Mr T Perry (Counsel)

JUDGMENT

1. The Respondent did not fail to comply with the duty to make reasonable adjustments in relation to the Claimant.

2. The Respondent did not indirectly discriminate against the Claimant.

3. The Respondent did not harass the Claimant related to disability or race.

4. The Respondent did not discriminate against the Claimant because of disability.

5. All of the Claimant's complaints were dismissed accordingly.

REASONS

Introduction

1. This case was about alleged failure to make reasonable adjustments to certain aspects of the Claimant's role as a Ward Clerk, and about ways in which she says she was harassed related to disability or race, and directly discriminated against because of disability in relation to such matters as allocation of overtime. These Reasons are provided in response to a request from Mr Effiong made in writing after the Hearing but before the simple Judgment had been provided to the parties.

Issues

Disabilities

2. The Respondent accepted that at all material times the Claimant had a number of impairments which each amounted to a disability within the meaning of section 6 of the Equality Act 2010 ("the Act"), including conditions affecting her back, arms and hands, and two mental impairments. We agreed with the parties, in the context of an application for an anonymity order by the Claimant which was refused, that given the Respondent's concessions it is not necessary to refer to those conditions with any specificity in these Reasons. Their clarity is unaffected by not doing so.

Failure to make reasonable adjustments

3. The complaints of failure to make reasonable adjustments were based on the physical impairments only. It was agreed at the start of the Hearing that the following were the issues for the Tribunal to determine.

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

5. Did the Respondent have one or more of the following PCPs:

5.1. From March 2022 until she went off sick in December 2022, Ward Clerks were expected to manoeuvre patients to their place of appointment in wheelchairs ("PCP1")? The Respondent denied having this PCP.

5.2. From November 2021 until the date of the Claim Form, Ward Clerks were provided with non-ergonomic chairs and a desk without a wrist rest, desk extension and foot rest ("PCP2"). The Respondent initially denied that it had this PCP and that it was capable of being a PCP, although as our Analysis makes clear, by the time of its submissions, its position had changed.

6. Did the PCPs put the Claimant to a substantial disadvantage compared to persons who were not disabled in that they caused her pain?

7. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage? The Respondent denied such knowledge.

8. What steps could have been taken to avoid the disadvantage? The Claimant suggested:

8.1. The removal of PCP1 in relation to her.

8.2. The provision of the adjustments implicit within PCP2 in relation to her. The Respondent said that a Display Screen Equipment ("DSE") assessment was carried out and as far as practicable equipment and adaptations for the Claimant secured.

9. Was it reasonable for the Respondent to take those steps and did it fail to take them?

Indirect discrimination

10. For the purposes of her complaints of indirect discrimination, the Claimant relied on the same PCPs and on her physical disabilities. The issues to be determined were agreed to be as follows.

11. Did the Respondent apply the PCPs to the Claimant?

12. Did the Respondent apply the PCP to persons who did not have the Claimant's particular physical disabilities, or would it have done so?

13. Did the PCPs put persons with the Claimant's particular physical disabilities at a particular disadvantage when compared with persons who did not have those disabilities, in that they would be more likely to experience pain? The Respondent did not accept that either PCP had that effect.

14. Did the PCP put the Claimant at that disadvantage? Again, the Respondent denied that they did.

15. Was the PCP a proportionate means of achieving a legitimate aim? The Respondent said that its aims were:

15.1. In relation to PCP 1, providing reasonable assistance to nursing staff as the demands of the service required, thereby ensuring that the flow of patients who attended the Oncology Treatment Unit ("the Unit") was maintained at an appropriate level that supported the safe and efficient delivery of patient care.

15.2. In relation to PCP 2, requiring that a DSE assessment was completed before a person with physical disabilities was equipped with specialist aids or adaptations were made to their workstation, thereby ensuring that such additional support which may be recommended was a) necessary and b) appropriate for that person's particular needs and their health and safety at that time.

16. The Tribunal was required to decide in particular:

16.1. Was the PCP an appropriate and reasonably necessary way to achieve those aims?

16.2. Could something less discriminatory have been done instead?

16.3. How should the needs of the Claimant and the Respondent be balanced?

Disability harassment

17. On 25 April 2023 the Claimant received a private message via WhatsApp from a work colleague (Neil Deeley) who the Claimant said made a comment about her physical disability and her need for adaptations, speculating and making an inappropriate comment regarding a disability scooter. The entire focus of this complaint in practice was Mr Deeley's reference to a disability scooter.

18. Was this unwanted conduct?

19. If so, was it related to disability?

20. If so, did it have the requisite purpose or effect?

Racial harassment

21. The alleged unwanted conduct occurred on 16 December 2022 and consisted of the Claimant being told to "fuck off" and being shouted at by a nursing colleague, Ruth Fielding, in the presence of two other staff members and patients. The Claimant also said that on the same date another nursing colleague, Craig Martin, said "fuck off" to her, gestured toward her using his middle finger and when asked by her directly if he was a racist, did not answer.

22. She also said she was ignored and excluded from kind, friendly actions and nice comments made by Craig Martin on 16 December 2022, that were only directed at a Ward Clerk colleague, Lynsey Flynn, who is White. The Claimant clarified in the course of her evidence that in fact this complaint was that she was not invited to social events, specifically the Ward Christmas party.

23. The questions for the Tribunal were the same as set out above for disability harassment except of course for asking whether the conduct was related to race.

Direct discrimination

24. The complaints below were set out during the case management process conducted by Employment Judge Perry as harassment complaints, but he clearly anticipated that they were direct discrimination complaints, Mr Effiong wrote to the Tribunal to confirm the same the day before the Hearing, and the Respondent had no objection to them being relabelled in this way.

25. The Claimant said she was ignored and excluded from kind/friendly actions and nice comments made by Craig Martin on 16 December 2022, that were only directed at a Ward Clerk colleague, Lynsey Flynn, who is White. The Claimant clarified in the course of her evidence that in fact this complaint was that she was not invited to social events, specifically the Ward Christmas party.

26. The Claimant said that she was not given an equal share of overtime by Paige Hutton from May to mid-October 2022, and that any spare overtime was given to her White colleagues although she had asked several times for it to be shared out equally. She said that when she complained she was promised the overtime only for it to be given to one of her White colleagues again.

27. The Claimant said that in approximately mid-October 2022, she requested a fleece jacket but was told by a manager (Jane Zambra) that she had to pay for it, whilst her White colleagues were given fleeces without charge.

28. The Claimant says her complaints to senior management on 4 November and 16 December 2022 about bullying and harassment were not addressed or investigated in accordance with the Respondent's policy, properly or at all.

29. The first issue for the Tribunal was whether the Respondent did one or more of the above and if so whether the Claimant was thereby subjected to a detriment.

30. If so, was she treated less favourably than the Respondent treated or would have treated others? For the first three matters, the Claimant relied on Lynsey Flynn as her comparator and for the fourth, a hypothetical comparator.

31. If the Claimant was less favourably treated than her comparator, was this because of race, or in relation to the alleged failure to address her complaints, disability (the mental impairments)? Mr Effiong said at the start of the Hearing that the Claimant relied on the protected characteristic of race in this respect, but in her evidence the Claimant was very clear that she relied on disability and not race.

Time limits

32. Any complaint about anything done before 9 December 2022 was presented out of time. It was agreed that in the event of any of the complaints about matters before this date succeeding, the Tribunal would have to consider:

32.1. When did time begin to run for the complaints?

32.2. Was the act or omission in question part of conduct extending over a period ending with an in-time act or omission found to be discrimination?

32.3. If not, was the complaint brought within such period after expiry of the time limit as the Tribunal considers just and equitable?

Hearing

33. We read statements and heard oral evidence from the Claimant, Jane Zambra (Ward Clerk Support Manager), Katie Allen (Deputy Operational Manager), Andrea Fernyhough (Ward Manager), Ruth Fielding (at the relevant times, Senior Sister), Neil Deeley (formerly a Ward Clerk) and Paige Hutton (Ward Clerk Team Leader). At the relevant times, the Claimant reported to Ms Hutton, who reported to Ms Zambra, who in turn reported to Ms Allen. By consent, we also heard brief oral evidence, with no written witness statement, from Ms Charlo Bartlett (Ward Administrator/Housekeeper).

34. The parties agreed a bundle of documents of around 600 pages. We informed the parties on day 1, that given the need to read all of the statements, we had limited time to read even the documents referred to in the statements, let alone anything further. We thus made clear we would assume the accuracy of what the statements said about documents unless either party showed otherwise. Beyond that, we said that it was for the parties to take us to documents they wanted us to consider, in oral evidence. Both representatives were content with that approach.

Page references below refer to the bundle, alphanumeric references to the statements. We dealt in our findings of fact with the issues most salient to the issues before us, though just because something is not mentioned below does not mean it was ignored. Any factual dispute was of course resolved on the balance of probabilities.

Facts

Background

35. The Respondent is a large teaching NHS Trust. It has employed the Claimant since 4 June 2018 as a Ward Clerk at the Queen Elizabeth Hospital ("the QE"), at all material times on the Unit. She describes her race as Asian/Indian. The other three or four Ward Clerks on the Unit were White. The role is about providing administrative support to the Unit and being a first point of contact for all service users, patients and visitors.

36. An occupational health ("OH") report in November 2018 (pages 127 to 128) recommended, because of a foot issue, that adjustments be made to reduce the amount of walking the Claimant was required to do at work, and that she be permitted to use supportive footwear. It did not advise the provision of specialist equipment or adaptations. Ms Allen was aware from 2018 that the Claimant had conditions affecting her back and joints and she was also aware of the Claimant having a condition affecting her hands and/or arms from 2021 when the Claimant underwent surgery. Ms Allen was not aware at that point however that any of these impairments affected the Claimant's ability to carry out daily activities or that the Claimant experienced pain or discomfort in doing so.

37. A further OH report on 30 September 2019 (pages 132 to 133) said that due to one of her disabilities, the Claimant had significant pain in her neck, shoulders, arms and hands, impacting her ability to undertake daily activities. A further report on 13 November 2019 (pages 134 to 135) said that because of her back impairment the Claimant should avoid certain tasks, such as heavy lifting, though she could push and pull such things as heavy notes using a trolley. It did not advise any specialist equipment or adaptations, though it did say that the Claimant should not spend long periods at her computer. It said that her foot issues continued but should not impact on her duties overall.

38. On 17 June 2021 the Claimant met with Ms Allen and informed her that she had arthritis in one foot and pain in the other. They discussed the possibility of alternative roles with less walking (KA37). On 22 June 2021 Ms Allen completed a referral to OH, stating that the Claimant had undergone foot and spinal surgery in 2020 (pages 138 to 141). The referral also said that part of the Claimant's duties was to take patients from reception to the Ward. On 27 July 2021 OH emailed Ms Allen and recommended that she discuss with the Claimant potential adjustments to support her reduced mobility. The Claimant did not want to move to another work area.

Equipment

39. As Ms Allen told us, and as might be expected, as a general rule staff are not provided with orthopaedic chairs, wrist rests, footrests or desk extensions. Essentially, such equipment is made available if recommended by an ergonomic assessment. Ms Hutton confirmed that the Respondent's general approach is to

be guided by each employee in terms of identifying a need for an adjustment to their workstation.

40. On 22 November 2021 the Claimant emailed her then Team Leader, Julie Mitton (page 144), to say she now had weakness in her arms and hands, would be seeing a neurologist and rheumatologist, and that her orthopaedic surgeon had recommended an OH referral. No mention was made of an ergonomic chair, but the Claimant did say she would need a hand/wrist rest for keyboard use. The Claimant told us she raised the need for an ergonomic chair verbally, but we concluded that she did not do so, given the content of the email and, as we will come to below, given also that her chair was not an issue for her until several months later. On 23 November 2021 Ms Mitton said that she would refer the Claimant to OH and asked Ms Allen whether she had time to complete the referral. Ms Allen replied to say she would do it the next day (page 515). She did not do so however, and can only assume she overlooked it. The Claimant did not tell Ms Mitton at any point that she was waiting to be referred.

