Case No: 1602976/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms R Gibbins

Respondent: Cardiff and Vale University Local Health Board

Heard at: Cardiff, in person

On: 17, 18, 19, 20, 23 and 24 September (and Tribunal panel only in chambers 25 October 2024)

Before: Employment Judge R Harfield, Mr M Vine, Mrs M Humphries

Representation:
Claimant: The Claimant represented herself
Respondent: Mr Walters (Counsel)

RESERVED JUDGMENT

1. The complaints of harassment related to sex at paragraphs 4.1.12, and 4.1.20 in the List of Issues succeed and are upheld;

2. The remaining complaints of harassment related to sex, direct sex discrimination, pregnancy and maternity discrimination, and indirect sex discrimination do not succeed either on their merits or because they were presented out of time, and they are dismissed;

3. The successful complaints will be listed for a remedy hearing

REASONS

1. Introduction

1.1 The ET1 Claim Form was presented on 3 December 2023, following Acas early conciliation between 24 September 2023 and 5 November 2023. The complaints made are direct sex discrimination, pregnancy/maternity discrimination, harassment related to sex and indirect sex discrimination. The case was case managed by Employment Judge Harfield at a case management hearing on 1 March 2024. A draft List of Issues was prepared following the Claimant submitting some further information about her complaints and a further discussion with EJ Harfield at that hearing. There was a further case management hearing before EJ Moore on 18 June 2024 where the final hearing was listed and directions made to get ready for that hearing. EJ Moore in her case management orders confirmed the List of Issues remained accurate.

1.2 We had a written statement from[1] and heard oral evidence from the Claimant. For the Respondent we heard evidence from Claire Crisp, B4 Haematology Ward Manger ("CC"); Maria Kearns, at the time Deputy Ward Manager on B4 Haematology Ward ("MK"); Karen Gillespie, at the time also a Deputy Ward Manager on B4 Haematology Ward ("KG"); Gipsy Joseph, Registered Nurse in Haematology("GJ"); Joanne Bagshawe, Senior Nurse, Haematology ("JB"); Lucy Smith, at the time People Services Manager ("LS"); Laura Proddow, Ward Manager, B5 Nephrology Ward ("LP"); and Claire Main, at the time Director of Nursing for Specialist Services ("CM").

1.3 We had a hearing file extending to 879 pages. Numbers in brackets [ ] refer to page numbers in that file. We had a supplemental hearing file of 17 pages. Numbers in brackets and initials [SB] refer to pages in that file. Both parties provided written closing submissions and oral submissions. For procedural economy we do not set out a summary of all the submissions in this Judgment. We do address particular points in our findings below. But we also confirm we took all submissions into account, even if not directly referred to below. We were not able to complete our deliberations within the listed hearing and the Tribunal panel held a further deliberation day in chambers on 25 October 2024. EJ Harfield apologies for the delay in delivering this written Judgment which was caused by the pressure of other judicial commitments.

2. Issues to be decided

2.1 The List of Issues is appended to this Judgment at Appendix 1.

3. The relevant legal principles

Prohibition against discrimination and harassment in work

3.1 Section 39(2) of the Equality Act 2010 prohibits discrimination in work. It reads:

> *"An employer (A) must not discriminate against an employee of A's (B) –*
> *(a) as to B's terms of employment;*
> *(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;*
> *(c) by dismissing B;*
> *(d) by subjecting B to any other detriment."*

3.2 Section 40 separately prohibits harassment, stating:

> "*An employer (A) must not, in relation to employment by A, harass a person (B) –*
> *(a) who is an employee of A's;"*

3.3 Section 212(1) provides that in the Equality Act "detriment" does not [subject to subsection (5)] include conduct which amounts to harassment. In essence, if an alleged detriment is found to be harassment, it cannot also be a discrimination detriment; the harassment complaint takes precedence.

3.4 What is actually discrimination or harassment is then defined elsewhere in the Equality Act. In particular, "Discrimination" is defined under Chapter 2 ("Prohibited Conduct") of Part 2 of the Act and there are different types of discrimination set out there including direct discrimination, indirect discrimination and pregnancy/maternity discrimination.

Direct Discrimination

3.5 Section 13 is concerned with "Direct Discrimination" and states in subsection (1):

[1] During the hearing the Claimant submitted an amended witness statement because there were significant typographical errors in the original version.

(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…

3.6 The "protected characteristics" are listed in section 4. They include "sex" and, separately (for some purposes), "pregnancy and maternity".

3.7 Breastfeeding is not a listed protected characteristic. But Section 13 goes on to state:

"(6) If the protected characteristic is sex –
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
(8) This section is subject to sections 17(6) and 18(7)."

3.8 So on the face of the legislation the specific provision that less favourable treatment of a woman because she is breastfeeding is disapplied in work cases, courtesy of Section 13(7). Section 13(7) has in turn been more recently repealed by Regulation 2 of the Equality Act 2010 (Amendment) Regulations 2023 which came into effect on 1 January 2024. That repealing of Section 13(7) does not have retrospective effect.

3.9 The explanatory note to the amendment Regulations says: "*Under the Recast Directive, pregnancy and maternity discrimination constitutes direct discrimination on grounds of sex, and in the case of Otero Ramos the European Court of Justice determined that this includes less favourable treatment because of breastfeeding. Claimants can therefore currently bring a work-related claim for direct sex discrimination because of breastfeeding, despite section 13(7) of the 2010 Act, by relying upon the interpretative effects of retained EU law."*

3.10 An explanatory note of course does not of itself have statutory force, but it encapsulates one interpretation of the position of retained EU law. Importantly in this case before us the Respondent has expressly conceded that the Claimant can bring a complaint of direct sex discrimination because she is a breastfeeding woman provided such discrimination has occurred outside of the protected period defined in Section 18 (summarised below). It is accepted by the Respondent that Section 13(7) is not a bar to such a complaint. But the Respondent emphasises that the Claimant would still need to show that any less favourable treatment was because she is a woman or because she was a breastfeeding woman (and indeed that a comparator is required – but we assess that further below).

3.11 The definition of direct discrimination in Section 13, on the face of it, requires a comparison – B must, because of a protected characteristic, be less favourably treated than "others". Section 23 (1) provides (so far as material): "*On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."* An archetypal direct sex discrimination complaint would therefore be where, because of sex, a woman has been treated less favourably than how a man, in not materially different circumstances, would be treated (or vice versa). The definition of direct discrimination is often analysed as comprising two elements – (1) whether the claimant received less favourable treatment than the appropriate comparator and (2) whether the less favourable treatment was because of the relevant protected characteristic (the "reason why" issue). However, it has long been recognised that these are two aspects of what is essentially a single question. The seminal case here is Shamoon v Chief Constable of the Royal Ulster Constabulary [2003]

UKHL11, [2003] ICR 337, where it was said in some cases that two step approach will be helpful, but in other cases, especially where the identity of the relevant comparator is a matter of dispute, the sequential analysis may give rise to needless problems. Lord Nicholls said: "*tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.*"

3.12 In terms of this "reason why" issue, the caselaw establishes that there can be two different kinds of inquiry. In some cases the decision-maker will have overtly applied a criterion based on a protected characteristic and the causation test will be made out on that basis. In other cases, where the ostensible criterion is something else, the decision maker may still have been materially influenced in their decision by the protected characteristic, whether consciously or unconsciously. In those cases it is necessary for the tribunal to look at the mental processes to establish what caused the decision maker to do as they did; R (E) v Governing Body of JFS [2009] UKSC 15, [2010] 2 AC 728. It is not a "but for" test. Likewise, the fact a protected characteristic is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean it formed part of the reason for the treatment.

3.13 The predecessor legislation to the Equality Act 2010 was the Sex Discrimination Act 1975. As originally drafted, it did not contain a specific provision concerned with pregnancy and maternity discrimination. The UK and EU [CJEU] courts have had to, over time, grapple with the question of how to interpret the sex discrimination provisions to cover pregnancy and maternity discrimination, and whether there should be a comparator in pregnancy and maternity cases, given that pregnancy is a condition unique to biological women. If so, the next question was who the comparator should be. Whilst there is now specific protection in Section 18 (summarised below) governing pregnancy and maternity discrimination, and which does not require a statutory comparator, these case law principles remain relevant where a particular complaint falls outside Section 18.

3.14 In Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, C-177/88, [1992] ICR 325, the CJEU held that a decision not to recruit a woman because of the cost of funding her maternity absence constituted direct discrimination on the grounds of her sex, and was contrary to the Equal Treatment Directive. The CJEU said:

"… [O]nly women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy."

3.15 In Webb v EMO Air Cargo (UK) Ltd, C-32/93, [1994] QB 718, the CJEU held it would be a breach of the Equal Treatment Directive to dismiss a pregnant employee even in circumstances where she had been recruited to cover the maternity leave of a colleague with whom her own maternity absence would overlap. The CJEU said: "*the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex";* and, as it pointed out, such dismissal will typically be because of the worker's absence from work during maternity leave. The CJEU also addressed a suggestion by the House of Lords that dismissal because of maternity absence was not discriminatory on grounds of sex because the essential element was the employee's absence rather than the reason for it. In particular, it had been argued that the absence could be equated with sickness absence, and that a hypothetical male with such a sickness absence would be treated the same. The CJEU said: "*Pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds … .*" When the case returned to the House of Lords,

Lord Keith said: "*The ruling of the Court of Justice proceeds on an interpretation of the broad principles dealt with in articles 2(1) and 5(1) of Council Directive (76/207/E.E.C.). Sections 1(1)(a) and 5(3) of the Act of 1975 set out a more precise test of unlawful discrimination, and the problem is how to fit the terms of that test into the ruling. It seems to me that the only way of doing so is to hold that, in a case where a woman is engaged for an indefinite period, the fact that the reason why she will be temporarily unavailable for work at a time when to her knowledge her services will be particularly required is pregnancy is a circumstance relevant to her case, being a circumstance which could not be present in the case of the hypothetical man."*

3.16 In City of London Police v Geldart 2021 ICR 1329 CA the Court of Appeal examined some of these earlier authorities. The claimant in that case was a police officer on maternity leave. Police Officers, due to a quirk in how their terms and regulations are governed, fall outside much of Section 18 of the Equality Act, and so the complaint had to be brought as a direct sex discrimination complaint. The claimant in that case did not receive 23 weeks of a London Allowance when on maternity leave. The Police Regulations had been misunderstood and the sum treated as a form of pay, when it should have been dealt with as an allowance under the Police Regulations. The claimant argued that this reason should be characterised as maternity absence and was because of the claimant's sex. The Court of Appeal held that the reason why the police officer claimant was mistakenly not paid the London allowance beyond 18 weeks was due to her absence/non availability for work and that the particular reason for her absence was immaterial. Her maternity was not the reason why the allowance ceased to be paid after 18 weeks; it was absence in itself (in conjunction with the misunderstanding of what the Police Regulations said).

3.17 The Court of Appeal went on to say:

"*65 On the basis of that conclusion, the direct discrimination claim fails whether or not the Claimant was obliged to identify a comparator: she loses straightforwardly on the basis that the treatment complained of was not because of her sex (or, applying Webb v EMO, because of her maternity absence). But in fact, as Lord Nicholls says in Shamoon, that finding also necessarily answers the less favourable treatment question: on the Commissioner's (mis)understanding that London Allowance fell to be treated as a form of pay, it would not have been paid to a man who was unavailable for work for 23 weeks in circumstances not covered by any express provision.*

66 One way that Ms Chudleigh put her case was to submit that the Commissioner would not have paid London Allowance to a man who remained absent because of illness following the expiry of his sick pay entitlement. That is correct as a matter of fact, and it illustrates the fundamental point that officers who are not available for work are not entitled to be paid without special provision. But it is not itself the point: long-term maternity leave and long-term sickness cannot be equated and indeed attract different entitlements.

67 I should say something more about the relationship between the ET's issues (3) and (4), because it is relevant to issue (C) on this appeal. Although I can understand why the ET took them separately, they are in fact intertwined in a similar way to the two issues defined in Shamoon. If it were correct to characterise the reason for the non-payment of London Allowance as "maternity" or "maternity absence" then it would indeed appear to follow from Webb v EMO, as the ET held on issue (3), that it was unnecessary to identify a male comparator in the same circumstances. If,

however, as I would hold, the reason is simply "absence", then Webb v EMO does not apply and the ET's finding on issue (3) was wrong. As Mr Leach accepted, the ET made life difficult for itself by addressing issue (3) before issue (4).” [Our emphasis]

3.18 We take from this that it is often a good idea to concentrate in the first instance on the “reason why” question. If the reason is maternity or maternity absence, then there would be (applying Webb) no need to identify a male comparator. On the other hand, if the reason for the treatment is not maternity/maternity absence then a comparator would be needed. Mr Walters in his written submissions refers to an extract from the editors of Harvey’s at paragraph 265 which refers to pregnancy or maternity leave cases falling outside of Section 18, being brought as complaints of sex discrimination and that: *“It appears that such a context a comparison can be made with sick men. There is some support for this proposition in the European case that established this principle (Brown v Rentokil…)”* But we do not interpret the Court of Appeal as saying that a comparator is required in all Section 13 complaints (as opposed to some). Moreover, the case law that Harvey’s then addresses is concerned with a specific issue of maternity related sickness that occurs after the end of maternity leave. The Court of Appeal in Geldart said such case law was not sufficiently close to the issues in Geldart to be useful (because like this case before us, Geldart was not concerned with dismissal for a maternity related illness outside the protected period). Our interpretation of Geldart also seems to accord with that of the IDS Employment Law Handbook also quoted by Mr Walters in his written submissions.

3.19 As to the need for a comparator the Respondent also refers to the decision of the Court of Appeal in Madarassy v Nomura International plc [2007] ICR 867 where Mummery LJ said:

“*18. The submission that a hypothetical male comparator is always irrelevant in cases of alleged pregnancy discrimination is incorrect. The mere fact that a tribunal compared Ms Madarassy's treatment with that of a hypothetical male comparator does not disclose an error of law in this case. It is necessary to take account of the factual nature of the particular allegation. As is clear, for example, from Webb v. EMO there is no place for a hypothetical male comparator in the case of dismissal of a female employee for becoming or being pregnant.*

119. It does not follow, however, that it is wrong for an employment tribunal to make a comparison with a hypothetical male comparator for the purpose of determining whether pregnancy or some other reason was the ground for the particular treatment of a pregnant female employee. As explained earlier, two routes are open to the tribunal and both of them are legitimate. The first route is to identify the attributes of a hypothetical comparator. The second is to go straight to the question why the complainant was treated as she was. There was no error of law on taking the first route of the hypothetical comparator."

3.20 The Respondent asserts that the Court of Appeal in Geldart did not suggest Madarassy was an incorrect assertion of the law. But the Court of Appeal in Geldart did say: “*Ms Chudleigh submitted that that supported her case. It may do, but the reasoning is rather compressed, and I prefer not to put it at the centre of my own reasoning.”* We therefore proceed with caution on that basis.

3.21 Mr Walters also cites an extract from the Equality Act Code of Practice on Employment at paragraphs 8.4 to 8.7 that culminates with saying that unfavourable treatment under Section 18 “*cannot be treated as direct sex discrimination (for which a comparator, actual or hypothetical, is required).”* But the extract does include a detailed or nuanced assessment of the law, such as that undertaken in Geldart.

3.22 Ultimately the Respondent argues that parliament has identified that for direct discrimination complaints there must be less favourable treatment and that whilst there is scope to bring a Section 13 claim based on the protected characteristic of pregnancy/maternity, parliament has not stipulated there need not be a comparator. It is argued that the differences in wording of Section 13 and Section 18 must be deliberate. It is said that the drafting of the Equality Act postdated Webb, and that it is not permissible to read down the words of the statute to the effect that where the alleged discrimination is sex relating to pregnancy/maternity outside of the protected period as defined by Section 18 the requirement for a comparator is obsolete. It is further observed that in the first instance decision of Mellor (a breastfeeding case) leading counsel for the claimant in that case accepted there was a need for a comparator.

3.23 We do not agree. We consider that we should follow the approach of the Court of Appeal in Geldart and focus on the reason for the treatment. If it is pregnancy/maternity/breastfeeding it is likely that a statutory comparator is not required following Webb. (That said it does not mean that, depending on the context, that evidential comparators may be of assistance when assessing the "reason why.") On the other hand, if the reason is not a prescribed factor, a comparator would be needed. We would add there have been numerous occasions since the original Sex Discrimination Act where wording has been read down to give effect to retained EU Law principles, and indeed Geldart itself postdates the Equality Act coming into force, drafted in the way it is drafted. It is also not a matter for us to speculate as to why leading counsel took the approach they did in another, separate first instance employment tribunal decision in Mellor.

Pregnancy and maternity discrimination

3.24 Section 18 Equality Act is a specific defining provision for pregnancy and maternity discrimination in "work cases." It reads, so far as material (and at the relevant time):

"(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it

(3)…

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4)."

3.25 Section 18 therefore requires only that the treatment complained of be "unfavourable", rather than, as in section 13, that it should be less favourable than that accorded to a comparator. There is no requirement for a statutory comparator. Unfavourable treatment has been characterised as a measurement against "an objective sense of that which is adverse as compared to that which is beneficial": Trustees of Swansea University Pension & Assurance Scheme v Williams UKEAT/0415/14 (which went on further appeal to the Court of Appeal and Supreme Court).

3.26 The unfavourable treatment must be "because of[2]" pregnancy or because of absence on maternity leave (for example). In Interserve FM Limited v Tuleikyte 2017 IRLR 615 the Court of Appeal confirmed that this still requires a "reason why" analysis. It was said, that unless a case was a "criterion case" where the criterion is inherently based on or indissociably linked to the protected characteristic, "*It follows that it is necessary to show that the reason or grounds for the treatment – whether conscious or subconscious – must be absence on maternity leave and the mere fact that a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish unlawful direct discrimination under section 18.*"

Risk assessments for pregnant and breastfeeding workers

3.27 There is no statutory right to time off work for breastfeeding and there is also no legislation that requires the provision of facilities for breastfeeding or expressing. The Workplace (Health, Safety and Welfare) Regulations 1992 requires employers to provide suitable facilities for breastfeeding mothers to rest (including facilities to lie down) and to provide adequate rest and meal breaks. The EU Pregnant Workers Directive makes provision for the health and safety of pregnant workers, workers who have recently given birth and workers who are breastfeeding. Article 4(1) requires employers to assess the health and safety risks posed to these three groups of workers by certain physical, biological and chemical agents, industrial processes and working conditions. Employers must avoid exposing these workers to such risks by temporarily adjusting their working conditions or hours. If that is not feasible the employer must move them to another job, and as a last resort grant paid leave.

3.28 The EU Pregnant Workers Directive is implemented in the UK by the Management of Health and Safety at Work Regulations 1999 ("the Regulations") which provide for both general and individual risk assessments. Under Regulation 3(1) and 16(1) the general risk assessments must be suitable and sufficient and include an assessment of particular risks to new or expectant mothers and their babies where the workforce includes women of child bearing age and the work is of a kind that could involve risk to the health and safety of a new or expectant mother or her baby from any processes or working conditions or physical, biological or chemical agents. A new or expectant mother includes a woman who is breastfeeding. Under Regulation 18(1) there is then a need to undertake an individual risk assessment once an employee gives written notice to an employer that she is pregnant, or has given birth within the last 6 months. The employer must consider whether measures to avoid risks identified by the general risk assessment will sufficiently

[2] i.e. a material influence

avoid risks to the individual employee and if not to take additional action to avoid the risks by changing aspects of the working conditions or hours, or offering suitable alternative employment or ultimately suspension on full pay.

3.29 The Regulations require the risk assessment to be "suitable and sufficient". Case law such as Stevenson v JM Skinner and Co EAT 0584/07 and R v Chargot Ltd and others 2009 ICR 263 establishes that a risk assessment is directed at situations where there is a material risk to health and safety which any reasonable person would appreciate and take steps to guard against.

3.30 Case law also says that there is no absolute legal requirement for the employer to meet with the employee when carrying out the risk assessment. It will depend on the circumstances of the case; O'Neill v Buckinghamshire County Council 2010 IRLR 384 EAT. An employer with 5 or more employees must keep a record of its findings but there is no requirement to hand over the results to the employee in writing. It can be compliant for an employer to discuss the findings and the steps being taken to avoid risks at a meeting with the employee; Stevenson v JM Skinner and Co EAT 0854/07.

3.31 Undue delay in carrying out a risk assessment can mean an employer is in breach of its obligations under the Regulations. In Home Farm Trust Ltd v Nnachi EAT 0400/07 a 13 day delay was found to amount to a failure to carry out a risk assessment where in the meantime the employee was exposed to lifting, carrying and aggressive situations. In contrast in a first instance decision of Marshall and another v Woolstone Community Centre ET Case No 1201459/08 an equivalent period for an employer to arrange a risk assessment meeting was found not to be a breach, where the employee was not carrying out any activities in the meantime which were inherently unsafe. On those facts the tribunal found it was a reasonable time to deal with the matter.

3.32 There is a body of case law that establishes a failure to carry out a risk assessment due under the Regulations may be discrimination under the Equality Act. Many of the cases are concerned with pregnancy, rather than breastfeeding. In Hardman v Mallon t/a Orchard Lodge Nursing Home 2002 IRLR 516 the EAT said:

"In our judgment the proper approach is to construe those statutes by reference to the Equal Treatment Directive and to the Pregnant Workers Directive. It is not necessary for the treatment by the Respondent of the Applicant to be compared with the Respondent's treatment of a comparable male employee, or a non pregnant female employee – see Webb v EMO Air Cargo (UK) Ltd (No 2) [1995] IRLR 645. In the context of the dismissal of a pregnant woman on the grounds of her pregnancy the House of Lords, applying the judgment of the European Court of Justice on a reference by the House, found that pregnancy was a relevant circumstance within the meaning of Section 5(3), with the consequence that no male employee was necessary. Thus, if the basis of the treatment is pregnancy, it is unlawful, irrespective of the Respondent's comparable treatment of men, or for that matter, non-pregnant women. Application of the Webb principle was provided in Brown v Rentokill Limited [1998] ICR 790 and Pederson [1999] IRLR 55. The former is a dismissal case, the latter is a case of disparate treatment of, on the one hand illness, and on the other, pregnancy.

The proper approach in the construction of applicable treatment is to consider not just dismissal but working conditions. We hold that the scope of the judgment of the European Court in Pedersen, albeit directed at dismissal, is wide enough to include working conditions and to require consideration of the special protection which is to be given to women during and after pregnancy – see paragraphs 14 to 22 of the judgment. As the Court puts it, the protection of a woman's biological condition during and after pregnancy indications a special relationship which has

to be protected. One way in which it is protected is by carrying out a risk assessment pursuant to the Management Regulations. Failure to do so impacts disparately on pregnant workers. It is, of course, a duty on all employers to carry out a risk assessment but in respect of a pregnant worker a failure to carry out such a risk assessment, in our judgment, is discrimination. It is the application of the same rule in different situations having an unfavourable impact on a particularly protected worker, here, a pregnant worker. This, direct application of the second part of the European Court's judgment to the answer to the first question in paragraphs 30 and 31 indicates discrimination."

3.33 Hardman predated amendments to the then Sex Discrimination Act which explicitly prohibited discrimination on grounds of pregnant and maternity leave (what is now Section 18 Equality Act). Hardman was then followed in Stevenson v JM Skinner and Co EAT 0584/07. In O'Neill v Buckinghamshire County Council UKEAT/0020/09/JOJ the EAT reviewed case law in the field and the decision of the Court of Appeal in Madarassy v Nomura International Plc [2007] IRLR 246. The EAT said:

"*Mr Hignett suggests that the Madarassy decision requires three elements; firstly that it must be shown that the employer was under an obligation to carry out a risk assessment, secondly that there was a failure, and thirdly that there was resulting detriment from that failure. The Tribunal in answering the first two elements in the negative did not go on to consider the third element. On the basis of the Hardman case we do not believe that a proof of detriment is necessary. Indeed Mummery LJ, in referring to the EAT decision in Hardman in paragraph 133 of Madarassy spoke of the "automatic unlawful discrimination which occurs in such a case." Certainly HHJ McMullen's decision would appear to support the contention that if obligation and failure is established, discrimination results."*

3.34 Yet in Indigo Design Build and Management Ltd and anor v Martinez EAT 0020/14 the EAT said there is no automatic finding of discrimination and that a failure to carry out a risk assessment relating to pregnancy or maternity may be, but is not necessarily, because of pregnancy or maternity leave. The EAT said a tribunal has to look at the reason for the treatment in question i.e. whether the employer has applied a criterion that is inherently based on the protected characteristic, or it is otherwise necessary to look at the mental processes of the alleged discriminator. The EAT did not, however, analyse the law in Hardman or O'Neill.

3.35 There is then the decision of the CJEU in 2017 in Otero Ramos v Galician Health Service C-531/15. The CJEU said:

"*59 It follows that, the condition of a breastfeeding woman being intimately related to maternity, and in particular "to pregnancy or maternity leave", workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth.*

60 Accordingly any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling within the scope of Article 2(2)(c) of Directive 2006/54 and therefore constitutes direct discrimination on grounds of sex…

62 As the Advocate General stated in point 57 of her Opinion, whether the risks posed by the work of a breastfeeding worker have not been assessed in conformity with the requirements of Article 4(1) of Directive 92/85, the worker concerned and her child are deprived of the protection they should receive under that directive, since they are likely to be exposed to the potential risks the existence of which was not correctly established in the course of the risk assessment of the work of the worker in question. In that regard, a breastfeeding worker may not be treated in

the same way as any other worker, since her specific situation necessarily requires special treatment on the part of the employer.