41. It was upon a change in the location of the Unit in March 2022 that the Claimant says she experienced pain from sitting at her desk. In previous locations she had used a normal, non-orthopaedic chair and was in fact sitting at her desk longer than was the case following the move, but apparently without difficulty. On 24 May 2022, she asked Ms Hutton (by then her new Team Leader) about the OH referral. Ms Hutton knew by this point, both from handover discussions with Ms Mitton and from reading the Claimant's file, that the Claimant had conditions affecting her back and joints. On 25 May 2022 Ms Hutton informed the Claimant that she had spoken with Ms Mitton and told the Claimant that the only thing that was advised was for her to self-refer to staff physio. If that is what Ms Mitton said had previously been discussed with the Claimant, it seems to be incorrect as both Ms Allen and Ms Mitton had indicated that there would be an OH referral. In any event, Ms Hutton told the Claimant she had not been referred to OH (page 145). On 27 May 2022, the Claimant emailed Ms Hutton (page 149) explaining that she had difficulty "running around" looking for chairs for patients, specifically due to arthritis in her feet. She said that it was not the role of Ward Clerks to do so. The email did not mention anything about discomfort with her chair or workstation.

42. In response to this email, Ms Hutton decided to shadow the Claimant on shift on 22 June 2022. Her detailed notes of that occasion are at pages 154 to 156. As the notes record, the Claimant mentioned on this occasion that her chair was uncomfortable and causing her pain. Realising that something had to be done about that, Ms Hutton suggested the Claimant complete a DSE form, saying to the Claimant that nothing could be done without one. The Claimant suggested awaiting her appointment with a neurosurgeon before referring her to OH. She told us she could not remember whether this was the first time she raised an issue with her chair, as both her mental impairments and one of her physical impairments can cause memory difficulties. We are clear that this was the first time any issue with the chair was raised, though as already noted the need for a wrist rest had been identified some time before.

43. On 29 June 2022 the Claimant told Ms Hutton (page 164) that she was scheduled for a toe joint replacement to alleviate arthritis on 3 July 2022. She also said she would upload and complete the DSE form. She was absent due to the surgery from 4 to 19 July 2022. In a return-to-work discussion with Ms Hutton on 1 August 2022, the Claimant said she was glad to be back at work and now had much more mobility (pages 521 to 522). On 10 August 2022 Ms Hutton chased

the Claimant about completing the DSE assessment. When the Claimant said she did not know which form to complete, Ms Hutton sent her one.

44. On 17 August 2022, the Claimant had a further meeting with Ms Hutton. She told Ms Hutton (MM16) that her chair was not helping the nerves in her back and that she would benefit from a neck support. She also said to Ms Hutton that the wrist rest was helpful, though she told us that it was in effect just a mouse mat. Whatever it was, it was helping. On 29 August 2022 the Claimant sent the completed DSE form to Ms Hutton who completed the management section the same day (pages 175 to 181). The Claimant stated on the form that her chair was not comfortable and she had a sore back, neck and wrists, noting for example that the chair she used did not properly support her back and did not have arm rests. She said she needed an orthopaedic chair to support her head/neck due to spinal problems. A DSE assessment was arranged for 4 October 2022. Ms Allen says that it is important a DSE assessment is completed to ensure any additional support is necessary and appropriate for an employee's particular needs (KA53).

45. On 1 September 2022, the Claimant met with Ms Zambra. According to Ms Zambra's note at page 185, the Claimant said that her walking had been okay since her operation – the Claimant says she does not recall saying that but we readily concluded, based on the note, that she did. She also said she wanted more hours. Although it is not in the note, nor in her witness statement, the Claimant says that she told Ms Zambra on this occasion that moving wheelchair users was causing her pain. Again, she told us that she had not mentioned this before in these proceedings because her memory is not good. Ms Zambra told us she is sure that if this had been mentioned she would have told the Claimant she should not be moving patients in wheelchairs, and would have noted it down. We conclude that the Claimant did not mention it, essentially because it is not in Ms Zambra's detailed note. On 27 September 2022, Ms Hutton referred the Claimant to OH. In doing so, she referred to the Claimant having specialist care, said that she had neck and back problems and a condition affecting her hands and/or arms, and stated that the Claimant's job included walking to and from the waiting room to collect patients and checking chair availability (pages 186 to 189).

46. The DSE assessment due on 4 October 2022 did not take place because the Ergonomics Advisor was on sick leave, only returning in the new year. There was no-one else employed by the Respondent who was qualified to carry them out, which Ms Allen acknowledged in evidence was a surprising situation. On 10 October 2022 OH advised Ms Hutton to await an ergonomics assessment before a further OH referral; no interim arrangements were recommended.

47. As we will return to below, the Claimant went on long-term sick leave on 19 December 2022. On 28 December 2022 Ms Zambra referred the Claimant to OH again, saying that her role included checking chair availability throughout the day. On 2 February 2023 someone involved in DSE assessments contacted Ms Hutton and the Claimant, explaining the delay in arranging an assessment for the Claimant due to the Ergonomics Advisor's sickness absence which had now ended. He asked the Claimant to provide her availability for an appointment the following week; Ms Hutton confirmed that the Claimant was on sick leave.

48. By 10 February 2023 (page 274) the Claimant had told Ms Zambra she needed an orthopaedic chair. Ms Zambra also spoke with Melanie Sutton, who was assisting the Claimant. Ms Sutton said the Claimant needed specialist equipment on her return to work. Ms Zambra replied that this would be explored after a DSE

assessment (page 276). An orthopaedic chair was mentioned in the Claimant's February 2023 grievance as well (prepared with Ms Sutton's help – pages 286 to 287), in the context of her November 2021 email to Ms Mitton and the follow up email to Ms Hutton in May 2022. On 21 March 2023, whilst still off sick, the Claimant attended a Wellbeing Meeting with Ms Allen who said that once she had the DSE report she would order the equipment. Ms Allen accepted in evidence that the Claimant needing an orthopaedic chair must have meant she had a problem with the existing one.

49. The DSE assessment was eventually completed on 28 March 2023 (the Claimant came into the Ward whilst on sick leave, for this purpose), in a vacant room rather than at the Claimant's desk. Ms Hutton said it is important to be working when an assessment is done, though she also said that the Ergonomics Assessor is so expert in her role that she could do the assessment anyway. The resulting report (page 299ff) said that the Claimant's work desk was not suitable, and that her chair did not support her upper and lower back. It recommended a two-week trial of an ergonomic chair, padded wrist rest, footrest and telephone headset. It also recommended that the Claimant did not move patients.

50. On 25 April 2023 (KA45) Ms Allen emailed Ms Fernyhough to say that it was reported that the depth of worktops in the reception area was too small and so she had spoken to Estates who would get a quotation for the work needed to extend them. On 26 April 2023, Ms Allen met with the Claimant (who remained on sick leave) and Ms Sutton and told them a keyboard extender and wrist rest had been ordered, Estates had been contacted regarding the worktop, and an ergonomic chair and footrest would be available to trial on the Claimant's return to work. A further OH report on 27 April 2023 (pages 337 to 338) focused on the Claimant's mental health following events in December 2022 (see below). It added that equipment should be available on the Claimant's return to work and also said that the Claimant had physical health conditions affecting her mobility and that she should not do any manual handling.

51. On 8 June 2023, after the date of the ET1, Ms Allen emailed the Claimant to say that the trial ergonomic chair would not be available until 4 August 2023 as they were all booked out. The Claimant returned to work on a phased basis on 10 July 2023. She was provided with a forearm keyboard rest, headset, padded wrist rest and foot-rest. Ms Allen offered the Claimant the option of taking annual leave until the chair arrived but the Claimant wanted to return to work. It was not until December 2023 that a permanent ergonomic chair was finally in place. It usually takes 6 to 12 weeks from order to arrival.

52. The grievance appeal outcome of 7 February 2024 (page 493) acknowledged that the Claimant had suffered some "significant health issues as a result of this process and the issues that you have brought to our attention, and we agree that there have been some failings on the Trust's behalf to identify and support you earlier than we did".

Wheelchair users

53. As the list of issues above indicates, the Claimant's case is that she was expected to move patients in wheelchairs, which caused pain in her wrists, even though this was not in the Ward Clerk job description.

54. On arrival in the Unit reception, each patient is allocated their own seat in the treatment area using an online scheduling system, which – once the patient arrives in the treatment area – lets clinical staff know which patient is next and where they are sitting. This is important in a busy environment. Some Ward Clerks help out by escorting or directing patients from the reception area to the treatment area. The Claimant says that Band 6 nurses, including Mr Martin and Ms Fielding, told Ward Clerks to bring patients to the treatment area when there were no Health Care Assistants ("HCAs") to do so, Ms Fielding telling her that Mr Deeley did it, so the Claimant could do it as well. The Claimant says that whilst it was not every day (because most patients were not wheelchair users), she would as part of this task have to move a wheelchair patient to the treatment area about 10 to 15 times per week. Ms Fernyhough says nowhere near that many patients arrived in wheelchairs.

55. In contrast to the Claimant's evidence, all of the Respondent's witnesses say that Ward Clerks were not required or expected to manoeuvre patients in wheelchairs as they are not trained to do so and it would be a health and safety issue for them and the patient. The Respondent says that Ward Clerks are expected to ask a member of the clinical team to do so.

56. The Respondent accepts however that Ward Clerks did bring patients from the reception area to the treatment area, and that nurses might ask them to do so if they knew the Ward Clerk was someone who liked that part of the role. In Ms Allen's OH referral in June 2021 (page 138) she included taking patients to the Ward as part of the "demands of the job" of Ward Clerks, alongside booking in and other core duties. She nevertheless insisted in her evidence that this was not part of the Ward Clerk job description and that she only mentioned it because she knew Ward Clerks were doing it and it was relevant to the referral.

57. In an email to Paige Hutton on 26 May 2022 (pages 148 to 149), the Claimant stated that Ward Clerks were having to look for empty chairs and going up and down the corridor to the waiting room; she mentioned arthritis in her feet and said that this part of the role became very difficult after Mr Deeley's shift ended (which was an hour after hers began). As already noted, Ms Hutton decided to work on the Claimant's shift on 22 June 2022; she knew from this point that the Claimant's health made walking patients to the treatment area difficult for her, though she observes at PH56 that the Claimant spent an "unnecessary amount of time" walking in and out of reception to look down the empty corridor for chairs. She discussed with the Claimant other work areas which did not require as much walking, but the Claimant said she was okay where she was (PH57).

58. As for moving patients in wheelchairs, Ms Fernyhough said in her statement that she was aware that the Claimant was doing so – AF14. She told us in oral evidence however that she only saw her doing it once, in the period 2020 to 2022 when the Unit was located elsewhere and relatives could not accompany patients because of Covid-19 restrictions. That was an inconsistency in Ms Fernyhough's evidence, and we thus concluded that in all likelihood she saw the Claimant moving a patient in a wheelchair more than once, though we also concluded that this was more likely than not in the period from 2020 to 2022. Ms Fernyhough also saw Mr Deeley doing it, more often than the Claimant, in the same period. Mr Deeley told us that because of the specific circumstances of the building and the limitations created by the pandemic he did it multiple times a day. Ms Fernyhough did not challenge him (or the Claimant), notwithstanding the health and safety issues; her evidence was that Mr Deeley was helping out in a difficult period. As noted above,

the DSE assessment in March 2023 (page 302) strongly recommended that the Claimant did not move any patients, even those in a wheelchair, giving the reason that she had not had the correct patient handling training. It did not say that moving patients in wheelchairs was causing her pain.

59. The Claimant was excused from any role in escorting patients when she returned from sick leave in July 2023, but (JZ68) continued to do so. Ms Zambra became aware after the Claimant raised her grievance that Mr Deeley had moved patients in wheelchairs between 2020 and 2022, and accepts that nurses might thus have expected other Ward Clerks to do the same, but she was not aware of any Ward Clerk doing so in the current location, from 2022 onwards; she only became aware that the Claimant had ever done so after these proceedings began. Mr Deeley told us he occasionally moved wheelchair patients in the current location, but much less than before.

60. At the Wellbeing meeting with the Claimant on 26 April 2023, Ms Allen told the Claimant that it was not part of her role to move patients. This clearly appears to have been part of a discussion about the Claimant moving patients in wheelchairs, given that Ms Allen's follow up letter (pages 331 to 332) specifically referred to the Claimant not being trained to move patients and it not being safe for her to do so, as KA13 reflects. As stated above, the OH report of 27 April 2023 said that upon her return to work, moving patients should not be part of the Claimant's duties. On 9 May 2023 Ms Allen and Ms Hutton met with Ms Fernyhough and informed her that the Claimant would no longer be helping to escort patients at all. Ms Fernyhough agreed, and nursing staff were told. The Claimant's February 2023 grievance (pages 286 to 287) did not mention moving wheelchair users.