63. Accordingly, failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of Article 4(1) of Directive 92/85 must be regarded as less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of that directive and constitutes, as appears from paragraph 60 above, direct discrimination on grounds of sex within the meaning of Article 2(2)(c) of Directive 2006/54."

3.36 The approach and analysis undertaken by the CJEU is similar to that in Hardman.

3.37 It was not suggested to us by the Respondent that Brexit and the European Union (Withdrawal) Act 2018 affected how we should treat the decision in Otero Ramos or other EU law/authorities.

Harassment related to sex

3.38 Section 26 of the Equality Act defines harassment as:

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

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

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

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the circumstances of the case;

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

3.39 Under Section 26(5) sex is one of the relevant protected characteristics, but pregnancy and maternity are not specifically listed.

3.40 In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the EAT set out a three-step test for establishing whether harassment has occurred:

- was there unwanted conduct;
- did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them[3]; and
- was it related to a protected characteristic.

3.41 The tribunal must consider both whether the claimant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The

[3] These are sometimes referred to as a "proscribed consequences" by way of short hand

tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

3.42 In Grant v HM Land Registry [2011] IRLR 748 the Court of Appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly material. A tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment. The Court of Appeal also said: "*It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.*" In Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13 it was also said by the EAT: "*The word violating is a strong word. Offending against dignity; hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

3.43 The phrase "related to" a protected characteristic in a harassment complaint is a different, broader test from whether the conduct is "because of" a protected characteristic in a direct discrimination complaint. But it does have its limits. The conduct complained about must still relate to the protected characteristic, which is a matter for the tribunal to determine based on all the facts as found. It was said in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and Heads UKEAT/0039/19 the "related to" test may be satisfied by looking at the motivation of the individuals concerned but it is not the necessary or only possible route. It was also said:

"Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Indirect Discrimination

3.44 Section 19 of the Equality Act says:

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

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

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

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

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

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

3.45 Section 18 applies to the protected characteristic of sex, but not pregnancy/maternity.

3.46 A provision, criterion or practice (PCP) must have an element of repetition about it, or at least the potential to be repeated. It cannot be a one off act applied solely to a claimant and must at least be the way in which things generally are or will be done: Ishola v Transport for London 2020 ICR 1204. The prohibition on indirect discrimination is intended to equalise outcomes for those with different protected characteristics. The PCP must be capable of being applied to people who do and do not share the claimant's protected characteristic. In Rutherford v Secretary of State for Trade and Industry (No 2) [2006] UKHL 19 Baroness Hale said: "*indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question.*" Therefore, where the protected characteristic is sex the PCP must be sensibly capable of being applied to men and women.

Burden of Proof under the Equality Act 2010

3.47 The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

"(2) if there are facts from which the Court (which includes a Tribunal) 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.

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

3.48 Consequently, it is for a claimant to prove facts from which the tribunal could infer (absent explanation from the respondent) that discrimination has taken place. If such facts have been made out to the tribunal's satisfaction, applying the balance of probabilities, the second stage is engaged. At the second stage the burden shifts to the respondent to prove, again on the balance of probabilities, that the treatment in question was "in *no sense whatsoever*" because of the prohibited reason / that the protected characteristic was not a ground for the treatment in question/ or justify the PCP in an indirect claim. A tribunal would normally expect cogent evidence to discharge that burden of proof.

3.49 In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931, as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Here it is important to note that although the concept of the shifting burden of proof involves that two-stage process, the analysis should only be conducted once the tribunal has heard all the evidence.

3.50 Further, as to what is required to discharge the burden at the first stage; it must be something more than a difference in protected characteristic and a difference in

treatment. It was said that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It is not necessarily an error of law for a tribunal to effectively assume the burden has shifted and look to the respondent to provide an explanation for the treatment in question. It was said in Hewage that the burden of proof provision may have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. But the burden of proof provisions do require careful attention where there is room for doubt as to the facts necessary to establish discrimination; see Field v Steve Pye &Co [2022] EAT 68 and the important guidance there at paragraph 41 onwards.

Time Limits in Discrimination Cases

3.51 The initial time limit for complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination complained about. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, time is extended, at least, by the period of conciliation.

3.52 Under Section 123(3) of the Equality Act conduct extending over a period is to be treated as done at the end of the period. A continuing course of conduct might amount to an act extending over a period; Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96.

3.53 Under Section 123(3) a failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on a failure to do something when either P does an act inconsistent with doing it, or if P does not do an inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it. A tribunal may consider a complaint out of time if it considers it just and equitable to do so in the relevant circumstances.

4. Findings of fact

Introduction

4.1 We do not have to make findings on all the evidential points in dispute in this case to decide the Issues. Where we do have to making findings, we decided any dispute by applying the balance of probabilities.

4.2 The Claimant has worked for the Respondent at their Heath Hospital site since May 2019 as a Health Care Support Worker. At the start of the material events the Claimant worked on Ward B4 Haematology.

4.3 On 8 February 2021 the Claimant emailed CC about her return to work from her first period of maternity leave, which was due to end in July 2021. Within that email the Claimant said she was planning to continue breastfeeding on her return to work [93]. The Respondent has Combining Breastfeeding and Returning to Work Guidelines starting at [490]. These say that as a public health facing organisation the Respondent wishes to support its staff to breastfeed their babies for as long as they wish. The Guidelines say that the line manager is required to assess the workplace to ensure there are no risks to the breastfeeding employee arising from any processes, working conditions, physical, biological and chemical agents, using the general risk assessment form. If the risk assessment reveals a risk the employer must do all that is reasonable to remove it or prevent the employee's

exposure to it. The guidelines note that the employer is legally required to provide somewhere for pregnancy and breastfeeding employees to rest. It then says: "*The employer is encouraged to provide a private, healthy and safe environment for the employee to express and store milk. Managers should arrange for employees who wish to express milk during their working hours to have access to a private room to allow them to do this. Ideally it should be close to their work area to make this as easy as possible for them. An office with a comfortable chair and a "Do Not Disturb" sign may be sufficient to meet this requirement. The toilet is not a suitable place for expressing milk. The breastfeeding employee will provide any expressing equipment and cool bag required. Milk or cool bags stored in the fridge should be clearly labelled. The employer may need to consider temporary adjustments to working conditions or hours of work; for example working shorter shifts, extra breaks for expressing milk, avoiding night work or overnight stays.*"

2021 – provision of a lockable room

4.4 There is a factual dispute about when the Respondent was made aware the Claimant wanted an internally lockable room to maintain her privacy whilst expressing on her return to work. The Claimant's case is that following her 8 February 2021 email there was a series of meetings at which arrangements for her return were discussed, including breastfeeding. The thrust of the Claimant's case was that having a lockable room was discussed earlier than 26 July 2021, but she did not identify a particular date.

4.5 CC in evidence could not identify a date. JB said in evidence that the request for a lock would have been no more than 3 months prior to the Claimant's return. But JB then said, when taken to some email evidence about ordering the lock, that she had no reason to suppose that CC had not acted efficiently in ordering it and she could remember one occasion on which it was raised, in a Microsoft Teams meeting in which both she and CC were present.

4.6 We know from the documents that there was a discussion on 26 July 2021 because the Claimant emailed JB that day saying: "*thank you for taking the time to talk today with me.*" It is evident from the email that a big topic of the discussion was the Claimant's ongoing flexible working request, which she was taking on to appeal. But it appears to us likely that there was also a discussion that day about the rooms that may be available for expressing because that same day JB emailed CC about scheduling in night shifts for the Claimant's return to work and said: "*Also to confirm arrangements re: Robyn's requirement to express whilst on duty, in privacy (I am hoping the carpenter would have been to put an internal lock onto the office door by this point). We shall also find out about any other facilities that might be suitable as well*" [102]. Also on 26 July MK emailed a Ms Swandt [99] saying they needed to be able to lock the office door but did not have the key and could Ms Swandt ask Estates for a new lock. The office door is a reference to CC's office door (also referred to as the Ward Manager's office) which she had offered for the Claimant to use whilst expressing, as it was likely to be vacant most of the time the Claimant wanted to use it (as the Claimant mainly worked night shifts) and was on the B4 Ward.

4.7 Thereafter, the next day on 27 July CC asked as Ms Swambo [98] to pick up the task as she thought Ms Swandt may not have had time to do it. CC said a key pad system needed to be fitted immediately due to a member of staff returning from maternity leave needing on site breastfeeding facilities. JB then intervened to say she thought it was just a basic slide lock that was needed as a keypad might delay things and be more costly, and if they got a key cut it may get lost [98]. JB said they only needed the ability to lock the door from the inside. Also on 27 July CC reported to JB, Carrie Symes in HR and Mr Thomas (the Claimant's Unison representative) that Helen was looking into an internal lock for the inside of the

office door to provide privacy for breastfeeding. CC said she had also asked Helen to make a laminated sign the Claimant could place on the door to say: please do not disturb privacy required [101]. CC also said the risk assessment would be done on the Friday of the Claimant's return and she asked Ms Symes to send a list of risk assessments and links. Ms Symes sent through the Breastfeeding at Work Policy and a link to the corporate policies saying that they included a general risk assessment for return [100].

4.8 Balancing the evidence before us, we are not satisfied that there was a discussion about the provision of an internally locking door prior to 26 July 2021. We consider there is insufficient evidence to allow us to specifically identify any other earlier date.

4.9 We do, however, find on the balance of probabilities that on 26 July 2021 there was a discussion about the Claimant's wish to express on her return, what rooms might be suitable and available, that the Ward Manager's office was not lockable from the inside, that the Claimant wanted a lockable room to maintain her privacy, and that there was an indication a lock would be fitted prior to her return to work on 6th August 2021. CC's evidence is that the Claimant knew the lock might not be fitted prior to the Claimant's return. On the balance of probabilities, we do not find that the Claimant was aware that a lock was not likely to be fitted in time, or that there was simply an indication they would try to get one sourced as soon as they could. Such an assertion does not reflect JB's email where JB said she hoped the carpenter would have fitted a lock by the time of the Claimant's return, and that it only needed to be a slide lock i.e. at the time it was thought to be a simple, quick request. The assertion also does not reflect the email sent by the Claimant on 6 August 2021, on her actual first day back in work, when the Claimant emailed JB and others to say: "*I arrived for my shift this morning to discover that my breastfeeding requirements have still not been sorted. I was given a sign to put on the door and told to put a chair up against the door as there is no lock. It is so undignified to be asked to prop a chair up against a door to express and also it's a fire risk…"* [104]. If the fitting of a lock was just a longer term ambition, we do not consider the Claimant would have been so disgruntled by its absence on her return to work.

2021 – risk assessments

4.10 On the Claimant's first day back in work on 6 August, CC was not in work. The need for a risk assessment had been raised in the pre-return to work discussions. CC had said a risk assessment would be done for the Claimant on the Claimant's return. On 5 August, following Ms Symes' email, CC spent some time looking for risk assessment documents but was looking for a specific breastfeeding/expressing and Covid shielding risk assessment document and could not find one. CC did not realise at the time that she was just to complete a general risk assessment document.

4.11 On 6 August MK was in charge on the Ward. MK told the Claimant CC had left a "to do" list which included carrying out risk assessments but there was no risk assessment document ready and available to complete. The Claimant also discovered there was no lock on the office door. The Claimant says, and we accept, that MK told her to push a chair up against the door to stop anyone coming in as there was no lock. The Claimant says she felt vulnerable, degraded and concerned for her privacy.

4.12 At the start of the shift MK was also busy, engaged, one on one with a patient. The Claimant considered that MK would not be able to do the risk assessment documents even if they were available and the Claimant decided to leave work, telling MK she would be going home until the risk assessments were ready to be

completed. At 9:44am she emailed JB, CC and others about her breastfeeding requirements not having been sorted (as above) and also saying: "*No risk assessments have been done, ideally they should have been done before my return but I was happy to come in today and for them to be completed by Claire this morning as previously arranged. I did not feel safe to stay without the risk assessments being completed and I feel very upset that still I am unable to express privately. I am going to do some mandatory training at home on the computer for the rest of the day as that's what I was going to be doing on shift. I explained to Maria who was on shift that I was going home until the risk assessments had been done and I would do the mandatory training that I was going to be doing on shift today on my computer at home. I feel so let down and upset. I was ready to get back into the swing of things today.*"

4.13 MK said in evidence that if she was one to one with a patient that morning it would only have been for a short time, because she would have been acting as Ward Manager that day in CC's absence. We accept that evidence.