61. Ms Allen assumed that if the Claimant was pushing patients in wheelchairs, it would cause pain for her, given her foot and spine issues. OH reported on 2 August 2023 that the Claimant had reduced mobility, and recommended she minimise any manual handling duties. According to Ms Allen at KA20 and Ms Fernyhough at AF20, the Claimant has nevertheless continued to involve herself in patient seating, by dealing with patients complaining about waiting times. Mr Deeley says at ND15 that the Claimant raised with him that Ward Clerks should not be moving patients, not from a health perspective but because it was not part of their duties.

62. The Claimant did not seek to lead any evidence, in relation to either indirect discrimination complaint, about whether others with her particular disabilities did suffer or would have suffered pain as a result of either PCP.

63. Our factual conclusions in relation to the question of moving wheelchair users were as follows:

63.1. We were in no doubt that Ward Clerks, including the Claimant, were presenting patients to the treatment area in the current Unit location, and doing so on a daily basis. We were equally in no doubt that managers knew that – the OH referrals make it clear in listing the demands of the Ward Clerk role. The distance between the waiting area and the treatment area made it necessary, and it had become common practice.

63.2. What the Claimant complains about however is not escorting patients but moving patients in wheelchairs. We concluded that she did sometimes do this, and that she did so on more than the one occasion Ms Fernyhough mentioned. It

was however nowhere near as frequent as the Claimant told us. The relevant period for the purposes of her complaint is May to December 2022, by which time patients could be accompanied by relatives again. Based on Mr Deeley's evidence – we found him a credible witness not least because he was open about moving patients in the previous location even though he knew he should not have been doing so – and based on the evidence of clinical staff we heard from, we think that in this period it was very infrequent.

63.3. As to whether nursing staff expected it, whilst they may have been grateful for it if it happened, there was no expectation on Ward Clerks to do it. The expectation was that a clinical member of staff would be asked to do it. We say that for four reasons. First, Mr Deeley said he did it of his own volition, in other words it was not expected of him. Secondly, whilst Mr Deeley doing it during the Covid-19 pandemic, when the Unit was at its previous location, may have created an expectation that other Ward Clerks would do the same, that had changed by the time the Unit moved to its present venue. Thirdly, it was an infrequent occurrence which is contrary to the assertion that it was an expectation. Fourthly, we can accept that wheelchair patients were treated as an exception to the informal arrangement that Ward Clerks would present patients to the treatment area, given there were much fewer of them and the Respondent's concerns about manual handling. We could also add that as soon as Ms Allen was told that the Claimant was moving wheelchairs in April 2023, she told her that she should not be doing it. We note too that the Claimant herself was adamant that Mr Deeley should not be doing it, which would also tend to indicate that it was not something she herself was doing with any regularity.

63.4. We were clear that the Claimant did not raise that this was causing pain or discomfort at any time; there is no evidence of her having done so despite her having many discussions with managers about other similar issues, including the moving of patients. Pain and discomfort consequent on moving patients in wheelchairs was not mentioned to OH either. As Mr Deeley said, the reason she did not want to do it was that it was not in her job description. Moreover, even the DSE assessment focused on lack of training, not on pain or discomfort, as the reason for not engaging in this activity.

Race harassment

64. The Claimant's case, formally put, was that from March 2022 she was shouted and sworn at by Ms Fielding in front of patients. The focus of this element of her case was exclusively however on the events of 16 December 2022. The context for the events of that day is that the Respondent's witnesses universally say that the Claimant regularly seated patients in the wrong seats in the treatment area. Neil Deeley said it happened once or twice a day, and Ms Fielding herself says at RF10 and RF11 that the Claimant often sat patients in empty chairs they were not allocated to and that she told her on many occasions she must not do this. Ms Fernyhough also heard that this was happening. The weight of the evidence very much shows that it was.

65. On 16 December 2022, Mr Martin was the Nurse in Charge ("NIC"). At a handover with Ms Fielding at 15.00, the Unit was busy but organised. Not long after the Claimant started her shift however, she began to move patients around. She says that within minutes Ms Fielding swore and shouted at her in the presence of two colleagues and of patients. The Claimant also says that when she spoke to Mr Martin shortly after that, he too swore at her, stuck his middle finger up at her,

and did not answer when she asked if he was racist. She told us the swearing was directed at her and that both nurses told her to "fuck off".

66. On 21 February 2023, the Claimant made a Dignity at Work complaint about Ms Fielding and Mr Martin – pages 284 and 285. She said in that complaint that as soon as she went to the treatment area Ms Fielding swore at her and told her to go away, saying there were no chairs; she said the patients laughed at the comment. She then said she approached Mr Martin about what chairs would be available and he told her to "fuck off". She did not say in her complaint that he raised his middle finger at her or that he failed to reply when she asked if he was racist. She said, "Craig treated me differently to the other Ward Clerk on this day and I asked him why. He didn't give me an answer. I believe it to be race discrimination". The Claimant also alleged that Ms Hutton witnessed verbal abuse by Ms Fielding who was "still shouting" when Ms Hutton arrived on the scene. Ms Hutton says at PH47, "That did not happen".

67. The Respondent accepts that Mr Martin swore at the Claimant as she alleges, but not that he gestured or failed to answer when asked if he was racist. As for Ms Fielding, she says at RF13 that she was very annoyed and snapped at the Claimant, saying, "I said that she must not do this [put patients in incorrect seats] and that the patients had to be seated in their correct chairs", but strongly denies shouting and swearing; she told us she has never sworn at anyone in 20 years of nursing. Her account is that it was in fact the Claimant who shouted, "Nobody ever helps me". Ms Fielding told us that if a patient is in the wrong seat, it can cause frustration for another patient who thinks it is theirs, and for medical staff when they go to see the patient. She says she tried to apologise but the Claimant refused to acknowledge her. Ms Fielding accepts that she was rude towards the Claimant on this occasion, but not on other occasions whether by swearing at her, raising her voice, or telling her to get out of the treatment area.

68. According to the Claimant (MM69) she told Ms Hutton that Ms Fielding shouted and swore at her, and that this was witnessed by Sarah Warr, an HCA. The Claimant says she also told Ms Hutton that Mr Martin shouted and swore at her, contrasting how he had treated Ms Flynn. The Respondent's witnesses on the other hand (JZ34 and PH41, see also Ms Hutton's note at pages 241 to 242) say that what the Claimant reported was being "snapped at" by nursing staff for looking for chairs and seating patients, and being told she was "in the way". "Snapped at" is the wording used in Ms Hutton's note, and she insisted that this was what the Claimant said as it is not a word that she would ordinarily use herself. She says the Claimant did not report being shouted or sworn at, nor that Mr Martin gestured at her, which the Claimant accepted during oral evidence, though she added that she was not likely to go into detail when speaking with Ms Hutton immediately after the event having had what she describes as a breakdown. The Claimant insists however that it is a lie to say she reported Ms Fielding as having "snapped" at her. Whilst noting that Ms Fielding reported having "snapped" at the Claimant, so that it is possible the word came from her, we accept unhesitatingly Ms Hutton's account of what the Claimant told her: first, she was a particularly impressive witness generally, being prepared throughout her evidence to accept matters that might support the Claimant's case, if they accorded with her recollections; secondly, she wrote her note immediately after her conversation with the Claimant; and thirdly, it is highly likely she would have been in a clearer state of mind than the Claimant at that point and thus more likely to record accurately what was said at the time.

69. Ms Zambra became involved as we will recount below. At JZ45 she says that on 19 December 2022, Ms Fernyhough told her (page 249) that she had spoken to Ms Fielding who had said she had asked the Claimant not to move patients into any chair that happened to be available and had been told about this before. Ms Fielding reported that the Claimant raised her voice and that Ms Fielding snapped at her; she tried to apologise but the Claimant was not interested. Ms Fielding told us, and we accepted, that she has had no previous complaint against her involving allegations of discrimination (RF17) and always considered she and the Claimant had a good working relationship.

70. HCA Warr told Ms Fernyhough that Mr Martin had sworn (confirmed by an email from Ms Zambra to Ms Fernyhough on 21 December 2022 – page 253). Ms Warr's statement given on 5 January 2023 (HR had recommended statements be collected) omitted reference to Mr Martin swearing and said that Ms Fielding was polite to the Claimant, though she also said she told Ms Fielding that she felt "it was a bit harsh because the Claimant became upset" (page 266). In the Claimant's grievance appeal outcome provided by Karen Johnson, Director of Corporate Nursing, on 7 February 2024 (page 493), it was agreed that Mr Martin sometimes swore, there was no racial element to his comment, but had he remained employed action would have been taken against him. Ms Johnson concluded that Ms Fielding's behaviour on 16 December 2022 was rude and abrupt, but not race discrimination. Ms Johnson gave an apology for both incidents.

71. Another nurse, Sam [surname unknown], shouted at, or more probably over to, the Claimant in September 2023 over the same issue, namely seating of patients, specifically that a particular chair was not clean (page 413) and the Claimant was about to seat a patient in it. The Claimant says that what Sam did was different because it was a one-off. She also sees the conduct of Mr Martin and Ms Fielding as related to race because she says Ms Flynn did exactly the same as her but was not shouted or sworn at. Ms Fielding told us that Ms Flynn's practice was in fact to approach the NIC in order to identify the correct seat for a patient, which enabled the NIC to move patients around, as it is the NIC who knows how long treatments are going to be and therefore who should sit where. We accept that evidence, which was unchallenged. Ms Fielding denies that what happened on 16 December 2022 was anything to do with the Claimant's race or anything about her personally; rather, she says, it was frustration that the Claimant had done something which she had repeatedly been asked not to do.

72. Our conclusions regarding Ruth Fielding's conduct were as follows:

72.1. She spoke harshly to the Claimant, not politely as Ms Warr said in her statement. After all, Ms Fielding herself told us she was rude and Ms Warr felt the need to speak with her about it on the day. It was undoubtedly a heated moment. It is thus likely that Ms Fielding also raised her voice, though the balance of the evidence indicates that she did not shout.

72.2. What happened clearly had a significant emotional effect on the Claimant. Apparently being surrounded by colleagues asking her for information, after she had been spoken to rudely by Ms Fielding and sworn at by Mr Martin, may well have been a major contributory factor to that. We can see how terribly unhelpful that was.

72.3. As to whether Ms Fielding swore (which was the Claimant's focus in this Hearing), we attached little weight to the fact that the Claimant did not mention this

to Ms Hutton on the day. As Ms Hutton herself accepted, the Claimant was in such a state of upset that she may well not have given a full account at the time. For reasons we will come to, we did not think it strictly necessary to determine precisely what Ms Fielding said, but we concluded that she did not tell the Claimant to "fuck off", for three reasons. First, she was prepared, both on the day and before us, to admit that she was rude and had snapped, which adds credibility to her evidence on the incident more broadly. Secondly, although she later contradicted herself by saying Ms Fielding had been polite, Sarah Warr was the most objective witness of fact on the day; she did not hesitate to say that Mr Martin had sworn and that Ms Fielding was harsh, but did not report Ms Fielding as having sworn. Thirdly, although undoubtedly a stressful moment, the area being full of patients would very likely have had something of a modifying effect on the behaviour of all those involved. We add that we were given no details about what Ms Fielding is supposed to have said or done before 16 December 2022 and so this does not shed any light on what she did or did not do on that occasion.

72.4. Ms Hutton did not witness Ruth Fielding still shouting at the Claimant. As we have said, we found her to be a clear and highly credible witness and prefer her evidence over that of the Claimant on this point.

73. As for Craig Martin, our conclusions were:

73.1. On the question of the gesture, the Claimant did not mention it to Ms Hutton on the day, though as we have said, that cannot be determinative. More tellingly however, Sarah Warr did not mention it either and, as we have said, was prepared to report him having sworn. Nor was it in the Claimant's Dignity at Work complaint prepared later, out of the heat of the moment, and with assistance. We find therefore that Mr Martin did not gesture to the Claimant.

73.2. As for his not answering the Claimant's question, Mr Martin told Ms Hutton (page 242) on the day that the Claimant had said that he or the Ward was racist. What the Claimant said in her Dignity at Work complaint was that she had asked him why he treated her differently and he did not reply. It is clear therefore, based on these two accounts, that the Claimant did not ask Mr Martin if he was a racist. She either made a statement about his or the Unit's racism as she perceived it, or asked him why he treated her differently. There is no record of any reply from Mr Martin, and so we conclude that whatever was said, he did not respond.

Complaints

74. The Claimant made two complaints about the behaviour of nurses towards her, on 4 November and 16 December 2022 respectively.

75. The Claimant had met Ms Zambra on 1 September 2022 to ask to increase her hours to full-time, which Ms Zambra agreed and proposed a trial for. On 4 November 2022 the Claimant emailed Ms Hutton and Ms Zambra, saying she would no longer trial doing extra hours, as she was being bullied by nurses who constantly told her to stick to her 3pm to 7pm shift and told her to get out of the bay (that is, the part of the treatment area where patients were seated) when she was looking for chairs for patients (page 204).

76. Ms Hutton replied on 7 November 2022, inviting the Claimant to meet with her (page 203). On 8 November 2022, the Claimant declined, saying she would meet Ms Zambra when she felt she could raise the issues with her (page 203); the

Claimant evidently did not want to speak with Ms Hutton about it at all. On 11 November 2022, the Claimant met Ms Zambra. The Claimant told her that the nursing staff said things like, "you can't put the patient there", to go back to her evening shifts, and that there were "constant digs". She said she had told Ms Fielding not long before the meeting to stop bullying her, saying it was becoming too much. In response, Ms Zambra asked if the Claimant wanted to take it further by raising the matter with Ms Fernyhough; the Claimant said she would see how things went and let Ms Zambra know if she changed her mind. Ms Zambra reiterated that the Claimant must inform her and Ms Hutton of any issues, as they could not support her if they were unaware of things – pages 214 to 215. The Claimant was unable to say in her evidence what more Ms Zambra could have done about this complaint.

77. As to 16 December, it is agreed the Claimant called Ms Hutton in tears at 15:11, that Ms Hutton went to see her immediately and found her surrounded by nursing and other colleagues asking her for patient information. Ms Hutton took the Claimant into a kitchen for a private conversation. There is a dispute about whether she hugged the Claimant to reassure her; we did not need to resolve that issue.

78. Ms Hutton asked the Claimant if she wished to leave work, but the Claimant continued with her duties. Ms Hutton told the Claimant (PH43) that she could contact her or Ms Zambra at any time and that Ms Hutton would raise with Ms Zambra what had happened. Ms Hutton having done so, later that day Ms Zambra went to see the Claimant and she too asked if she wished to go home (page 243). They agreed to meet after the weekend. Ms Zambra told the Claimant (JZ36) that she would be supported if she wanted to pursue the matter further. Ms Hutton also went to see the Claimant for a second time later that day and offered to stay behind until the end of her shift. The Claimant confirmed that would not be necessary. After Ms Hutton left her following their initial discussion, the Claimant had emailed her and Ms Zambra (page 238) to say that the nurses were bullies, had bullied her for some time, she had broken down, and that she felt they were racist and treated her differently. Later that same day, the Claimant emailed Ms Zambra to say she would no longer be assisting patients to the treatment area or locating chairs.

79. On 19 December 2022 the Claimant and Ms Zambra spoke by telephone. The Claimant disclosed a personal matter to Ms Zambra, but did not want to discuss it further (MM73). Ms Zambra advised the Claimant to speak to her GP and ascertained that the Claimant's son was with her at home. She called the Claimant again later that day having spoken with HR. She told the Claimant she could call her at any time, and also gave the Claimant some advice. The Claimant effectively reassured Ms Zambra she would be ok.

80. Ms Zambra met with Ms Fernyhough that same day (pages 532 to 533), without the Claimant's consent, because she was concerned for her. Ms Zambra told Ms Fernyhough that the Claimant felt she was being treated differently to other Ward Clerks, which Ms Fernyhough did not believe, though (AF26) she recognised how it might look to the Claimant. Ms Zambra explained to Ms Fernyhough that Sarah Warr had witnessed Ms Fielding snapping at the Claimant, and that Mr Martin had approached Paige Hutton to say the Claimant had told him she felt the Unit was racist. Ms Fernyhough spoke to Sarah Warr herself (AF28) who informed her Craig Martin had sworn at the Claimant. Ms Fernyhough also spoke with Ms Fielding – page 249.

81. On 21 December 2022, Julie Clarke, Operational Manager, spoke to the Claimant, who updated her. Ms Clarke informed the Claimant that the concerns about 16 December were being taken seriously. Ms Zambra spoke to someone in HR and said she would email Ms Fernyhough to request statements from those involved so that HR could advise on next steps, which she did the same day – page 253. She asked that Ms Fernyhough get the staff to prepare statements as soon as possible.

82. From late December to mid-January, Katie Allen had several wellbeing calls with the Claimant. Ms Allen confirmed that the Claimant's complaint had been notified to Ms Fernyhough and to HR and that HR had advised collecting statements for formal investigation. In one of those calls, on 13 January 2023, the Claimant informed Ms Allen she was not sure she wanted her concerns escalated (KA25).

83. The Claimant's case regarding Ms Zambra's response to the complaint of 16 December is that she could not have done more except that on 19 December she asked Ms Zambra if she could reassure her that she would not be treated in the same way in future, and Ms Zambra had said she could not reassure her about anything. Ms Zambra told us she does not recall that exchange. For reasons we will come to, we did not deem it necessary to resolve that factual dispute. The Claimant says this was disability discrimination because Ms Zambra was aware of her mental impairments. Mr Effiong clarified this to mean that Ms Zambra thought the Claimant was exaggerating. Ms Zambra for her part told us she had no knowledge of the Claimant's mental impairments, though Ms Hutton contradicted that and said Ms Zambra would have had some knowledge, because it was clear from the Claimant's file, which we accept. The Claimant accepted that Ms Hutton for her part did not do anything wrong by not dealing with the complaint herself.

84. On 9 February 2023, Ms Zambra and the Claimant spoke by phone. The Claimant said she wanted to return to the Ward and get back to normal. On 10 February 2023, Ms Zambra spoke with Melanie Sutton, and said that whether the Claimant wished to make things formal or not, her concerns could not be ignored (page 276). It was thus Ms Zambra's intention that the matter be taken further.

85. As noted above, on 21 February 2023 the Claimant filed a Dignity at Work complaint. She also filed a grievance alleging failure to make adjustments (she mentioned the emails of November 2021 and May 2022 to Ms Mitton and Ms Hutton respectively) and bullying and harassment by Ms Fielding and Mr Martin (pages 286 and 287), as well as race discrimination related to overtime and uniform – see below. She also said her complaints of bullying and harassment had not been responded to by Ms Zambra and Ms Hutton, adding that this was because of her ethnicity. She now says it was because of her mental health. At that point, Ms Zambra and Ms Hutton could take no further action on what the Claimant had referred to them (JZ57). HR decided that both complaints should be independently investigated.

Disability harassment

86. Neil Deeley says at ND8 that he and the Claimant were good colleagues and friends, sharing jokes, gossip and personal matters and remaining on friendly terms even after he left the department, as he would chat with her at the end of his shifts. They swapped telephone numbers and it can be seen from the emails at pages 167 to 170 in August 2022 that they spoke about Mr Deeley's family. The

Claimant expressed concern about them, suggested how they might get some financial support, indicated that she had texted him to ask about his new job and questioned why he had not replied. The Claimant by contrast told us that they were colleagues not and friends. We strongly preferred Mr Deeley's evidence and were in no doubt that the relationship was more than just a relationship between professional colleagues. It continued outside the working environment, went beyond working issues, was mutually supportive and was marked by some humour – see below. Mr Deeley could thus properly describe it as a friendship.

87. Mr Deeley was aware that the Claimant was off work for medical reasons from December 2022, but other than knowing she had undergone back surgery a year or more before, did not know any details. On 25 April 2023 he sent the Claimant a WhatsApp message (page 535). Though they were not in the bundle, we were satisfied that there were other WhatsApp exchanges preceding this date, when Mr Deeley asked the Claimant when she would be returning to work. The Claimant did not say to him that she did not want any contact, though she said to us that she was just being polite. The context of what Mr Deeley said on 25 April 2023 was that he asked the Claimant how she was, the Claimant reciprocated and asked if there had been any changes on the Unit, then said she had met that day with Katie Allen. The conversation then went as follows:

C: "chair and other equipment has been ordered … lots of issues to be sorted at work before I return. Not much help from management".

ND: "Other equipment?! I want a special chair".

C: "LOL".

C: "I can just say there will be adaptations coz we haven't got enough space around our desk".

ND: "Like a little disabled scooter?"

Mr Deeley then said he was hating his job, and the Claimant replied within a few minutes, "Look for another job? Ain't there any Band 4 jobs going?"

88. The Claimant accepts that she volunteered the information about equipment, but does not accept that "LOL" meant she took Mr Deeley's comment about a special chair as a joke. We will come back to that in our Analysis. On 26 April 2023 she emailed Ms Allen saying she was upset (pages 333 to 334) as she felt her sickness absence was being discussed at work and she did not want colleagues to know she was suffering poor mental health and physical impairments. She said to Ms Allen that she told Mr Deeley she was waiting for some equipment and adaptations around her desk and his reply was "are they making space for a little disabled scooter". She said this was mocking her disabilities, and she did not want to be labelled in this way. Ms Allen raised this with Mr Deeley, requesting that he refrain from such comments in future. Mr Deeley replied, apologising and saying that it was a personal communication meant as a joke.

89. Mr Deeley says at ND21 that it is clear the Claimant found his remark that he wanted a special chair to be funny. He also says the interaction was typical of their exchanges and that he is shocked by the allegation of harassment. He says he would only have made the comment in question to someone who shared his sense

of humour and who he believed would see it as funny. The Claimant had previously made what she plainly regarded as humorous comments to him about his being too old for computer games, about how she perceived his sexuality and she also made a crude comment when he was going to have hernia surgery. We accept that these comments were not put to the Claimant in her evidence, and that Mr Effiong may not have known he had to challenge Mr Deeley's evidence on this point, but in any event, we have no hesitation in accepting Mr Deeley's account. As we have said, we found him to be a credible witness.

Overtime

90. The Claimant says at MM59 that she asked Ms Hutton verbally on various occasions from May to October 2022 for extra Saturday overtime slots and also requested that if there was a spare Saturday it be shared fairly on a rota basis as there were three Ward Clerks and four Saturdays. Ms Hutton says at PH17 that the Claimant did not ask several times for overtime to be equally allocated. Even accounting for the impact of the Claimant's disabilities on her memory, we prefer Ms Hutton's account for the reasons we have given regarding her evidence generally.

91. Ms Hutton inherited from Julie Mitton a practice that overtime was allocated on a first come, first served basis. Adopting that practice, Ms Hutton sent regular emails to her team about overtime requests, a month in advance. We noted:

91.1. The Claimant did not request overtime for August 2022 (though she was off on sick leave from 4 to 29 July 2022 so may not have been present when Ms Hutton emailed the team).

91.2. When Ms Hutton emailed the team on 3 August 2022, after some exchanges the Claimant requested Saturday 10 September which was granted.

91.3. The Claimant requested 25 November 2022 which was granted. Ms Hutton said on this occasion that she would ensure the Claimant got first choice for two Saturdays in December, the Claimant subsequently requesting 3 and 10 December.

The Claimant's point is that each Ward Clerk could select one Saturday per month, but if an extra one became available because someone could no longer do it, when Ms Hutton became the Team Leader, it would always go to Lynsey Flynn.

92. The Claimant made a complaint about overtime in two emails to Ms Hutton on 15 November 2022 (pages 216 and 225), saying that Ms Flynn got more overtime on Saturdays than she did, and that Ms Hutton had gone back on her word about December (because Neil Deeley had now been given 10 December). She made no mention of race, though she did say the arrangements were unfair, that she was being treated differently and was questioning why. Ms Hutton says at PH17 that this was the first time the Claimant raised this issue; we have accepted that.