4.14 The Claimant says her risk assessments were carried out the next day. The general risk assessment has a handwritten date on it of either 6 or 8 August and a typed date of 6 August. The risk assessment [105] identified the risks of there not being sufficient time for expressing due to shortages of staff and no appropriate space to express and no privacy. By way of further action to take it says that there was a lockable Clinical Nurse Specialist room that was busy during working hours but accessible on nights and weekends. CC said in evidence that in fact that room was not ideal because once locked the room could not be opened from the outside, meaning that if the Claimant had an accident it would be difficult for anyone to enter. CC also said in evidence that the Clinical Nurse Specialist often worked late into the evening and so the room would not always be available when the Claimant wanted access; hence why CC's office had been offered to the Claimant with the lock to be fitted and it was the Respondent's preference that CC's office be used. The risk assessment then identified that CC's office was available, was not locked, but the "do not disturb" sign was available. The risk assessment identified that all managers and co-ordinators within the directorate were to be aware of the Claimant's needs to provide additional support and allow sufficient access/time to express.

4.15 The general risk assessment also identified the risk of exposure to chemotherapy and other hazardous agents within the clinical area which could impact the Claimant's ability to express and the risk of exposure to harmful procedures which could impact the Claimant's safety.

4.16 On 7 August KG completed a separate Covid risk assessment [109]. The Claimant had a risk factor of "1" identified due to Asthma but handwritten on the sheet is also "+7 as previously advised to Shield. Total - 8". CC's evidence is that there was an agreement that the Claimant would be allocated to work on green wards because the Claimant had previously shielded during the first wave of the pandemic and had not yet had her second Covid vaccine. A green ward was where patients were confirmed to be Covid-19 negative. A red ward was for patients with active Covid status; there were no red areas in Haematology at the time. There was an amber area, A4, where patients were waiting for Covid19 swab results for at least 72 hours. KG's evidence was likewise that she was aware that the Claimant had shielded in the first wave and KG therefore thought it appropriate to agree the Claimant would continue to work on green areas until the Claimant had her second Covid 19 vaccination.

4.17 MK said that she recalls the ward being very busy and there were staffing issues at the time, and she cannot now remember if the expressing risk assessment was done on 6 August or after and if there were delays then why. MK says she would

have done it as soon as reasonably practicable. Whilst it is not entirely clear who completed the general risk assessment and when, we thought it most likely that MK completed it on 6 August after the Claimant had left. It is possible that on 7 August KG then ran through both risk assessment documents with the Claimant. But the ultimate outcome was that there was a risk identified of the Claimant (as a breastfeeding mother) being exposed to chemotherapy and other hazardous agents and also under the Covid risk assessment a need to be allocated to work on green wards. The risk assessments had been completed and gone through with the Claimant by or on 7 August 2021.

Claimant's further concerns following her return to work

4.18 On 29 August 2021 the Claimant emailed CC, JB, Ms Symes and Mr Thomas saying she wanted to raise a few issues she had been experiencing, but most upsetting was her night shift the night before when she said a male staff member burst through the door whilst she was expressing. The Claimant said it was an accident, but she felt exposed, undignified and very embarrassed. She said that when she was expressing again at 4:30am, she told everyone she would be in the office expressing, put the sign on the door but one of the bank staff on A4 barged in. The Claimant said she asked the bank staff member to stop as the Claimant was expressing, but the staff member said she needed to put her time sheet on the table, continued to enter and gave the Claimant her time sheet. The Claimant says she was so upset she could not continue to express. The Claimant said she knew she could use the other office which had keys, but on some occasions there had been nurses in there doing work so she had got used to using the office. The Claimant said that 3 times people had walked in. She said she had also experienced negative comments about breastfeeding, for example about how long she was intending to continue breastfeeding for (that are not a part of this case in terms of being specific allegations before us). The Claimant said she had spent the rest of the shift in extreme discomfort and was holding back the tears and cried as soon as she got in her car. She said there was still no lock on the door and did not know what else could be suggested but the thought of being barged in on again was too distressing [110].

4.19 The Claimant says that the lockable room was only accessible on a night shift and she did use it on occasion when vacant, but that she would express for the first time at 8pm and at 8pm there would frequently still be staff in there. She said if she did her first pumping session in CCs' office she would continue to use CC's office for the rest of the night because it meant she did not have to move the pump around to avoid the risk of milk entering and damaging the pump.

4.20 Both JB and CC spoke with the Claimant, but the Claimant refused to name the staff involved. CC says the Claimant was happy for a blanket message to go out to all staff advising them not to enter the Ward Manager's office at night as it was in use. CC entered CAV Core Values into the Communications File and signposted staff to read and acknowledge this and that on 2 September a general message was sent to all clinical staff via the Staff Whats App Group stating the Ward Manager's Office was being used at night and if there was a notice on the door then staff were not to enter. CC also sent the Claimant a Whats App message on 2 September 2021 advising a key had been found for the Practice Facilitator's office, which had previously been lost. The room would be empty by 5:30pm most days and the Claimant could use it if she wished [456]. CC said they had chased maintenance again but was not sure how long it would take. She said she had made a list of the people the Claimant had worked with since her return and would have a chat to them about core values and respecting personal values. CC said she would continue to give the Claimant her full support in ensuring the Claimant was able to express and maintain it for as long as required. The Claimant replied

to thank CC and said it would be great to express in there. The Claimant thanked CC for her support.

4.21 The Claimant was off work from 6 September to 20 September with Covid in her immediate family. On 23 September 2021 the Claimant sent a further email [112] referring to the decision that she would not work on A4. The Claimant said that on 20 September 2021 there had been an issue as she had been put down to work on A4 (at the time an amber ward) and when she spoke with Helen Bartlett [HB], HB said she was not aware of the decision and changed the allocation. The Claimant said that she was then upset about the behaviour towards her of the staff member, who had to go to A4 in the Claimant's place. The Claimant said she was questioned by other staff why she could not go to A4, and that other staff who had been shielding were working there. The Claimant said she was also still being questioned about how long she was going to breastfeed.

4.22 We did not hear evidence from HB but CC said HB would have had knowledge of the Claimant's risk assessments as part of the management team. She said people who had been previously shielding were now working on amber wards with correct PPE and vaccinations, but that the original agreement between the Claimant and KG was that the Claimant would not work on A4 until she had her second covid vaccine. CC says she thinks HB may not have known this detail as it was not expressly written down, or HB may have simply forgot.

4.23 On 27 September CC spoke with the Claimant and offered to speak to those involved or to send a blanket message about freedom of choice to breastfeed and express and that staff should not pass comments. The Claimant did not want CC to take such action at the time. JB says she also met with the Claimant and that she wanted to try to keep the Claimant on a green ward but it could not always been a firm plan as a patient with suspected Covid may be admitted into one of the isolating cubicles on B4H (a ward that cared for transplant patients) green zone. JB says she did tell the Claimant that there may be a request for her to go to an amber zone but noted the preference to stay on B4. JB says that as discussions went on she discussed with CC that where possible the Claimant should work on B4 in the green area, but it could not always be guaranteed as the ward's needs can change from hour to hour.

4.24 On 28 September 2021 the Claimant was signed off work with stress and anxiety. CC was in touch with the Claimant via Whats App and sent her the link for a wellbeing telephone number and the health for health professionals service [458]. The Claimant was also still pursing a flexible working appeal and on 4 October 2021 received the outcome of the appeal, chaired by CM. The Claimant was offered a compromise of working night shifts, with a regular day shift once a month allocated on a weekly basis to be reviewed after 3 months [848].

4.25 On 25 October 2021 the Claimant and CC spoke by phone. CC said a lock had now been fitted to the Ward Manager's door and it should be used with the sign in place. There is an invoice for the cost of purchasing two hook locks from Screwfix dated 1 September 2021, at a cost of £5.50. CC also sent the Claimant an email. One part of it was to apologise for the delay in fitting the lock. CC explained what had happened with the previous risk assessments and said again she was happy to take action against individuals if the Claimant authorised it/ gave the names of those involved.

November 2021 risk assessments

4.26 On 2 November 2021 the Claimant emailed CC to say was pregnant and looked like she was 9 weeks that week but was not telling people until she was ready, probably after the scan [127]. CC contacted Ms Lewis in HR [128] saying she

wanted to ensure all the risk assessments were ready and correct and the maternity risk assessment link was not working. CC asked for that and any Covid pregnancy risk assessment.

4.27 On 9 November 2021 there was a long term sickness meeting. CC says the Claimant was happy to return on a full time basis without a phased return to work. It was reiterated again the lock had been fitted and said they would attempt to accommodate the Claimant on green wards.

4.28 CC did the Covid pregnancy risk assessment on 11 November 2021 [141]. CC also discussed it with the Claimant on the phone. The Covid risk assessment document says that pregnant women can only continue to work in direct patient facing roles if they are under 28 week's gestation and a risk assessment has been completed. It says that an employee more than 28 weeks pregnant or an employee with an underlying health condition such as heart or lung disease should work from home or in a non-patient facing role in a Covid secure workplace with 2m physical distancing. The Claimant was identified as being under 28 weeks' pregnant and working in an area with low likelihood of coming into contact with patients who were confirmed or suspected Covid positive. The general risk assessment document identified there were risks with patients who have chemotherapy and with coming into contact with viruses such as CMV and CDIFF. It was identified that the Claimant was to refrain from emptying bodily fluids for patients undergoing chemotherapy and patients with CDIFF and CMV and would require FIT testing for FFP masks. Manual handling tasks were to be reduced, and the Claimant was to update her manual handling training. It was also noted that the Claimant had to take responsibility to ensure her own safety as she did not want to disclose her pregnancy status. It was further noted that the Claimant was having a consultant's review on 22 November 2021 about suitability for second covid jab, flu jab and whooping cough due to the Claimant's son's allergies [143]. The Claimant was also told [459] she could wear a face mask and visor if required when coming into close contact with patients.

4.29 CC gave a copy of the risk assessments to JB, MK, KG and HB explaining the Claimant wanted her pregnancy to be confidential other than the management team [152]. CC said that meant that ward staff generally would not know the contents of the risk assessment and the Claimant would have to escalate to management if she was asked to do tasks that she felt she could not do.

4.30 The Claimant's anticipated return to work was delayed as she had shingles and then a separate pregnancy related complication. The Claimant then returned to work on 5 December 2021. The Claimant worked until 27 December 2021 when she tested positive for Covid. She returned to work again on 7 January 2022. The Claimant's absences had not been recorded correctly. CC's evidence, which we accept, is that she had updated it on the shift booking system, Roster Pro and believed it copied across automatically to the HR software ESR which records absence and calculates pay. CC said due to a glitch it had not filtered through. She says she had to later go in and manually amend the dates on ESR.

4.31 The Respondent's guidelines on handling cytotoxic drugs says women expecting a baby or are breastfeeding are at risk, and individual risk assessments are to be completed for all pregnant women who handle cytotoxic drugs as part of their role [526]. There is also a handling of cytotoxics during pregnancy procedure [751]. This says handling bodily fluids is a medium risk and may be done in the second and third trimester if the staff member is keen to do so and is well (and with other measures in placed such as PPE) but the staff member should not feel pressured to administer due to staff shortages.

January 2022 – fluids from chemotherapy patients and proposal to work on an amber ward

4.32 On 8 January 2022 [167] the claimant emailed CC saying on the night shift, the night before, when she told a nurse she would not be able to take away urine bottles/bedpans from patients who had chemotherapy the nurse had laughed at her. The Claimant said the nurse went to speak to MK and then MK told her she could take away bedpans etc from chemotherapy patients. The Claimant said MK said this in front of another member of staff which was embarrassing and could have been discussed in private. The Claimant reported she had told MK under her breastfeeding risk assessment and pregnancy risk assessment she was to avoid those bodily fluids and that MK had gone on to say how many patients were on chemotherapy which made the claimant feel bad. The Claimant said that MK told the nurse that due to the Claimant breastfeeding it was different, which again was done in front of staff and a visiting family. The Claimant reported the nurse had questioned why the Claimant could not go to A4 and swap with a staff member there, and that the Claimant had to state she could not go to A4 due to her risk assessment and could only work on green wards. She says MK said that no one was positive on A4 and that the Claimant again said the risk assessment was to work on green wards. The Claimant said the student nurse had helped out. The Claimant said she understood the risk of being exposed to bodily fluids from chemotherapy whilst breastfeeding /pregnant can cause harm and she asked for some clarification, saying she did not feel safe when nurses and senior staff were questioning the risk assessment.

4.33 GJ is a registered nurse and the nurse the Claimant referred to in her email to CC. GJ said in evidence she worked with the Claimant occasionally and did not know her very well. GJ said that at no point was she aware the Claimant was breastfeeding at work or pregnant or aware of any risk assessment in place for expressing or that related to pregnancy. GJ said she cannot recall any specific incident but may have asked the Claimant to assist in dealing with chemotherapy fluids from a patient as she would ask any other healthcare support worker on the ward. JG said if she was aware she would not have asked the Claimant, and to the best of her knowledge the Claimant did not tell her she could not work with this patient because she was pregnant, expressing or had any type of risk assessment in place which meant she could not undertake certain tasks.

4.34 MK said she could not recall the shift in question, but knowing GJ she did not think GJ would have done it deliberately. MK said it was a busy and short staffed ward, and you may ask someone to do something without realising or recalling they cannot do the task because you are busy. MK said once you remember you may then have to apologise or correct yourself and it would not be deliberate. She says alternatively GJ may have not been aware. MK said of herself, she would not have deliberately asked the Claimant to go against any risk assessment and would not have insisted the Claimant work in an area that was not green or expect her to do so. MK said if she did give the option to work on A4, it would have been an offer made on the basis the patients at that time were not receiving chemotherapy and if the patients had negative covid tests the Claimant would be able to work with all the patients on A4. MK said she would not offer A4 if she did not think it was safe. MK said she did not recall the Claimant being allocated to work on A4 around this time, but if the Claimant was it would not be intentional and may have been done in error or because they were busy, and those allocating staff had forgotten. MK said they were short staffed and had around 30 members of staff at the time, so it was hard to remember everyone's individual circumstances.

4.35 CC said that A4 was not a green ward, but at that time the patients had negative Covid tests and there were no infection prevention controls in place for the four patients on that ward, and no risk for the Claimant if she wanted to go to A4 and

not work on B4 that day. CC says the suggestion of a swap arose because of ward demands and pressures of the shift, and was not an attempt to make the Claimant feel uncomfortable. JB said the information she received third hand was that the incident occurred at handover time when all the nurses were at the nurses station and then a buzzer may have gone off. She says full PPE would have been worn (face mask and apron) and that anyone could handle the bodily fluids. JB thinks that what happened was done in a passing moment by a nurse on the ward seeking help when busy, and was not meant in a malicious way. JB said they were more than happy to adhere to the claimant's concerns as per the risk assessment and that MK was happy to confirm this. JB said the risk assessments were confidential and not distributed unless shared by the Claimant herself and not all staff would be aware of them. It is for the nurse in charge to ensure the staff were communicated with appropriately regarding tasks.

4.36 On balance, we concluded that GJ's request was an off the cuff, every day, request by a nurse to a healthcare assistant at a busy time to deal with fluids from a chemotherapy patient. On balance we found that GJ did not expressly or knowingly make the request on the basis that it was contrary to the Claimant's breastfeeding or pregnancy risk assessment. There is no reason to suppose GJ knew the Claimant was breastfeeding with a breastfeeding risk assessment that did not allow working with chemotherapy patient fluids. GJ could not recall knowing the Claimant was pregnant at the time. The Claimant said it was more common knowledge by this point, and she had announced it on Facebook. GJ said she was not on social media. We did not think it likely that even if GJ had at some point been told in passing that the Claimant was pregnant, that the pregnancy was operating at all in GJ's mind at the time she made the request.

4.37 We thought it likely that when the Claimant told GJ she could not handle the bodily fluids that it is likely that GJ scoffed and went to speak to MK about it. In our judgement it is likely that by this point in time there was an exchange between GJ and MK about the Claimant being pregnant, because it would explain the later comment of "breastfeeding, its different". It seems likely to us that GJ and MK's discussion was based on whether such fluids could be handled in the second trimester and which led to MK telling the Claimant she could take away bedpans from chemotherapy patients (and which explains why MK was saying something to the Claimant that was different from MK's initial risk assessment). In fact, the Respondent's policy on this was that handling bodily fluids in the second trimester should be by agreement and what MK said also did not accord with the Claimant's risk assessment that was in place. We consider it likely that the Claimant then told MK she could not do so due to her breastfeeding and pregnancy risk assessments and that MK then did comment about the number of patients on the ward that were receiving chemotherapy but did also go on to say to GJ that due to the Claimant breastfeeding, her situation was different. We accept that GJ then went on to suggest that the Claimant could go to A4 (where there were no chemotherapy patients) and swap with the healthcare assistant based there. The Claimant then stated this was against her risk assessment as she was to work on green wards. We find MK did then state that nobody was Covid positive on A4 and the Claimant again said that her risk assessment was to work on green wards.

4.38 We find it likely that MK would have known about the Claimant's risk assessments that were in place. MK also knew the Claimant was breastfeeding and pregnant. We do not consider that MK set out to upset the Claimant or place the Claimant at risk. We think it more likely that MK had loosely in mind the Respondent's policy on cytotoxics and pregnancy, and was initially reacting to and following what it is likely that GJ, as a nurse, said to her about the Claimant being able to handle chemotherapy fluids. Once MK had reflected on that in the conversation with the Claimant and GJ, and GJ went on to propose the Claimant going to A4, we think it likely that MK also thought A4 was low risk as she understood the patients there

had not tested positive for Covid 19. MK was in a pressured environment trying to deal with, and reacting to, the patients and staffing dynamics that she was faced with, including a large number of chemotherapy patients on the main ward that the Claimant would not be able to handle bodily fluids for. But the net effect on the Claimant was as set out in the Claimant's email.

4.39 On 10 January 2022 the Claimant's TU representative emailed asking for a copy of the risk assessment [177]. On 11 January 2022 the Claimant emailed CC to say she had a midwife appointment, and the midwife had said not to handle anything chemotherapy related, which included taking bedpans and urine bottles from patients receiving chemotherapy. The Claimant said her midwife advised the Claimant to contact Maternity Action for support. The Claimant said the midwife also said the claimant was right not to go to an amber ward when the risk assessment was to only work on green. The Claimant asked for some clarity on her risk assessment before she returned to work and asked what she could do when she was being told to go against it by staff and senior staff [166]. The Claimant also asked that the risk assessment be left somewhere safe for her to have when she came in for her shift the next day so that if she was challenged by staff she could show them the risk assessment instead of verbally explaining it. She asked if there would be management on shift she could have a chat with about it [165].

4.40 On 12 January 2022 CC emailed the Claimant saying she had gone through the risk assessment with MK and had left a copy for the Claimant. CC said it had identified chemotherapy patients (not to handle bodily fluids) and to avoid patients who have certain viruses: CMV, Norovirus, and CDIFF infections [164]. MK was to meet up with the Claimant that evening and go through the risk assessment. CC said they had looked at the patients and identified those patients it was safe for the Claimant to care for. CC also responded about a manual handling course, fit testing, asked where the Claimant was with Covid and flu jabs and if the Claimant wanted any help arranging vaccines. On 12 January 2022 the Claimant emailed CC saying: "*In regards to A4 what can I do when staff ask me to go there? My covid risk assessment is to stay on green.*" The Claimant updated about her flu and whopping cough vaccinations [164]. On 13 January 2022 CC emailed the Claimant about her manual handling course and said with regards to the staying on a green area only, she would update the band 6 team to let them know regarding allocation [163]. CC says she did that via a message on the Band 6 Nursing Whats App group so that the Claimant would only be allocated to B4.

4.41 A system was then put in place where the nurse in charge would put dots next to the patient's name as to whether it was safe for the Claimant to care for them and only the Claimant, and the deputies, managers and nurses in charge knew what they meant.

4.42 On 16 January the Claimant emailed CC to thank her for resolving the issue raised the previous week, saying she had a good shift on the Wednesday night with MK putting the red dots on the board, and that MK had also spoken to staff about what the Claimant needed to avoid. The Claimant said on the Friday night she had negativity from a healthcare support worker she was working with, and would discuss that with CC when she saw her next [162]. The Claimant said that on 16 January there had unfortunately been a further issue, and she was again concerned for her safety. The Claimant said she had been confronted by a staff nurse who asked her to assist a patient in a four bed barriered room due to norovirus, and she told the nurse that due to her pregnancy she could not enter the room. The Claimant said the nurse said the patient no longer had norovirus and it was fine to go in. The Claimant said she explained that on the board there was a green triangle next to the patient which was a risk. The Claimant said the nurse continued to say the Claimant could go in and then went to check with HB.

The Claimant said this was all done in front of other staff which was embarrassing to defend herself in front of others. HB checked and said even though they believed the patient was now negative, with no negative result back, the Claimant was to avoid the room to be safe. The Claimant said she was so upset to once again have pressure from staff nurses to do things that endangered her pregnancy, and she spoke to HB privately because she was upset. She said HB said the staff nurse was abrupt to everyone, but that was no excuse, and that she was too upset to continue her shift. The Claimant said she told HB that for the safety of her pregnancy she was going home and would speak to her GP about her safety at work. She said HB offered for her to go to A4 and she had to explain she was only to work on green wards. The Claimant said that she was crying and was concerned about the impact it was having on her pregnancy as stress is not healthy for pregnancy and she felt continual work related stress due to having to defend her risk assessment. The Claimant said she could not take any more pressure from staff. The Claimant set out an extract of advice she had received from Maternity Action. She said she was following advice from Maternity Action to try to informally resolve the issue with CC.

4.43 CC said in evidence she understands that HB offered support and reassurance immediately to the Claimant, saying the Claimant should not be in that bay, and that A4 was only offered as an option. CC said the nurse would not necessarily have known the Claimant could not work with a norovirus patient due to any risk assessment or may have thought negative test results had been received. CC said the patients on A4 had individual Covid PCR negative results, with no infection prevent and control precautions in place other than routine PPE. CC said the Claimant could also have stayed on B4 with a review of the patients she could interact with. JB likewise said in evidence that HB only offered the option to work on A4 and HB had reported the events to JB shortly after they occurred. JB said she had hoped to speak to the Claimant that day, but the Claimant was already off site.

4.44 CC says [656] that she spoke with Infection Prevention and Control colleagues after these events, and the advice was pregnant people can nurse norovirus patients as long as they are using the correct PPE. She says the Chemotherapy CNS also said after 12 weeks it was deemed safe for the handling of bodily fluids from patients receiving chemotherapy. CC says she was made aware pregnant women should avoid CMV patients. CC said in evidence she did not feel it was an appropriate time to discuss this advice with the Claimant and felt they should stick to the risk assessment already done. Her note at [656] acknowledges that the existing risk assessment identified that the Claimant was to remain on B4/ a green zone.

4.45 On 17 January the Claimant said she had spoken to her GP about how she was feeling due to treatment by staff members and feeling unsafe and it was a concern for the stress with her pregnancy. She said the GP said the Claimant should not be asked to do things that put her at risk, and she had been advised to self-certify for a week or two to recover from stress and anxiety [161].

4.46 On 18 January 2022 CC, on advice from Ms Lewis in HR, emailed the Claimant offering a work related stress support meeting on 26 January [156]. Also in attendance were JB, Mr Thomas and Ms Lewis. We do not have details of what was discussed. The Claimant then returned to work on 29 January 2022.

February 2022 incident with patient and referral to OH

4.47 On 2 February 2022 the Claimant emailed CC saying they were very short staffed the night before, she was constantly on her feet, and told by the staff nurse she could not go for a break to eat her food which was important when pregnant. She

said she suffered pain in her stomach and groin, rested at 2am and at 3:45 went home as the pain was too much. She said her GP advised her to rest that day and had given her a fit note for amended duties for 28 days as the current workload was putting a strain on her pregnancy. She said the GP also encouraged a referral to OH. The Claimant said she did not want to take more time off work because she felt well enough to work. The Claimant also said there was also a patient displaying aggressive behaviour and had been identified on the board as a patient for the Claimant to avoid. She said her concern was the patient approached her on her shift very agitated and came up into her face. She said luckily she was able to move backwards and away from him and she was aware a staff member had suffered a bad back from being pushed by the patient. The Claimant said she could not avoid him approaching her and wanted it risk assessed as she did not want to suffer an injury. Her next shift would be 9 February [187]. The Claimant said in evidence that the patient had injured a member of staff caring for him, was showing aggressive behaviour in all areas of the ward and had not been restricted to his room. She said there was a red dot next to his name, but she was not made aware of his behaviour and the dangers that came with it. The Claimant said if it had been properly assessed she should not have been allocated to work on the ward at all because if he had pushed her, it could have had serious consequences.