93. Ms Hutton replied on 21 November 2022 (page 224) to say she had not realised when offering the Claimant first choice of two Saturdays in December that the Saturdays in that month would include Christmas Eve and New Year's Eve, so to ensure fairness she had left it to Ms Flynn and the Claimant to agree who would work what. She felt that if Ms Flynn or Mr Deeley wanted to work two Saturdays, it would not be fair if they ended up working both of 24 and 31 December. She

also wanted to give some shifts to bank staff in case they were needed when Ms Flynn and the Claimant were not available. As she explained in her email, Ms Hutton then set up a 4-week Saturday overtime rota from 7 January 2023. The Claimant remained booked to work two Saturdays in December, but only worked one of the two due to her sickness absence. Ms Hutton's evidence was that if any Saturday became available because someone could not do it, she sent another group email. We accepted that evidence.

94. The Respondent says that part of the problem was that the Claimant's shift began at 15:00, so sometimes bookings had already been made before she saw Ms Hutton's emails. There was no complaint from the Claimant after the rota was introduced. In the grievance appeal outcome (page 493) the Respondent conceded that the initial process for allocating overtime shifts was not fair. The Claimant told us she believes Ms Hutton's actions amounted to race discrimination because Ms Hutton did not like her.

Clothing

95. On 31 October 2022 the Claimant emailed Ms Hutton requesting a fleece jacket as the one she had was 4 years old and second hand; she said that Charlo Bartlett had told her to raise it with her line manager. She also said Lynsey Flynn had received a new one from Ms Bartlett without having to follow the same process. The Claimant does not know if Ms Flynn had a fleece previously. Ms Fernyhough said that Ms Flynn would not have had one at all as she had joined the Respondent sometime after 2018 when the Ward Clerk Department stopped ordering them. We saw no reason to doubt that, not least because Ms Flynn had raised with Paige Hutton being cold on the Unit.

96. On 4 November 2022, Ms Hutton replied that the Ward Clerk Department did not pay for fleeces for Ward Clerks anymore and that the Claimant would need to order one from Voluntary Services, which implied that the Claimant would have to pay for it – page 200. Consistent with that, other Ward Clerks had asked for fleeces months previously and Ms Zambra had told Ms Hutton there was no budget for them. One such Ward Clerk was Lauren Campbell, who is White. Paige Hutton herself bought her own fleece – she too is White – whilst Mr Deeley (who is also White) says at ND11 that he was never given a new fleece jacket and so wore a second-hand one, which was far too big for him.

97. On 7 November 2022, Ms Hutton emailed Ms Bartlett (page 213) who confirmed the next day that she had ordered a fleece for Ms Flynn. Ms Hutton asked why one had not been ordered for the Claimant, saying it seemed a little unfair and requesting that Ms Bartlett do so. Ms Bartlett replied (page 211) to say that she did not tell the Claimant she could not have a fleece but had told her she had ordered the fleeces and some spares. The Claimant says this is untrue. In her 15 June 2023 interview as part of the investigation of the Claimant's grievance (see page 360), Ms Bartlett said she did order fleeces for the Claimant and Ms Flynn, told the Claimant she was doing an order for everybody and that the Claimant would need to bear with her. She added that the Claimant had asked for a medium size and it was put on the list, so that she did not tell the Claimant she could not have one.

98.This is consistent with what Ms Bartlett told us in her oral evidence. She said she had asked everyone on the Ward if they wanted a fleece and ordered 32 in total and had some spares. She ordered fleeces for people of all "different

cultures" as she put it. She also seemed puzzled by the question put to her about the Claimant's race, saying that the Claimant being Asian/Indian "did not mean anything; I was just ordering fleeces". Ms Zambra confirms at JZ21 that there was insufficient budget to supply fleeces to all staff in the Ward Clerks Department. Ms Fernyhough says at AF6 that it was she who authorised their purchase, as her Ward budget could fund them.

99. The Claimant says Ms Zambra discriminated against because she told the Claimant (presumably indirectly, via Ms Hutton) that she had to purchase a fleece. As for Ms Bartlett's conduct, the Claimant says she cannot think of any other reason why Ms Bartlett would have acted as she did.

100. The facts of this particular matter were somewhat difficult to determine. As to what Ms Hutton and Ms Zambra said about it, this can be seen from Ms Hutton's email telling the Claimant she would need to go to Voluntary Services, which would mean paying for it herself. They were clearly in the dark as to Ms Fernyhough's position on ordering fleeces, which is why they took the normal route in this way. What seems to us to have happened is that Ms Fernyhough authorised Ms Bartlett to order fleeces by asking who needed one. We are satisfied that Ms Bartlett's accounts to Paige Hutton by email and to the later grievance investigation were not, on proper scrutiny, inconsistent; the latter was just more detailed. It is unclear why the Claimant did not get a fleece, though Ms Bartlett being absent when they were handed out is likely to have been an important factor, as is the fact that the Claimant started her shifts late, but we are satisfied that Ms Bartlett did not refuse to order one for the Claimant either in the first instance or at all.

Social activities

101. The Claimant told Paige Hutton on 16 December 2022 (PH42) that she felt differently treated to Ms Flynn because when Ms Flynn left work, she received a hug and goodbye but the Claimant did not. The Claimant told us however that she was not saying not being hugged was a detriment. What she was actually referring to was not being invited by email circulation to social events such as a Christmas party for the Unit, involving clinical and non-clinical staff. She does not know whether other Asian staff (she says there are a lot of Filipino nurses) were included or excluded, though she said in oral evidence (for the first time) that she heard Ms Fielding and Mr Martin say not to work on certain Saturdays "because all of the Asians will be in". This was not in her statement, she says, because she was focusing on what happened to her, not others.

102. Ms Fielding strongly denied making any such comment or hearing Mr Martin say it. As to the Christmas party, she, Mr Deeley and Ms Fernyhough described it as being arranged by a poster going up in the staff room for anyone to sign up to. Those who did were then sent emails about menu choices and so on. Ms Fielding thinks she asked the Claimant about the party once and the Claimant said it was not her thing. There were Asian staff at the party, in 2022 and otherwise.

103. We accepted the Respondent's evidence as to these arrangements. We could not accept the Claimant's evidence that comments were made about Asian staff being in on Saturdays. If this had been said, even again taking proper account of the impact of the Claimant's disabilities on her memory, it would have been mentioned in at least one of her Dignity at Work complaint (or grievance), her Claim Form or her statement, all of which she had help to prepare.

Time limits

104. ACAS Early Conciliation was from 8 March 2023 to 19 April 2023, with the Claim Form being presented on 9 May 2023. The Claimant's explanation for the delay in bringing the complaints, for example about the fleece and overtime, was that HR were slow in dealing with her grievances. She did not identify a thread connecting her various complaints.

Law

105. This section summarises the law we took into account in reaching our decision.

106. Case law emphasises that tribunals should not stick slavishly to a list of issues, such that we (and, it must be noted, the Respondent) allowed (in some cases material) departures from the list discussed at the start of the Hearing as it progressed, for example the change in the protected characteristic relied upon for the direct discrimination complaints, which was made during the Claimant's oral evidence. That said, in **Chapman v Simon [1994] IRLR 124**, the Court of Appeal made clear that an employment tribunal's jurisdiction is limited to the complaints that have been made to it. In other words, tribunals can only decide the case presented to them. That was our task, not to decide a different case that might have been presented to us.

Knowledge

107. Paragraph 20 of Schedule 8 to the Act provides:

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

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

108. There is no need to say anything about knowledge of disability as this was conceded in the Respondent's submissions. The burden was on the Respondent to show that it did not know or could not reasonably be expected to know that the Claimant was put to the substantial disadvantage on which she relied for her reasonable adjustment complaints. What was reasonable for the Respondent to have known is for the Tribunal to determine and depends on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z EAT 0273/18** on the question of disability, though there is no reason to think the position is different in relation to knowledge of disadvantage).

Burden of proof

109. Section 136 of the Act provides 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 [which includes employment tribunals] *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.

110. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

111. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

112. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

113. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic.

114. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation be adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

115. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is

satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination. This decision was considered by the EAT in **Field v Steve Pye and Co (KL) Ltd and others [2022] EAT 68**. The EAT said that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored. In such a case, where a tribunal moves straight to the "reason why" question it could only do so on the basis that it has assumed the claimant has passed the stage one threshold, so that the burden was now upon the respondent in the way described above. The EAT went on to say that if at the end of the hearing the tribunal concludes that there is nothing that can suggest that discrimination has occurred and the respondent has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but in fact the complaint would fail at the first stage. If having heard all of the evidence the tribunal concludes that there is some evidence that could indicate discrimination, but nonetheless is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible to reach a conclusion at the second stage only, but there is much to be said for properly grappling with the evidence and deciding whether it is sufficient to switch the burden of proof. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage.

Direct discrimination

116. Section 39 of the Act provides, so far as relevant:

(2) An employer (A) must not discriminate against an employee of A's (B)— …

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service …

(d) by subjecting B to any other detriment.

117. Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". To the extent that the protected characteristic relied upon in this case was disability, section 6(2) makes clear that this means the Claimant's particular disability (or disabilities), in this case those arising from her mental impairments. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

118. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than that afforded to Ms Flynn or a hypothetical comparator, and whether this was because of the Claimant's disability/disabilities.

119. In determining whether the Claimant has been subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view

that in all the circumstances it was to her detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

120. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Disability being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

121. Most often, the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. The Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be a significant influence, in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

Indirect discrimination

122. Section 19 of the Act provides that indirect discrimination occurs when a person (A) applies to another (B) a PCP that is discriminatory in relation to a relevant protected characteristic of B's. This is the case when, according to section 19(2):

(a) A applies, or would apply, [the PCP] to persons with whom B does not share the [relevant protected] characteristic [here, the Claimant's disability or disabilities],

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

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

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

123. Section 23 must be taken into account when determining the question of "group disadvantage" posed by section 19(2)(b). The Claimant bears the burden of proof in respect of the first three steps in section 19(2). The Respondent conceded that both PCPs were capable of being PCPs in principle, so we say no more about the law in relation to that.

124. In relation to the second and third steps, it would be relevant to consider the decisions in **Essop v Home Office [2017] ICR 640** and other cases, although given how the Claimant's case was pursued, we need say nothing about them.

125. In **Pendleton v Derbyshire County Council [2016] IRLR 580** the EAT did not read "particular disadvantage" for these purposes as requiring any particular level or threshold of disadvantage. The term was "apt to cover any disadvantage". There will need to be some basis on which to conclude that this is the case, though in **Homer v Chief Constable of West Yorkshire [2012] ICR 704** Baroness Hale

noted that "the new formulation [in the Act] was not intended to make it more difficult to establish indirect discrimination: quite the reverse … It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply [with the PCP] and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages".

126. When judicial notice can be taken was considered in the employment tribunal context in **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729.** First, there are two broad categories of matters of which judicial notice may be taken: facts that are so notorious or so well established to the knowledge of the court or tribunal that they may be accepted without further enquiry; and other matters that may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources. Secondly, the court or tribunal must take judicial notice of matters directed by statute and of matters that have been so noticed by the well-established practice or precedents of the courts. Thirdly, the court or tribunal has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence. Finally, the party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.

Justification

127. We draw the following principles from the relevant case law concerned with whether a PCP is a proportionate means of achieving a legitimate aim (justification for short):

127.1. The burden of establishing this defence is on the Respondent. What has to be justified is the PCP generally rather than its application to the Claimant.

127.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

127.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer** it was said, approving Mummery LJ **in R (Elias) v Secretary of State for Defence [2006] EWCA Civ. 1293**, and mirroring the decision in **Bilka-Kaufhaus GmbH v Weber Von Hartz [1987] ICR 110**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

127.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of

the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

127.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Essop**.

127.6. The Courts have generally deprecated the idea that cost alone can justify indirect discrimination.

127.7. As Mr Perry submitted, concrete evidence for justification is not always required. The EAT in **Homer [2009] IRLR 262**, stated that "… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions".

127.8. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action but whether what it did was reasonably necessary to achieving the aim.