4.48 KG's evidence was that the Claimant was not allocated to this patient and the patient was in a side room in a corridor separated from B4 by a set of double doors. She said the patient was under a deprivation of liberty order, but they could not lock him in his room, and he was wandering through the ward accompanied by his support worker when he shouted at the Claimant. KG said in terms of risk management she did not see what further the Respondent could have done. CC said the behaviour was out of character for the patient and was unexpected. CC said such an episode of delirium can happen and can come on quickly after a complex bone marrow transplant. CC said the potential risk to the Claimant had been identified and considered and simply not documented. She said measures were in place so that the Claimant was not asked to work with the patient or the immediate vicinity of him. CC said she was not aware of the need to notify the Claimant of any changes in the ward setting immediately because things can change from one hour to the next.

4.49 The GP fit note said the Claimant may be fit for work on amended duties for 28 days, referring to physical strain.

4.50 On 3 February CC contacted payroll saying the Claimant had some periods of sickness in the calculation period of maternity pay and CC felt maternity pay should not be affected. CC asked for maternity pay calculations to be done with enhancements [189]. Payroll said if someone was on half pay in the calculation period it would be made up to full pay for the purposes of occupational maternity pay and any enhancements reported and paid in the same period would also be adjusted accordingly.

4.51 On 7 February the Claimant emailed CC and JB saying she wanted a meeting to discuss the issues before she returned to work [186]. She said the midwife's advice was that the risk assessment should be updated, and it was important she returned to a safe environment. JB replied to say CC was isolating at home and not picking up emails. She asked HB, KG or MK to speak to the Claimant as soon as possible to review and amend the risk assessment and discuss a pay query [196].

4.52 On 7 February 2022 CC completed a risk assessment saying the patient was already under a Deprivation of Liberty Safeguards (DOLS) and receiving 1:1 care. The risk assessment said the palliative team had changed the medication, which had settled the patient. CC said the Claimant had never been asked to support the patient's care needs but due to the nature of the condition he was walking around

the ward being specialled 1:1, and he had verbally shouted in the Claimant's face [193].

4.53 On 8 February 2022 JB emailed HB, KG, MK, CC and the Claimant [185] attaching the Claimant's emails with concerns asking if it could be actioned that day when they were able. She asked if the Claimant wished to be referred to OH. JB said she was glad it was recognised the Claimant should not be allocated that patient and it was important for the Claimant to self-assess and communicate concerns at the time. On 8 February the Claimant emailed JB to say she wanted a meeting with her, CC, HR and her union representative as she felt her health and safety had again been put at risk, that Maternity Action said the risk assessment should be ongoing and reflect any changes that occur. She said [185] a patient displaying aggressive behaviour meant the risk assessment should have been updated and should have been discussed with her. She said that as much as she could self-assess a situation it was also the employer's responsibility to ensure her health and safety. The Claimant said the patient was unavoidable as he was walking around both sides of the ward and she self-assessed and did her best to stay safe but was still approached with the patient shouting in her face. She said Maternity Action had said there should be a meeting, and the Claimant could complaint to the HSE. JB responded to say she was trying to get the risk assessment done in a timely manner as she wanted to avoid the Claimant nearing the time of returning to work without it being discussed and amended and keeping the Claimant safe in work.

4.54 JB said in evidence that the Claimant was asked to take leave as the Claimant's next shift was imminent and they wanted to ensure there were amended duties in place the Claimant as happy with. JB said CC would have recorded it as sick leave not annual leave.

4.55 On 8 February 2022 payroll emailed the Claimant in response a query saying the Claimant should speak to her manager as the Claimant was showing on sick leave from 12 September 2021 [215]. The Claimant says her January and February payslips were being used to calculate her maternity pay and they were incorrect because she was entered as continually sick, and she did not receive payment for shifts she had worked as well as enhancements which would affect her maternity pay.

4.56 On 14 February CC emailed JB and others [199] about sick pay, setting out some history and asking where the Claimant stood as it was work related and the Claimant would be dropping to half pay.

4.57 On 17 February 2022 a referral was made to OH [206].

Consideration of amended duties and pay issues

4.58 On 18 February JB emailed the Claimant following a meeting. CC was not at the meeting as she was on leave, but says she understood the Claimant was advised to stay off work and was placed on leave as the ward could not facilitate light duties due to the current clinical presentation of patients at the time. JB was to explore redeployment. JB said in her email she was attempting to find a suitable green zone for short term redeployment, but needed further confirmation from the senior nurse/ward manager. JB was hopeful of a role on ward A2 for patients coming in for planned surgery. JB said she hoped it would be the safest place for the Claimant to work until the challenging patient was discharged or up to the 28 week maternity point. JB said it would hopefully avoid any covid patient risks. The potentially violent patient was going to be there for at least another week and continued to wander around the ward area, although medication was helping to reduce his aggressiveness. [214].

4.59 JB said in evidence that she looked outside of Haematology to see if anyone was looking for administrative roles, but they were not appropriate and administrative tasks in their directorate required contacting patients. As the Claimant worked predominantly nights that type of administrative work was not an option.

4.50 On 20 February JB emailed to add that A2 required admitting patients to socially distance for 14 days prior to admission and self-isolate closer to their operation date and needed a Covid PCR test pre-admission. JB said the surgical senior nurse had said they could support the Claimant on the ward in line with regular risk assessment reviews prior to each shift [213]. The Claimant expressed an interest and asked if arrangements could be made for expressing whilst working there. On 21 February the Claimant said she had spoken to her GP, who had said she should be assessed by OH [212] about amending her duties because OH would know more about the work environment and what amended duties would be best. The Claimant said her GP had said there should be no manual handling or heavy lifting or work that would cause strain, and the Claimant should have regular breaks and be able to sit down. The GP said the Claimant should also speak to her midwife [212].

4.51 On 21 February JB said that the OH referral had been done but she was not sure if it would get expedited before the Claimant was next due in work and redeployed. JB asked if the claimant was happy to continue with the plan for the redeployment [212]. The Claimant said she was happy to go to A2 but her amended duties needed to be sorted for this as her risk assessment needed to reflect it. JB said she would communicate it to the ward manager on A2. Mr Thomas asked who would be doing the risk assessment and whether it would be done before the move. JB said CC was going on leave the next day so unless it could be done that day it would have to be done by one of the deputies or done by A2. JB said she supported the points identified by the GP and it would be conveyed to A2 and updated following the midwife appointment too.

4.52 On 22 February JB said it sounded like in fact A2 would be unsuitable as it was quite a heavy ward when it came to manual handling, they only had two Healthcare Support Workers each shift and the workload would be significant. She said it only came to light when she and CC spoke to the ward manager. JB said alternative work would have to be non-patient facing/ non clinical as she had exhausted clinical options and still had to work this through. JB asked about IT skills and whether there was any mandatory training the Claimant could do on her next shift or appraisal preparation [209].

4.53 On 23 February the Claimant identified that there were only classroom courses to do, and asked if IT work would be ready for a shift for her that night and where it would be. The Claimant says she spoke to JB by phone that afternoon and was asked to take annual leave as no suitable work had been organised for the night shift that night. JB said in evidence she asked if the Claimant would like to use an annual leave day to allow JB to go back the following week with a plan. JB said the Claimant was not forced to take annual leave and that the Claimant was happy to take it as it was just for one shift. CC said she understood the Claimant was asked to take leave whilst something was sourced, she did not know if it was annual leave or sick leave, but it was a very temporary measure. CC said in evidence that JB made many attempts to find lighter duties or redeployment that included non-clinical roles but there was nothing suitable. CC said there was not an adequate number of tasks to fill a shift, particularly as the majority of the Claimant's shifts were night shifts. Ward B4 still had the confused patient and staff challenges.

4.54 On 28 February the Claimant sent a WhatsApp to CC saying she had a rash, and the GP was screening her bloods. CC was out of the country and asked the

Claimant to contact the nurse in charge. CC says the Claimant was advised to await the blood test results and discuss them with the GP. CC said in evidence that it was felt by the nurse in charge and the Senior Nurse that the Claimant should remain off work until the GP could advise what was causing the rash due to the patients on the ward being immunocompromised.

4.55 On 3 March the Claimant submitted her MAT B20 form stating she was intending to take maternity leave from 9 June 2022. The Claimant also submitted a Respect and Resolution (Grievance) [220] about her pay and how absences had been recorded. She said she should not be losing out on pay for pregnancy related issues or work related issues, especially not when she had been in work. She provided a breakdown of her absences. The Claimant also included other matters such as privacy issues when breastfeeding and being asked to work against her risk assessments.

4.56 On 4 March 2022 the Claimant emailed CC saying she was turning 26 weeks pregnant the following week and would require an updated risk assessment to follow government guidance, as the risk of complications from Covid increased. CC said in evidence that the Claimant was medically suspended because alternative duties could not be found, with medical suspension backdated to 4 February. CC said the risk assessment was not updated at 26 weeks because the Claimant would not be in work when she reached 26 weeks. Although at this point in time the decision to medically suspend had not yet in fact been made.

4.57 On 7 March the Claimant emailed CC to say she had spoken to payroll who said CC needed to confirm the sickness absence periods accurately and that they were work related/pregnancy related. The Claimant said she had been showing as sick since 2 February, which meant her pay was going to be wrong and she had not received her amended payments. The Claimant said she had been signed fit for work on 2 February on amended duties, and should not be showing as sick. She said pregnancy related sickness only started on 28 February 2022. The Claimant said she had been waiting for amended duties and should not be losing out on pay.

4.58 On 8 March Tracey Rowlands in payroll emailed CC to confirm the correct sickness dates and reason for sickness. Ms Rowlands said the sickness was open from 2 February [242]. On 11 March Ms Rowlands asked if the Claimant had returned to work from sick leave. CC replied to say there were ongoing discussions [241].

4.59 On 9 March the Claimant emailed [235] to say her doctor had extended her fit note to cover the time she was current off. CC said she was on a course on 8 March and 10 March, and on a clinical shift on 9 March, and could not respond immediately.

4.60 On 11 March the Claimant asked for confirmation her pay had been amended as she was otherwise facing half pay. She also asked about her Covid risk assessment. She said waiting for her pay to be sorted was causing unnecessary stress which was not healthy for her pregnancy [225].

4.61 On 15 March the Claimant emailed CC to say she had spoken to payroll and that her pay was not going on to half pay but was still not correct. The absences were all recorded as unknown which meant she did not receive the correct pay. A £200 payment she received in February was being paid back in March as it was an emergency payment. She said she was still missing pay and was still showing as sick which would affect April pay. The Claimant said she had not received all her enhancements. She said her February payslips were wrong and would affect her maternity pay. She also chased a risk assessment having turned 26 weeks pregnant [227].

Medical suspension and pay queries

4.62 On 18 March CC spoke with Ms Lewis in HR who confirmed the Claimant should be medically suspended based on the fit note recommendations and the inability of the health board to find alternative employment. On 18 March the Claimant also attended an OH appointment.

4.63 On 21 March CC apologised for the delay and said she was having a management day the next day and would look at what was recorded on Rosterpro. CC told the Claimant that HR and payroll said that pregnancy related absence did not mean that pay was protected, and work related stress absence was only topped up if it went through an industrial injury procedure.

4.64 On 22 March the Claimant replied to say CC had not given her any forms to fill out for work related absences and in all Teams meetings it had been agreed her absences were due to work related issues. The Claimant said most days off were for health and safety reasons where there had not been risk assessments to protect her and her unborn baby. She again chased her 26 week risk assessment. The Claimant said when waiting for amended duties she should not be at a loss. She set out her sickness absence history. The Claimant followed it up with a list of shifts from December onwards she had worked and not been paid for [232].

4.65 On 23 March CC said she had not been able to look at the shifts the previous day but had entered the Claimant's shifts as medical suspension as advised by HR and would address it the following week as she was on annual leave [231].

4.66 On 28 March the Claimant asked for her pay to be sorted that week. She said she was completing industrial claims forms. CC said she was hoping to get to the bottom of it in the next couple of days and was waiting for an answer from RosterPro and payroll. CC said the discrepancies occurred because the Claimant had been entered as continuous sick from 26 September to 4 December when the shifts should have been entered as individual entries. CC said she could not now amend them. CC provided other information on specific shifts and said 4 February should have been entered as medical suspension.

4.67 On 28 March Ms Rowlands in payroll said she had adjusted the sickness dates and said the Claimant would now be due full pay and she would arrange a payment for the correction in half pay from 22 February to 31 March. Also on 28 March CC emailed John Watson saying RosterPro had been corrected and asking for the Claimant's pay to be recalculated from 26 September 2021 to 21 March 2022 [261]. Mr Watson in payroll said they would need a breakdown of enhancements due for the period. On 29 March the claimant submitted her industrial claim paperwork to CC.

4.68 On 31 March Mr Watson emailed the Claimant about calculations for enhancements [248]. They went on to exchange more information.

OH Report

4.69 The OH report was provided on 7 April [262]. The OH report said the Respondent had a duty of care to perform a workplace pregnancy Covid risk assessment and that the Claimant had requested it at 26 weeks, and it had not been undertaken. OH said from 26 weeks pregnancy close contact with people you do not normally meet should be avoided. The report said the Claimant also required a health and safety workplace risk assessment to establish what tasks she should and should not be expected to do in pregnancy. The OH doctor recorded the Claimant saying there had been several issues that put her in positions she considered to be unsafe. OH said that if elements of risk could not be removed, the Claimant should

have been on full suspended pay and not expected to take sick leave. The report said the workplace issues including pay errors had reportedly caused a surmountable deal of stress that was putting her and her baby at risk. It was said: "*She is fit for work in some capacity based on information discussed today, depending on her risk assessment results; it is work itself has prevented her from being in work.*" The report said: "*Your risk assessments which are overdue will indicate what adjustments are required to enable her to be in work and remain safe*" and that if suitable adjustments cannot be provided the Claimant should be suspended on full pay until maternity leave starts under government regulations.

Grievance and industrial claim

4.70 On 5 April 2022 the Claimant's union representative sent the Claimant's desired resolution to the grievance which included the completion of industrial claims forms; correction of payslips; maternity pay to be calculated on the basis of corrected payslips; CC to ensure when the claimant returns to work no issues occur as she will be returning and breastfeeding. Mr Thomas suggested a meeting planned well in advance. The Claimant also sought a written apology [268].

4.71 On 16 April CC wrote to the Claimant about her annual leave and whether she wanted to add it on to maternity leave. On 13 May CC wrote to the Claimant about shielding and claiming back annual leave.

4.72 On 31 May the Claimant chased CC about the industrial claim forms [575]. On 1 June 2022 the Claimant said to Ms Lewis in HR she had not heard anything since 17 May when CC said she was going to show JB the industrial claim forms she had completed. The Claimant said she was querying her maternity pay forecast as it was lower than expected and was querying the enhancements. The Claimant said she was constantly chasing things up, was at a disadvantage and did not find it acceptable.

4.73 On 2 June Mr Thomas said they wanted to have the issues dealt with formally and as soon as possible because the Claimant was having a baby imminently [274]. On 6 June Ms Lewis in HR emailed CM asking for her to intervene [274].

4.74 On 9 June 2022 the Claimant's baby was born. On 30 June JB emailed Ms Lewis with some documents relating to the industrial injury claim, saying that it was difficult as CC was currently off sick, and the summary document CC had written was confusing [595]. Ms Lewis chased it again on 7 July.

4.75 On 13 July 2022 Ms Lewis messaged CM saying the industrial paperwork still had not been completed [278]. Ms Lewis said that Mr Thomas said they wanted a formal resolution meeting and that payroll issues had been rectified but the industrial injury was outstanding.

4.76 On 26 July JB sent paperwork to Ms Lewis and Ms Main [594]. One topic was a request for options to be provided for an appropriate alternative department to return to due to a break down in trust and relationships on B4. CM agreed to explore this.

4.77 On 23 August 2022 JB emailed the Claimant saying the industrial injury claim pack had been submitted to the panel.

4.78 On 31 August 2022 the Claimant attended a formal grievance meeting with CM. CM said she wanted the claimant to remain in the Specialist Servies Clinical Board so she could offer appropriate support and ensure actions agreed were delivered, and oversee the Claimant's return to work in due course.

4.79 On 22 September the industrial injury application was declined [599]. It was said there was insufficient evidence to determine whether the injury was wholly or mainly attributable to NHS employment, that a private room was provided, that a room with a lock was provided that the Claimant chose not to use, that the manager reminded all staff about values and behaviour, and support was in place including the red dot system. The Claimant appealed the industrial injury decision [601].

4.80 On 12 November 2022 CM apologised for the delay regarding the grievance [281], saying it was taking longer than hoped to gather information.

4.81 On 3 January 2023 the Claimant chased CM to see if there were any updates and said her maternity leave would end in March. On 25 January 2023 Mr Thomas chased for an update, saying it was over 6 months since the formal grievance. He set out a summary of what the Claimant was seeking. He said that included that a new ward be found and that CM had previously agreed with this. Mr Thomas pointed out that the Claimant was due to finish her maternity leave in a matter of weeks and had no contact from any manager to put support in place ready for her return [281]. He said they wanted to avoid any more issues. LS liaised with CM and said the outcome would be sent very shortly.

Grievance outcome

4.82 The grievance outcome was sent on 27 January 2023 [286]. CM provided a calculation of annual leave saying the Claimant had 411.3 hours of annual leave outstanding. CM said in the outcome letter that discussions with payroll were ongoing about providing a breakdown of pay. CM offered the Claimant the opportunity to return in the Nephrology & Transplant Directorate saying they could accommodate the hours and flexible working pattern the Claimant had in place. CM drafted a return from maternity leave plan she said was to be a guide to the new ward manager to help support a return to the workplace as smoothly as possible. CM said, as agreed in the August meeting, once a work base had been confirmed then she would then meet with the ward manager "*to identify an appropriate private room for you for your breastfeeding needs and then discuss with you."* The letter said CM would welcome the opportunity to discuss the information with the Claimant and suggested the week of 13 February. She said her PA would contact the Claimant and Mr Thomas to agree a convenient date and time.

4.83 CM also provided a letter of apology [288] for the experiences the Claimant had in her pregnancy and maternity leave. The return to work plan [290] said there should be a meeting to discuss the return to work in a relevant and reasonable timetable and said there should be initial contact 4 weeks prior to 8 March 2023 and suggested a meeting week commencing 1 March 2023. A review of all risk assessments on file were to be agreed and updated in a timely manner prior to the first shift back, said to be at least a week prior to the return. For breastfeeding support there was to be a room identified on or near the ward, a "*lockable room to be confirmed (storage of keys)",* a door sign in place/locatable, and the information shared the week before the first rostered week on duty.

Industrial claim appeal

4.84 The Claimant's internal industrial claim appeal took place on 31 January 2023. The Claimant says that at the appeal the panel accepted the apology letter as evidence. In the outcome letter of 6 February 2023, it was said that during Covid there was a longer delay in getting routine maintenance completed, and they felt the ward manager chased this sufficiently and offered alternatives in line with policy in the meantime. But the panel felt there could have been more done to prevent staff from walking into the room, i.e. handover discussions re: privacy and the use

of the room. It was said that without names the ward manager was limited in how much she could do to address any specific comments by staff. It was said that they felt although a risk assessment was carried out a day after the Claimant returned to work, there was an intention for this to be caried out on her first day back, which was appropriate as the Claimant can and should be involved in the assessment. It was said this arose from an unfortunate lack of communication. The panel said the management action regarding the challenging behaviour patient was appropriate. The patient was 1:1 on a separate part of the unit and the Claimant had not been assigned to his care. The member of staff who had been injured the day before had been directly assigned and was in the patient's bedroom at the time. It was said: "*Although the risk assessment was completed and we acknowledge there were delays in production, there was a lack of understanding across the management team of what was in the risk assessment, and how this impacted your day to day role. If the risk assessment had been shared with you immediately, it may also have given you more opportunity to self-assess any changes. We therefore uphold that a lack of communication seems to have contributed to a few very uncomfortable situations that could have been avoided relating to your risk assessment and supported by advice from your midwife, GP and Occupational Health.*" Payroll was to be notified and pay adjusted [607].

Proposal to change wards

4.85 On 13 February 2023 the Claimant emailed CM [296] saying she was happy to go to the new ward, and asked if she could have contact with the manager to discuss her return. The Claimant asked about who to contact when arranging to take annual leave as she had not heard from B4 and wanted to add it on to the end of maternity leave. The Claimant said a meeting to discuss her return and all relevant steps would be great when everyone is available.

4.86 On 21 February 2023 the Claimant chased up a response saying her maternity leave was ending in 2 weeks so would like to know if her annual leave was granted and who she needed to speak to about her return. On 22 February CM responded to apologise, saying she thought she had responded, and it was fine to take the annual leave. CM said she would try and coordinate a meeting as soon as she could once the strikes were over tomorrow and that it had taken all her time [295]. Mr Thomas asked for confirmation of the new manager so the Claimant could reach out to set up a meeting [295]. On 3 March CM apologised again for the delay, and said she was on leave for 2 weeks so had asked LS to support the transition from B4 to renal and ensure maternity leave and annual leave was recorded properly. CM identified the new manager as being Lisa Higginson (LH) who, she said, would introduce the Claimant to the ward manager. CM said the Claimant could make contact or otherwise wait for CM's return. On 3 March CM also emailed LH, JB and LS asking LS to advise the on best way to return the Claimant from maternity leave and move her to renal and to share the details of the annual leave that had been agreed so that it could be accurately recorded. CM said she was working off her phone so did not have the attachments to hand. CM told LH the Claimant may be in touch, the Claimant had a work life balance plan, and would require breastfeeding space and time that LS had the details of [299].

4.87 LS said that payroll could be informed on a PIF of the permanent move and could be informed of the dates of AL and the return to work. LH said she had been in touch with Mr Thomas about organising for the Claimant to come and meet the ward manager. She said any information LS could provide would be helpful. Mr Thomas also asked the Claimant to arrange to go in and go through with LH her work life balance, expressing milk, and risk assessment needs. He said they could also arrange that annual leave be sorted and a return to work date agreed.

4.88 On 13 March LH identified to LS that the PIF form had not been completed and asked for information about the agreement about annual leave as the Claimant was about to go onto zero pay [320]. LS replied with details of the outstanding entitlement and suggested that leave been agreed in a block for the next few weeks (4-6 weeks) and then discuss it with CM when she returned [302]. LH also asked JB when the maternity leave was due to end [305] which JB passed on to CC.

4.89 That same day Mr Thomas emailed LH to say he had spoken to the Claimant who had spoken to payroll who said she was due to receive zero pay on 21 March as no PIF form had been done, and no annual leave had been put through as agreed with CM [308]. The Claimant also emailed to say it was unacceptable, particularly having received a written apology that said going forward shifts would be verified and annual leave and sickness and maternity leave would be marked appropriately, and that annual leave be requested and approved appropriately. LH sent through the PIF form at 17:50 that evening [311] asking for it to be actioned as a matter of urgency and emergency payment made if needed. LS also sent it to an Asim Iqbal saying annual leave for 6 weeks from 9 March had been agreed.

11 April 2023 meeting

4.90 Mr Thomas told the Claimant to make contact with LH to arrange a date to visit the ward and meet LP the ward manager. They met on 11 April 2023. LP recommended a phased a return to full hours and for the Claimant to do a few day shifts during that phased return, which the Claimant agreed. They discussed expressing arrangements. LP said in evidence that she offered two different rooms. There was the ward meeting room/medics room which was used in the daytime as an extra computer room but was free after 9pm. The second room was the quiet room only used for sensitive discussions with patients/ relatives and was often available. LP said in evidence both rooms had keypad locks that needed the code to access. She said neither room had an internal lock. LP said she told the Claimant they had always struggled for space, that the rooms were not idea, and she would enquire whether there was anything more appropriate on other wards/corridors. She said the only alternative found was on the maternity unit approximately a 6 minute walk away. LP said in evidence that at the time Claimant was understanding and was happy with the rooms offered. LP says the claimant asked about her outstanding annual leave and LP did not know as she did not have administrative line management. LP said the Claimant could not use her office, which did lock, due to data protection concerns.

4.91 The Claimant said in evidence that when walking around she was told the doors could lock and at the time she failed to realise that the keypad could be accessed and opened from the outside if somebody knew the code.

Ongoing queries about return to work date

4.92 On 11 April LP emailed CC saying she had met the Claimant that day, and asked about annual leave entitlement so that a PIF form could be completed [315]. On 18 April LP chased it with JB [314]. LH also chased it with JB saying she was being chased to provide the Claimant an answer about her annual leave. JB asked a Leanne Howells to calculate the annual leave.

4.93 On 24 April the Claimant emailed LP [312] asking if LP had found out when she was due to return following the end of her annual leave and said she was also thinking about returning and using some of that year's annual leave to do a phased return as they had discussed. LP replied on 3 May to say she had not heard back yet, but the department was under a lot of pressure. LP said she was happy to agree a start date and put in place annual leave to support the return as the Claimant would have accrued enough to use [312]. On 3 May LP emailed JB and

others chasing again, saying she needed clarity on annual leave entitlement so that she could arrange when the Claimant was due to return and what the Claimant could book. On 4 May the Claimant emailed LP saying she thought it was the end of May she was expecting to return but was not 100% certain and would get Mr Thomas to chase it up [316]. On 5 May Mr Thomas asked LP who he could chase so that she and the Claimant could arrange a start date, and the Claimant could at least get a couple of weeks stress free leave [317]. LP said she had asked JB and the new ward manager, Leanne and Deputy, Chelsie. LP said in evidence there was a delay in confirming the Claimant's annual leave entitlement from Hematology. There was a new manager in position, Leanne, who had not had a handover about the Claimant's history and had to back date and manually work out the entitlement.