Harassment

128. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic [here, disability], and
(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

129. The Tribunal was thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to race or disability as the case may be.

130. It is clear that the requirement for the conduct to be "related to" disability or race entails a broader enquiry than whether conduct is because of disability or race as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability or race, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

131. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (she must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the conduct, and all the surrounding context. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

> *A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That … creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …*
>
> *…We accept that not every racially [as it was in that case] slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…*

132. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If she does, then it is plain that the Respondent can have harassed her even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can

whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Reasonable adjustments

133. Section 20 of the Act provides as far as relevant:

(*(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 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.

134. Section 21 provides:

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

135. In respect of the burden of proof, it is for the Claimant to establish the PCP and substantial disadvantage, and to suggest a step to avoid the disadvantage which was reasonable and which the Respondent did not take, although again as the Respondent conceded that the PCPs could be PCPs in law, there is no need for us to say anything further about that at this point, though we note that unwritten expectations can be PCPs – **United First Partners Research v Carreras [2018] EWCA Civ. 323**.

136. "Substantial" disadvantage in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that put the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP put the Claimant at the substantial disadvantage. The disadvantage must relate to the Claimant's disability.

137. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of

taking it, the employer's resources and the resources and support available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

138. A summary of the above can be found in **Environment Agency v Rowan [2008] IRLR 20,** in which the EAT restated guidance on how an employment tribunal should approach such a complaint, saying that tribunals must identify:

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

139. **Rowan** also held (at paragraph 61), subsequently approved in **Rider v Leeds City Council [2012] UKEAT/0243/11**, that what the duty envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining what steps should be taken, thus following **Tarbuck v J Sainsbury's Supermarkets [2006] IRLR 664**.

Time limits

140. As will become obvious from our Analysis, there is no need for us to set out the law in relation to time limits.

Analysis

Direct discrimination

141. As indicated above, the complaints under this heading were set out as harassment complaints in the list of issues compiled by EJ Perry, but it is clear he intended that they be identified as complaints of direct discrimination, and in any event the Claimant's application to clarify her case to that effect just before this Hearing was not disputed.

Social activities

142. As also set out above, the Claimant's case under this heading was not pursued on the basis of Craig Martin not hugging her or giving her kind and supportive comments. Rather, it was pursued as a complaint that she was excluded from social events, specifically the Christmas party.

143. The detriment on which the complaint depends was not made out. The Claimant produced no email or other evidence that she was excluded from the party. The Respondent had no documentary evidence on the matter either, though this was unsurprising given that it was such a late development in the Claimant's

case. Analysing the oral evidence therefore and as set out above, we accepted the following:

143.1. Notice of the party was given by a poster in the staff room on which employees could sign up. There was nothing to suggest the Claimant could not do so.

143.2. Email communications came later, dealing with menu choices, payment and so on. Inevitably the Claimant would not have been included had she not signed the poster.

143.3. Ms Fielding asked the Claimant about the party on one occasion and the Claimant said it was not her thing.

144. Furthermore, the Claimant did not establish facts from which we could conclude that she was less favourably treated than others in this respect, or indeed that her non-attendance at the party was due to race. The little evidence we had was to the contrary, in that we accepted that other Asian staff on the Unit attended, which means that they must have been part of the arrangements for those occasions.

Overtime

145. There were three parts to this complaint, which we deal with in turn:

145.1. The Claimant says she was not given an equal share of overtime from May to October 2022.

145.2. She says that any spare overtime was given to Lynsey Flynn.

145.3. She says that when she complained about the above, she was promised overtime (for December 2022) only for it to be given to a White colleague (this must be Mr Deeley) again.

Not being given an equal share of overtime

146. The Claimant did not establish the detriment on which this part of the complaint relied. The evidence we were taken to showed that she was allocated overtime, including the one date she asked for in September 2022 and the one date she asked for in November 2022 (page 226). Further, according to Ms Hutton's grievance interview in April 2023 (page 319), on at least one occasion in the Summer of 2022 the Claimant was offered the option to be allocated three Saturdays and chose to work one. Further still, for December 2022, she was allocated two Saturdays, which was what she had requested, it was just that one of them was not a date she originally asked for, something we return to below. We were not taken to any evidence establishing that she was allocated fewer Saturdays than Ms Flynn or Mr Deeley. Indeed, page 226 shows that Mr Deeley and the Claimant were both booked to work one Saturday in November. This part of the complaint failed on its facts.

Spare overtime being given to Ms Flynn

147. This part of the complaint also failed on the facts. Again, the Claimant produced no supporting evidence. Although the Respondent did not provide emails from Ms Hutton offering spare Saturdays to the team after an initial allocation, we concluded that this is what she did, based on the clear evidence of how she offered overtime initially each month, and on our acceptance of her very persuasive oral evidence generally.

December 2022

148. As for the third part of the complaint, it is true that Ms Hutton went back on her commitment to give the Claimant whichever two Saturdays for December 2022 she requested, as she acknowledged. There was however no evidence from which we could conclude that this was influenced by considerations of race. Even if there had been sufficient evidence to shift the burden to the Respondent, we were wholly satisfied by Ms Hutton's explanation that when making this commitment she missed the point that two of the five Saturdays fell on 24 and 31 December respectively, and can fully understand why she felt it would be unfair to follow through on her commitment to the Claimant, having realised the situation. Properly analysed, there was in any event no less favourable treatment of the Claimant. She was allocated two Saturdays in December, no-one got more than that, and anyone else who wanted to work two Saturdays that month would have had to work either 24 or 31 December, just like the Claimant.

Overall

149. In relation to all three parts of this complaint, if was any difference in the treatment of the Claimant and her colleagues (and we repeat that the Claimant did not establish a prima facie case that there was), nothing in all of the evidence presented to us suggested that it was influenced consciously or unconsciously by considerations of race. We could very readily therefore go straight to the reason why question, noting that the reasons were:

149.1. The process for allocating overtime, which Ms Hutton adopted from Julie Mitton. It was a first come, first served arrangement – whether for initial or spare allocations – which on occasion might have meant that others got their requests in before the Claimant.

149.2. That was particularly likely to be the case given that the Claimant came on shift later than her colleagues.

150. We were confirmed in our conclusions by the fact that Ms Hutton acted immediately on the Claimant raising concerns and changed the system. That was not Ms Hutton covering up prior discrimination, but rather, evidence of a proactive endeavour on her part to ensure equal treatment and thus evidence of the absence of race discrimination.

151. The grievance appeal outcome acknowledged the unfairness of the previous system, but there is a clear explanation of why that system could be seen as having been unfair which does not reasonably lead to an inference of discrimination. The Claimant said that the reason why Paige Hutton acted as she did was that she did not like the Claimant. We do not think that is established on the evidence, and in any event, Ms Hutton acted towards the Claimant in a professional manner throughout.

Clothing

152. On the question of the provision of a fleece, we deal first with the involvement of Ms Zambra and Ms Hutton. It is difficult to see how Ms Zambra can be said to have been involved in the matter at all, as it was Ms Hutton who referred the Claimant to Voluntary Services. As far as Ms Hutton is concerned, there was no evidence from which we could conclude in the absence of an adequate explanation that race played any part in influencing her actions in any way:

152.1. She was very obviously unaware of any arrangements made by Ms Fernyhough. There was no evidence that she arranged for Ms Flynn to get a free fleece.

152.2. Her email to the Claimant referring her to Voluntary Services was thus no more than the application of arrangements that had applied since 2018. There was no budget in the Ward Clerk Department for fleeces, and thus Voluntary Services was the only port of call.

152.3. Once the Claimant raised the issue, as with the overtime, Ms Hutton took immediate action, raising it with Charlo Bartlett. That of itself is clear evidence of the absence of discrimination by Ms Hutton.

In so far as this complaint rested against Ms Zambra and Ms Hutton, it failed for these reasons.

153. As to Ms Bartlett, although as indicated above the factual position was not easy to establish on the evidence presented to us, we found as a fact that Ms Bartlett did not refuse to order a fleece for the Claimant. That effectively disposes of the complaint against her, but we would also add the following:

153.1. As we have said, on proper scrutiny, Ms Bartlett's email to Ms Hutton at page 211 and her later account to the Dignity at Work investigation at page 360 did not contradict. Both say she ordered fleeces; the latter was simply more detailed.

153.2. We drew no adverse inference from Ms Bartlett being called to give evidence at the last minute, given that the alleged detriment set out in the list of issues following case management was clearly levelled at Ms Zambra, not Ms Bartlett. That it was levelled also against Ms Bartlett was only clarified in the Claimant's oral evidence, and in any event, the Respondent did call her, albeit late in the day.

153.3. We agree with Mr Perry that there was nothing else to suggest that race played any part in whatever Ms Bartlett did, even had we come to different conclusions on the facts.

153.4. We have accepted that she ordered fleeces for people of multiple different races, including Asian staff.

153.5. We were particularly struck by her comment that the Claimant being Asian/ Indian "did not mean anything; I was just ordering fleeces".

154. In summary, the Claimant did not establish facts from which we could conclude either that she was less favourably treated than others or that race was in any sense a factor in Ms Bartlett's actions, whatever they were.

155. In relation to this allegation overall, our conclusions were confirmed by the fact that a White Ward Clerk had previously been told by Ms Hutton that she would have to pay for a fleece, that Ms Hutton (who is also White) did the same, and that Mr Deeley (he too is White) only ever had an old fleece, just like the Claimant. This complaint also failed.

Complaints

156. This complaint was also in two parts, relating to the alleged failure to addres the Claimant's complaints of 4 November 2022 and 16 December 2022 respectively. This was clarified to be a complaint of direct disability discrimination, not race discrimination, the Claimant relying on her mental health impairments.

157. We deal first with two preliminary points. First, we have found that Ms Zambra was in all likelihood aware of those impairments at the time, or at least of the Claimant's mental ill-health generally. We do not say at all that she misled us in saying otherwise; we simply noted Ms Hutton's contrary evidence, related to what was clear from the Claimant's file, including the 2018 OH report. Secondly, we also noted that the Claimant at no point made clear which parts of the Respondent's policy – or in truth, even which policy – it failed to comply with. The complaint could have failed on that basis, but we nevertheless considered it on the basis of the Respondent allegedly having failed to address the complaints properly or at all in a general sense. We deal below with the two complaints in turn.

4 November 2022

158. In relation to 4 November 2022, Paige Hutton cannot have discriminated against the Claimant, or even have subjected her to a detriment, for the simple reason that the Claimant did not want to meet with her. This means that the detriment on which the Claimant relied against Ms Hutton was thus not made out and that the reason for Ms Hutton's inaction was clearly nothing to do with the Claimant's mental health. She acted immediately on receipt of the complaint to offer a discussion, but her offer was refused.

159. As for Ms Zambra, again the evidence did not support the Claimant's case. First, the detriment she relied on was not established in that:

159.1. Ms Zambra did meet with her when the Claimant asked her to.

159.2. She offered further investigation, but the Claimant did not want to take the matter further. That was clearly the reason why Ms Zambra took no further action.

159.3. She also made clear that the Claimant must inform her and Ms Hutton of any issues, so that they could be addressed.

159.4. The Claimant was unable to say what more Ms Zambra should have done.

160. Mr Effiong suggested that Ms Zambra should have overridden the Claimant's wishes and taken further steps to investigate the complaint anyway, or at least discuss it with HR, as she did after the second complaint. We could not accept that Ms Zambra not doing this permitted an inference of disability discrimination because:

160.1. On the second occasion the Claimant provided specifics of what had happened, whereas on this occasion she made only general allegations.

160.2. More importantly, the Claimant was in a very different position second time round, and it is unsurprising Ms Zambra went further on that occasion, given her understandable concerns for the Claimant's welfare.

161. The Claimant did not prove facts from which an inference of discrimination could be drawn, and this part of the complaint failed accordingly.

16 December 2022

162. As for the complaint made on 16 December 2022, the Claimant did not identify anything that Ms Hutton and/or Ms Zambra should have done beyond what we have outlined in our findings of fact, with one exception which we come to below. This complaint also failed on the facts accordingly, in that the Claimant did not establish the detriment on which she relied. The facts are:

162.1. On 16 December itself, Ms Hutton met with and listened to the Claimant.

162.2. Ms Hutton immediately raised the matter with her line manager, Ms Zambra.

162.3. Both provided reassurance to the Claimant that the matter would be treated seriously.

162.4. Ms Zambra spoke again with the Claimant on 19 December, twice.

162.5. She also, more pertinently for the purposes of this complaint, spoke with Andrea Fernyhough and HR.

162.6. Ms Fernyhough almost immediately spoke with Ruth Fielding and Sarah Warr.

162.7. Very shortly thereafter, the Respondent commenced the process of getting statements, Ms Zambra making clear to Ms Fernyhough that she wanted them promptly.

162.8. Julie Clarke spoke with the Claimant on 21 December, making clear that the events of 16 December were being taken seriously.

162.9. Katie Allen kept in touch with the Claimant throughout January 2023.

162.10. The Claimant indicated to Ms Allen on 13 January 2023 that she was not sure if she wanted the matter taken further, but on 10 February 2023 Ms Zambra made clear to Melanie Sutton that it would have to be considered regardless of the Claimant's intentions.

162.11. Once the Claimant raised a grievance against them, Ms Zambra and Ms Hutton could do no more.

163. As we have said, the only thing the Claimant could point to in support of this allegation was that Jane Zambra could not reassure her when they spoke on 19 December 2022 that she would not experience the same treatment again. Whether that was said or not, it was not in Ms Zambra's gift to give that guarantee,

certainly not at that stage. Moreover, the Claimant's case is that Ms Zambra said this because she thought the Claimant's mental health meant she was exaggerating what had happened, an assertion which is entirely contrary to Ms Zambra's actions summarised above which show she took the complaint very seriously indeed. There is no evidence that she thought it exaggerated.

164. In summary, the Claimant did not prove facts from which we could infer that her mental health disabilities played any part in the Respondent's actions or inactions. The reasons for its conduct are very clear from what we have summarised above. We also note that the Claimant provided no evidence of how a comparator was or would have been treated. That was not of itself fatal to the complaint, but confirmed our conclusions. We thought it highly unlikely that anyone in materially the same circumstances as the Claimant would have been treated differently, not least because Ms Zambra took HR advice immediately and there is no reason to think that HR would have suggested a different course of action with anyone else. It is also telling that the Claimant changed her case as to which protected characteristic was at play in the investigation process, which in our judgment served to confirm that disability was not.

Race harassment

165. Turning to race harassment, we can deal briefly with the complaint regarding exclusion from the Christmas party. Given our findings of fact and our conclusions on the parallel direct discrimination complaint, the Claimant has not established the unwanted conduct on which she relies, nor any relation to race in the arrangements that were made. This complaint failed accordingly.

166. Focussing therefore on the events of 16 December 2022, the facts as we found them to be were:

166.1. Mr Martin swore at the Claimant, using the f-word.

166.2. Ms Fielding was harsh with her and raised her voice.

166.3. Mr Martin did not respond to the Claimant's comment or question about racism.

167. Mr Martin swearing and Ruth Fielding being harsh and raising her voice was all undoubtedly unwanted conduct. Whilst certainly in Ms Fielding's case we did not consider, given the heat of the moment, that it had the requisite intention (to violate the Claimant's dignity or create an intimidating etc. environment) we were also in no doubt that the conduct, certainly of Mr Martin and Ms Fielding combined, had the requisite effect on the Claimant. The Respondent did not dispute that. The Claimant's account of how she felt on that occasion and Ms Hutton's account of how the Claimant seemed to her, together with the Claimant's and Ms Zambra's accounts of how she was when they spoke on 19 December, was ample evidence of how the conduct was perceived very badly by the Claimant. We were satisfied that it was reasonable for the conduct to have the statutory effect given that it was in public, was at the hands of two people who were senior to the Claimant, and took place within an apparently short space of time.

168. The crucial question therefore was whether the conduct was related to race. Obviously, it was not inherently so related, as is the case with some comments or

behaviour that come before tribunals. What we had to consider therefore was whether there was any connection to race, taking matters broadly and overall.

169. We did not think that the Claimant established facts from which we could conclude that this conduct was related to race. We noted the following:

169.1. Comparisons are not necessary to establish harassment, though they can be instructive. The Claimant relied on a comparison with how Lynsey Flynn was treated, but we did not think the fact that Ms Flynn was treated differently to the Claimant (she was not sworn at, treated harshly or spoken to with a raised voice) supported her case. She did not do what the Claimant did, or at the very least was not perceived by Mr Martin and Ms Fielding (or other colleagues) as doing so, in that unlike the Claimant she was not someone, or seen as someone, who seated patients in the wrong chairs.

169.2. The immediate context of the unwanted conduct is crucial to note. First, the Claimant had been told by Ms Fielding many times before that she should not seat patients in vacant chairs without being sure that they were the allocated chairs. Secondly, relevant to both Ms Fielding's and Mr Martin's conduct, this had not been a problem on the day in question until the Claimant arrived on shift. At the very least, that is how they genuinely saw it.

169.3. That broad context is confirmed by the Claimant's own (essentially private) email to Mr Deeley at pages 219 to 220, less than a month before, that the nurses did not like her because she put patients in vacant chairs (she also said they could not sit in her chair at her desk any longer because she was occupying it).

169.4. The conduct in question was therefore plainly related to what the Claimant did, and what she had done repeatedly before, not who she is. This is confirmed by Mr Deeley's evidence that it was a source of some amusement that the Claimant walked around with a clipboard when it was known that she was making mistakes regarding seating.

169.5. The grievance appeal outcome rightly apologised for what had happened on 16 December, but no inference can be drawn from that to a connection to race.

169.6. There was nothing in the background facts from which an inference of a connection to race could be drawn. We explicitly rejected the Claimant's evidence, offered at the last minute to support her case on this point, that Ms Fielding and Mr Martin said not to work on certain Saturdays "because the Asians are in".

170. The complaint related to Ms Fielding's conduct and Mr Martin swearing therefore failed.

171. As for Mr Martin not responding to the Claimant when she either asked him why he treated her differently, or stated that he or the Unit were racist, it was not entirely clear whether this was a separate complaint of harassment, or simply included in the list of issues because the Claimant believed it supported her case that what happened beforehand was race-based conduct. What the Claimant told us was that Mr Martin's silence proved he was racist, which suggests that her intention was the latter. We nevertheless assessed it as a distinct complaint, and noted the following:

171.1. The Claimant did not articulate how the conduct of not responding to her was unwanted. Indeed, it barely featured in her oral evidence at all. It is also questionable whether a non-response to a question or statement could be conduct at all. We can imagine some situations where it might be, but were not satisfied that it was in this case.

171.2. Whilst the context of Mr Martin's non-response may well have been race – assuming that the Claimant stated that he or the department were racist – it is the conduct itself that has to be related to race. The Claimant did not establish facts from which we could conclude that Mr Martin's silence was so related. We conclude that it was not, first because we have concluded that his swearing was not so related and secondly because the absence of a response in a heated and momentary situation was understandable.

171.3. Further, it would be difficult to infer the statutory purpose from silence, and the Claimant did lead any evidence or make any statement as to what the effect of the silence was upon her.

172. For completeness, we add that we were not invited to draw an adverse inference from Mr Martin not being called as a witness to this Hearing, and in any event would not have done so given the rarity of former employees getting involved in such matters. Specifically in this case, the Respondent conceded from the outset that he had sworn and there were other witnesses – either via statements and oral testimony such as Ms Hutton or in contemporaneous documents such as Ms Warr – who could give an account of what happened or (in Ms Hutton's case) what the Claimant told her had happened.

173. The complaints of race harassment failed.

Disability harassment

174. The complaint of disability harassment relates of course to the conduct of Mr Deeley on 25 April 2023. The first question was whether it was unwanted conduct. Mr Perry said in submissions that it "may have been unwanted". This is not a high threshold to get over, and so we concluded that it was unwanted in that it was a comment the Claimant would have preferred Mr Deeley not to make.

175. It was obviously and inherently related to disability. That was not disputed. It was also agreed that the conduct did not have the purpose of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The question of crucial importance was whether it had that effect. Section 26(4) of the Act identifies three matters tribunals should have regard to in answering that question. We take each in turn.

The Claimant's perception

176. There were four things we took into account in considering the Claimant's perception of the conduct:

176.1. The first was what the Claimant said to us, in her statement and oral evidence. She said that she felt the comment was mocking her disability. Mr Perry invited us to find that the Claimant's comment in her statement that what Mr Deeley said was "tantamount to harassment" meant that she doubted it was. We did not think it would be appropriate to draw that conclusion from that comment.

176.2. Of more importance was the evidence of the Claimant's perception at the time. First, on the day itself, there was the rest of the WhatsApp exchange. After the comment in question, the Claimant did not reply. Ten minutes later, Mr Deeley messaged her saying he was hating his job. Within three minutes of that, the Claimant sent two further messages engaging with his comment. The exchange then ended. The Claimant says she did not want to be impolite, but in our judgment, the fact she carried on the conversation – albeit in a limited way – shows that the comment had not affected her as much as she now says it did, though we accept that it does not show a complete lack of effect on her, given the absence of any further conversation with Mr Deeley on that day.

176.3. Secondly, the Claimant's email to Paige Hutton the next day is also important (pages 333 to 334). We note that it started with the Claimant expressing concern about colleagues knowing why she was off work and saying she felt pressurised by Mr Deeley's enquiries to return to work, and we also note that this formed the bulk of the email. It was over halfway through that the Claimant referred to the comment, saying "I don't appreciate anyone 'mocking my disabilities'", that she had not mentioned disability and did not want to be labelled. This in our judgment was very much an analytical response to what Mr Deeley had said, more than an emotionally upset or indignant response. She then returned to the question of her return to work.

176.4. We also agree with the Respondent that the Claimant's refusal to admit that she and Mr Deeley were friends, as we have found was the case, calls into question the extent to which her evidence as to how she perceived his comment can be trusted. Mr Effiong said that Mr Deeley did not ask the Claimant about her absence for several months, in support of his submission that they were no more than acquaintances, but there were previous exchanges whilst the Claimant was off sick which we have not seen and so we cannot draw any conclusions to that effect.

Circumstances of the case

177. As to the broader circumstances of the case, the friendship between the Claimant and Mr Deeley was an important circumstance for us to take into account, as were the following:

177.1. The Claimant's comments to Mr Deeley on other occasions, using humour about his sexuality and mocking him about an intimate medical issue, as well as about his age because he enjoys gaming.

177.2. The comment "LOL" within the WhatsApp exchange itself, which indicates (and indicated to Mr Deeley) the nature of that particular conversation.

178. We do not draw any conclusion against the Claimant for not disclosing the full history of all her WhatsApp exchanges with Mr Deeley (he deleted them after this incident), as the Tribunal's Order did not make entirely clear whether she should disclose all of the messages on 25 April 2023 or the full history.

Reasonable to have the requisite effect?

179. As to whether it was reasonable for the comment to have the requisite effect, in isolation it was inappropriate, unwise and in poor humour, but particularly taking

account of the context we have set out, it was not reasonable for it to have the effect. The strength and nature of certain relationships can create a sense of comfort and confidence for comments to be made that, whether they should be made or not in and of themselves, are believed and understood to be acceptable when they would not be in other contexts. The relationship between the Claimant and Mr Deeley was evidently such a relationship.

Summary

180. In summary, taking account of:

180.1. The relationship between the Claimant and Mr Deeley;

180.2. The friendly and mildly humorous nature of the conversation itself up to the point of the comment in question;

180.3. How it seems to us the Claimant perceived the comment at the time; and

180.4. The strength of the statutory word "violation" of dignity,

the Claimant did not establish that the comment had that effect. Further, whilst we acknowledge that a one-off comment can create the requisite environment, we do not think it had that effect either given the private nature of the conversation and who made the comment, again noting the strength of the statutory words – "intimidating, hostile, degrading, humiliating or offensive".

181. This complaint failed accordingly.

Reasonable adjustments

182. Turning to the complaints of failure to make reasonable adjustments, knowledge of disability was conceded and so no more need be said about that. We thus dealt with the remaining constituent parts of the complaints in turn.

PCPs

183. The first alleged PCP was that from March to December 2022, Ward Clerks on the Unit were expected to manoeuvre patients in wheelchairs to their place of appointment. Whilst the Respondent accepted in principle that this could be a PCP (and we agree – see **Carreras**), we found as a fact that in the period in question, there was no such expectation. We do not need to repeat the reasons for that conclusion. The PCP on which the Claimant relied for this complaint was not made out on the facts and this particular complaint failed on that basis.

184. As for the second PCP, it was agreed during submissions to be that the Respondent provided standard desks and related equipment (whether to Ward Clerks on the Unit or to staff generally makes no difference). The Respondent accepted that this could be a PCP in law. Again, we agree. The Claimant could have brought this as an auxiliary aid case, but it was not identified as such at the case management stage nor once she was represented, and it was not for us to raise the point, particularly given Mr Effiong's involvement. In any event, it is difficult to see that any disadvantage accrued to the Claimant in proceeding as she did, namely on the basis of the PCP. The Respondent accepted that it had the

PCP as refined. That was not only a common-sense concession, Ms Allen's evidence confirmed it.

Substantial disadvantage

185. The next question was whether the provision of a standard desk and equipment put the Claimant at a substantial disadvantage compared to persons who are not disabled, in that it created discomfort and pain for her.

186. Mr Perry sought to cast some doubt on this, pointing out that the Claimant sought extra hours and worked overtime, all of which additional time was presumably worked at a standard desk with standard equipment. He nevertheless conceded that we were likely to accept what the Claimant said in her impact statement (pages 54 to 56) about the adverse effects she experienced, specifically that she was regularly in pain, which we did. We add that the Respondent's witnesses – Ms Allen for example – accepted that the Claimant experienced discomfort and/or pain related to her physical disabilities from the use of a standard desk and equipment.

187. "Substantial" means more than minor or trivial, and we were satisfied that what the Claimant described met that test. We did not need to dwell long on whether there was a substantial disadvantage compared to persons who were not disabled. To use the language of the case law, it is clear that provision of standard desks and equipment would "bite harder" on persons with the Claimant's disabilities – particularly the combination of those affecting her back, neck, arms, hands and wrists – than on those not disabled.

Knowledge of disadvantage

188. The Claimant drew to the Respondent's attention by her email to Julie Mitton on 22 November 2021 that she needed a rest for her hands/wrists. Whilst of itself that email did not say enough to give the Respondent actual knowledge that she was in pain or discomfort as a result of the provision of standard equipment (i.e. without such a rest), it seems to us highly likely that if it had made the OH referral Ms Mitton and Ms Allen intended, this would have come to its attention. We know things can slip through the net, but it would have been reasonable to make the referral in light of the Claimant's email, and it is reasonable to assume the reason why the Claimant was seeking the rest – namely pain and/or discomfort – would have emerged from it. We thus concluded that the Respondent ought reasonably to have known of the Claimant's discomfort and/or pain in her wrists/hands by mid-December 2021.

189. As to pain and/or discomfort in her back, on the Claimant's own case, this was not an issue until March 2022. It cannot be said therefore that the Respondent knew or should reasonably have known about it before then. The OH report of 30 September 2019 referred to significant pain in the Claimant's neck, shoulders and arms, but did not relate this to having a standard chair and equipment. The report of 13 November 2019 said that the Claimant should get up from her desk but did not say that a standard desk and equipment was creating pain or discomfort for her. None of the OH reports before 2022 were to this effect, nor did the Claimant draw the issue to the Respondent's attention before then.

190. As the Respondent submits therefore, it only had knowledge of this disadvantage when Paige Hutton shadowed the Claimant on 22 June 2022 and

could not reasonably have been expected to know before, given the Claimant's own case as to when she was in discomfort because of her chair, and given that the Respondent had been regularly in touch with OH on other issues on and off for some time without this point emerging.

191. Finally, any further pain or discomfort occasioned by the absence of a footrest or desk extension only came to the Respondent's actual knowledge as a result of the DSE assessment on 28 March 2023 and for the same reasons – its regular conversations with the Claimant about other health matters and its regular engagement with OH – the Respondent could not reasonably have known sooner.

What steps could the Respondent have taken to avoid the substantial disadvantage (of pain and/or discomfort)?

192. It was agreed that the steps the Respondent could have taken to avoid the disadvantage were to provide a wrist rest, orthopaedic chair, footrest and desk extension.

Was it reasonable for the Respondent to take those steps and did it fail to take them?

193. The Respondent agreed that all of the steps were reasonable to take in and of themselves. Other than the provision of a rest for the Claimant's hands/wrists however, it is also agreed that they were not taken by the time the Claimant presented her Claim Form on 8 May 2023. The question in relation to the chair, footrest and desk extension was therefore <u>when</u> it was reasonable for the Respondent to provide them and whether it failed to do so at that point.

194. To repeat our summary of the relevant law, whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it. The question before us was how the adjustments, or any of them, might have had the effect of preventing the provision of a standard desk, chair and equipment (the PCP) putting the Claimant at a substantial disadvantage (of pain and/or discomfort) compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

Wrist/hand rest

195. Dealing with the rest for the Claimant's wrists/hands first, it is clear from the notes of the meeting on 17 August 2022 at page 171, that the Claimant had been given a rest at some point before then. It is also clear from those notes that she had found it useful.

196. What was not said to us by the Claimant however is when the rest was provided (after she mentioned it on 22 November 2021). She did not say either that, whenever it was provided, the Respondent was in breach of the duty to make reasonable adjustments by not providing it sooner. The focus of her case was very much on the non-provision of an orthopaedic chair, which we will come to below. Notwithstanding the mix up between Ms Mitton and Ms Allen about the referral to OH, there was no evidence that was put to us on the basis of which we could

conclude that the Respondent failed to take the reasonable step of providing a wrist or hand rest at a reasonable time. That complaint therefore failed.

Footrest and desk extension

197. Given that the provision of a footrest and desk extension was only raised by the DSE assessment, and were in place by the time the Claimant returned to work in the Summer of 2023, it cannot be said there was any failure to take these steps. It would not have helped to overcome the disadvantage by providing them sooner given that the Claimant was not at work.

Orthopaedic chair

198. As to the chair, as we have said, the duty to make this reasonable adjustment was engaged and the Respondent had knowledge of the substantial disadvantage by 22 June 2022. It had not been provided by 8 May 2023 when the Claim Form was presented. Was it reasonable for the Respondent to provide it before then?

199. We did not think that it was a reasonable step to take until a DSE assessment had been carried out. That certainly appears to have been OH's view, and it was also ours. In fact, the substantial disadvantage could have been made worse by the provision of a chair without such an assessment. The Claimant delayed in completing the form by two months from the date on which the Respondent had the required knowledge, until 29 August 2022, and we were in no doubt that she had to complete it as the person best placed to explain what she was experiencing and how she was feeling. As at 29 August 2022 therefore, the Respondent had not failed to take a reasonable step.

200. It is also clear that providing the chair whilst the Claimant was on sick leave from 19 December 2022 to 8 May 2023 (the date of the Claim Form) would not have helped to overcome the substantial disadvantage because the Claimant was not experiencing the disadvantage, given she was not at work. It was not said at any point in this case that the failure to provide an orthopaedic chair either led to her absence or prevented her returning to work sooner than she did (in July 2023).

201. The core question for us to grapple with therefore was whether the Respondent failed to take the reasonable step of providing an orthopaedic chair in the period from 29 August 2022 until 16 December 2022, the Claimant's last day at work before her absence. We were careful to note that it was the provision of the orthopaedic chair, not a trial chair or some other adjustment, that we had to assess – that was the case the Respondent had been asked to meet and the case that was argued by the parties in the course of the Hearing.

202. The period in question was 16 weeks. What happened in that period was that the DSE assessment was arranged for 4 October 2022 and then the Ergonomics Assessor – the sole Ergonomics Assessor for the whole of the Respondent's workforce which is spread over four sites – was off sick until the New Year. Chairs take between 6 and 12 weeks to arrive from the point of order. We accept that the Respondent has no control over that; it does not build them itself.

203. The Respondent is a large employer and notwithstanding that the NHS, and the public sector generally, face constraints on funding, it is well-resourced. That said, it is clear that all of the following would need to take place before a chair was in place:

203.1. An ergonomics assessment would have to be arranged on a reasonably convenient date for the Claimant and the Ergonomics Assessor.

203.2. The assessment would then take place, a report would be written, and a decision taken (possibly in discussion with the Claimant) as to whether an orthopaedic chair should be provided.

203.3. There would then need to be a two-week trial of a chair to test overall suitability for the Claimant.

203.4. Thereafter, assuming a successful trial, a chair would be ordered and delivered, which takes between 6 and 12 weeks.

204. After careful consideration, we concluded that it was not a failure to take the reasonable step of providing the chair prior to the Claimant going on leave, given all that the Respondent rightly needed to do and what needed to take place to get to that point. Assuming an average of 9 weeks from order of the chair to delivery, and a 2-week trial, leaves 5 weeks to take all of the other steps. We did not think it could be said that the failure to complete them in that timescale can be said to have been a failure to take a reasonable step.

205. The complaint failed on this basis. We would however say that we can entirely see why the Claimant brought this particular complaint given that in bald terms it took over a year to provide the chair. We were not in a position to make formal recommendations of course, but would urge the Respondent to look again at the resources it makes available for DSE assessments, and at the process it follows for the specific task of providing ergonomic/orthopaedic chairs. Some parts of that process are out of its control of course, but such matters as are within its control such as the supply of a trial chair and carrying out assessments promptly could certainly be reviewed and improved.

Indirect discrimination

206. Much of our analysis of the complaints of indirect discrimination rested on our conclusions in respect of the complaints of failure to make reasonable adjustments, and so we do not repeat all of that detail.

207. The first PCP was not made out on the facts, and so nothing further need be said about the complaint which depended on that. The Respondent agreed that the second PCP, namely the provision of standard desks and equipment, was applied to persons not having the Claimant's particular physical disabilities. The first question for us to consider therefore was whether the PCP put persons with the Claimant's particular disabilities at a particular disadvantage when compared with persons who did not have those disabilities, in that they would be more likely to experience pain.

208. As Mr Perry anticipated we would, we were content to take judicial notice of the fact that someone with the combination of the Claimant's physical disabilities, or indeed any one of them, would be at a particular disadvantage (namely pain or at least discomfort) compared to people who did not have those disabilities or any of them. We did not require that to be proven by evidence.

209. The next question was whether the Claimant was put to the particular disadvantage. There is no discernible difference between substantial disadvantage for reasonable adjustments purposes and particular disadvantage for indirect discrimination purposes. We therefore concluded that she was.

210. The final question therefore was that of justification, namely whether the PCP (the provision of standard desks and equipment to all Ward Clerks on the Unit or indeed to the Respondent's employees generally) was a proportionate means of achieving a legitimate aim.

211. The first question was whether the Respondent had one or more legitimate aims. We were conscious that the PCP was only finally refined into its current form during submissions and therefore did not hold the Respondent only to the aims stated in the list of issues agreed at the start of the Hearing. The aims relied on were twofold:

211.1. Saving cost, or as it might more properly be said, appropriate allocation of the Respondent's funds. We were satisfied that this was implicit in the pleaded aim.

211.2. Taking what was set out in the list of issues, but using different words, ensuring that specialist equipment provided to employees is relevant to the conditions they have – effectively to protect health and safety.

212. We were in no doubt that individually, and certainly when taken together, these were legitimate aims. That is so clear that there is no need to say anything further about them.

213. That left us to determine whether the provision of standard desks and equipment was a proportionate means of achieving those aims. We concluded that it was. First, it was certainly rationally connected to achieving the aim of proper allocation of resources and protection of health and safety because to provide standard equipment to all and to depart from that when a need arises and a proper assessment has taken place very obviously protects the Respondent's resources as a public sector employer and avoids providing what may end up causing harm to employees for whom adjustments are not suitable. Secondly, it is difficult to see an alternative approach which would secure both aims. Thirdly, we know as a fact that the Respondent was committed to and did provide non-standard equipment when required because it did so for the Claimant. That approach, doubtless adopted by all (or at least most) employers, strikes the right balance between achieving the aims and the adverse effect of the PCP on employees such as the Claimant.

214. The PCP was therefore justified and this complaint also failed.

Time limits

215. As none of the complaints succeeded, there was no need for us to consider the question of time limits.

Note: This was a remote hearing on 26 April 2024 only. There was no objection to that part of the case being heard remotely. The form of remote hearing was video.

Employment Judge Faulkner
Date: 5 June 2024