4.94 On 5 May LP emailed the Claimant with a document LH had found which came from Hematology saying it looked like maternity leave was completed on 1 March 2023, but she did not know how much leave was left outstanding. LP said the Claimant was not showing on her ESR management for LP to check, but the Claimant could check from her side. LP said she was going to try to go to Hematology to speak with the new managers [326]. The Claimant said nothing was showing on ESR since the last day of maternity leave of 7 March 2023.

4.95 On 15 May Mr Thomas emailed LS saying the Claimant had not been given a date to return from maternity [325]. The Claimant emailed LS and CM saying she had not heard anything for months, and was not sure when her return to work was following annual leave but thought it was soon. The Claimant said she had no meeting to discuss the return to work plan as stated in previous emails which she found extremely disappointing. She said her new manger had tried to find out dates but had no luck with B4 [340]. LS asked CM to confirm the agreed return to work date and on 16 May said that Mr Thomas was also chasing. On 16 May CM said she was confused because the letter she sent to summarise included the annual leave that was carried over and left to take so dates had been worked out for that. CM said LP was contacting the Claimant to confirm that was the number they were working to and would finalise the return date with the Claimant again. CM said in evidence she understood that LH and LP had been in regular contact with the Claimant to plan a return to work.

4.96 On 16 May LP said to the Claimant she had spoken to LH, who said she was raising the issue regarding leave again with Hematology and asked if the Claimant wanted to make a provisional start date for the following week whilst they tried to ascertain what annual leave was remaining [326]. The Claimant suggested 25th May which LP confirmed [330]. On 16 May LH then sent LP the information on annual leave that had been shared by CM asking her to confirm it with the Claimant [329]. LP said in evidence she had not previously had this extract from the grievance outcome letter and did not know the Claimant had been sent it. She said if she had known this then it would have been easier to clarify and arrange a start date for the Claimant. On 16 May the Claimant also sent LP her grievance outcome correspondence saying there was a breakdown of annual leave in there [335]. A payroll instruction form was then sent confirming the Claimant had been on carried over annual leave since 7 March and her first shift on new role would be 25 May. On 17 May LH emailed LS confirming the agreed start date and asked if there was any information LP would benefit from [344].

4.97 On 22 May the Claimant emailed LP to see if she had found out when annual leave would run out. LP replied to say using the information in the grievance letter the Claimant would have 423.8 hours to take [347]. The Claimant replied to say she was using carried over annual leave to extend maternity leave so was not sure what date that took her to [347].

4.98 On 23 May LP emailed Mr Thomas to say she had found a room with a lock on the inside which was not an office and so had no data protection concerns [350]. LP also chased the processing of the PIF saying she did not want there to be a delay in the Claimant receiving her correct pay when returning from maternity leave. There was a query whether the Claimant was band 2 or a band 3.

25 May 2023 shift

4.99 The Claimant's first shift was on 25 May 2023 9am to 19:30. The ward meeting room was not available because it was a daytime shift. LP said in evidence that instead of using the quiet room they were able to provide the practice development nurse's office which was not in use by staff that day, and they thought offered better privacy. LP said in evidence there was a twist lock so it could be locked from the inside. LP said it locked on the outside with a physical key kept in the senior nurse's office. LP said staff were not allowed to keep the key in case it got lost, and there was confidential information in the room, so when the Claimant wanted to use the room she needed to ask the senior nursing team for the key. LP said when the senior nurse was not there the Claimant would need to use the quiet room to express, and that after LP left work that day at 5pm the Claimant would have needed to use the quiet room instead. But in fact the Claimant had access to the room she was given that evening, that is clear from her contemporaneous email at [367] and this was despite the fact that LP had left for the day. The Claimant's evidence is that she needed a physical key to lock the room from the inside that she did not have. LP's evidence was that the physical key was for the outside and there was a twist lock on the inside. The Claimant suggested in cross examination of LP that it may have been a different room again (the social worker's office), but LP did not agree. On balance given that LP was ward manager and this was her ward and she would know her ward, we prefer the evidence of LP and find that the room did have a twist lock and it is likely that the Claimant, knowing the door needed a physical key for access, unwittingly did not know that it was in fact lockable from the inside.

4.100 The Claimant could access the staff fridge in the staff room to store her milk. LP said the Claimant did not ask her to identify where she could wash or sterilize equipment, and that if the Claimant had done so LP could have reviewed the arrangements. LP said in evidence that on 25 May she and the Claimant discussed the risks on the ward whilst expressing, and that she told the Claimant she would write up the risk assessment, that she had not completed one before, and would save it to the Claimant's file. LP said the claimant seemed happy with this. LP said she appreciated the arrangements for expressing were not ideal, but the Claimant understood that wards struggled for space and room, and the Claimant was aware once on night shift she would have better access to the office room after 9pm. LP said the practice development nurse's office was not an ongoing solution because it had confidential records in it, and was locked out of office hours. LP said the Claimant did not raise issues with arrangements that day, and was not aware of any issue until CM contacted her.

2023 risk assessment

4.101 LP completed the first draft of a breastfeeding/expressing risk assessment form found at [354]. It recorded that the Claimant was to express three times a shift to maintain her comfort. Risks to the Claimant were identified as including loss of privacy and dignity, exposure to infectious diseases that could transfer to mother and child, and contamination of milk/poor storage. Risks to the ward included delay in patient care, unexpected high patient acuity requiring emergency responses and increased staff pressures. Controls in place were recorded as including "*room allocated with internal lock for privacy*", not to care for patients with known infectious diseases, and for the Claimant to liaise with the nurse in charge

of the shift at the start to discuss expressing times. The original draft, under "assurances" said "*patient safety will need to prioritise to an extent but all efforts will be made to ensure breast feeding is met*" This was later changed, presumably by CM to "*Appropriate allocations will be made on the day to support minimizing risks.*" It was said the ward manager was aware of the need to support breast feeding and had communicated to all staff that need to know the plan. Gaps in assurances were recorded as short staffing, patient safety will need to be prioritized and patient acuity/known risks. Action required to reduce risks included: "*show employee allocated room and ensure lock works appropriately" which was marked as "completed."* On 14 June 2023 LP sent the draft to CM who said she made some amendments to reinforce there was a need to balance safety [357]. LP said in evidence she also sought guidance from health and safety by phone and from LH.

Further concerns raised about facilities

4.102 LP sent the risk assessment to the Claimant and Mr Thomas on 15 June [359]. On 21 June LP emailed Mr Thomas saying she had heard from LH that the Claimant was not happy with the quiet room arrangement for day shifts. She asked if he was free for a call and suggested they arrange another walk around the ward to identify the Claimant's needs [361]. Mr Thomas said he had spoken to CM and was waiting for a response for a request that a room be provided that is available at the time required and had a lock [361]. On 21 June the Claimant also emailed CM saying that contrary to promises a breastfeeding risk assessment had not been completed before her return on 25 May and that she did not receive it until 15 June. The Claimant said in the grievance she had been promised a locked room would be provided. The Claimant said she was given a room with a lock, but was not given a key and as the ward manager had left before she started expressing, she could not ask for the key and so used the sign and told staff she would be expressing. The Claimant said her phased return was starting on 27 June and as it stood she only had a safe place to express after 9pm, and did not have one for her phased return to work day shifts. The Claimant said not having a clear place to express would affect her ability to express and have a detrimental affect on her health and her children's. The Claimant said as she had not been given anywhere to wash and sterilize her equipment she had purchased extra pump parts but moving them around different rooms could cause damage to the equipment. She said if she did not have a dedicated room she would need to wash and sterilise her equipment after every use. The Claimant referred to the impact stress could have effective breastfeeding. She said since March she had pay issues, annual leave issues, risk assessment issues and expressing issues which ruined her maternity leave and annual leave [370]. The Claimant was due to return from annual leave the following week.

4.103 CM replied to say she was surprised by the email as she had understood a room had been found that was suitable, and that she would speak to LP. CM said in evidence she was surprised by the email because she had discussed and reviewed the arrangements for expressing with LP and she was generally aware of the ward's facilities. CM said she was aware the quiet room had been offered in the daytime which had keypad entry, comfortable furniture and could offer privacy. CM discussed the rooms on offer with LP. CM also went to speak with the Director of Midwifery who said a lot of staff express on the Midwife Led Unit (MLU).

4.104 On 23 June CM emailed the Claimant saying she had discussed the rooms on offer with LP and said again the two rooms on offer where the quiet room which had keypad entry but could not have an internal door lock because of safety concerns if the room was used by others, and secondly the doctors' office. CM said: "*This was suggested as it is the only room available with an internal lock, but not the preferred choice. However it is for the junior doctors so in use until 9pm so would*

be available overnight." CM also explained about the potential use of the MLU saying staff had to ring ahead of time to ensure a room was free but otherwise there were no restrictions [365].

4.105 On 24 June the Claimant emailed CM referring to the return to work plan CM had put together that had included a lockable room. The Claimant said the quiet room would still mean she was exposed and put in a vulnerable position if someone walked in. The Claimant pointed out they knew from A4 that a sign on the door does not stop people coming in. The Claimant observed CM had previously said B5 was a suitable alternative department, but she did not feel this was the case, and she had not been given a clear plan where she could express. The Claimant said if the only lockable room was used by the doctors until 9pm it was not suitable for a day shift or a night shift as she started at 7pm. The Claimant said she had not had the meeting that had been requested and CM had said on 22 February would be coordinated. The Claimant said if the meeting had happened then the issues being experienced now may have been brought to light giving more time. The Claimant said if she had to go to maternity to express then that's what she had to do, but she would be away from work for longer. She asked what she was supposed to do if she rang the MLU to check availability and it was not an appropriate time. The Claimant said she would be taking her equipment back and forth and would need to be able to wash and sterilise on B4 and had not been given anywhere. The Claimant referred to HSE guidance and information from Maternity Action.

Trial of using MLU

4.106 On 26 June CM met with the consultant midwife in the MLU and CM emailed LS saying they had made a plan the Claimant could visit the next day [374]. LS forwarded it on to Mr Thomas. The MLU said in general the Claimant should phone 20-30mins before arrival just to check a room was clean and prepared, but it was very rare a room would not be available. The MLU advised that most mums spent around 30 minutes on the unit and the staff were happy to support as needed. CM relayed this information and offered to book the time slots with the midwife team and they could leave them with the receptionist for daily booking of the room. LS told CM the Claimant had said she needed to express on day shifts at 9am and 1pm and on night shifts at 8pm, 1am, and 4am and asked if the times could be checked with the MLU and said the Claimant would need one hour each time she expressed. Mr Thomas wanted confirmation there was a lock, a microwave and a sink and CM confirmed there was a lock and a sink and the Claimant could use the staff microwave facilities.

4.107 On 27 June CM and Ms Britton, senior nurse for nephrology and transplant walked the route with the Claimant to the MLU. CM said in evidence the midwife they met also explained to the Claimant that once a routine is established about 30 minutes is needed. The midwife explained the Claimant could make a drink or have her food there and use the breakroom on the unit. CM said that if the Claimant was not comfortable with that they could make other arrangements. CM said the Claimant was given the option of keeping her equipment in the staff room on the unit because the Claimant was concerned about transporting it once used if not cleaned thoroughly, but that the Claimant wanted to take it with her due to the cost of the equipment.

Meeting with LP

4.108 LP said in evidence that she then met with the Claimant about 11am. To provide some context, ward B5 is an inpatient ward with 28 beds and an average of 27 patients at a time. In the day it is staffed by 6 nurses, the ward manager and 4

healthcare support workers. On the night shift there were 4 nurses and 2 healthcare support workers. On a night shift there is a safety brief and handover at 19:00, patient observations taken by healthcare support workers from 19:30, turning down and assisting patients to bed at 20:00 and blood sugars are taken between 20:30 and 21:30. The healthcare support workers would assist with patient observations, blood levels, the tea trolley and ensuring patients had been to the toilet. LP said the first break does not normally take placed until 22:00 at the earliest.

4.109 LP said in evidence they discussed that the Claimant wanted to express at 8pm, 1am and 4am. LP said in evidence the main concern was the timings and the amount of time the Claimant would be off the ward. LP said she was more than happy to accommodate additional breaks for breastfeeding or expressing mothers but as a ward manager she needed to maintain safe staffing levels and manage rest breaks for other staff alongside ward demands. She said she explained from the ward's perspective the safest time that the Claimant could go to express in the MLU would be once the key tasks were done around 9pm, but ward acuity could not always be guaranteed and during some shifts it may be later. LP said in evidence that the Claimant was apprehensive as the Claimant felt 9pm would be late because 8pm was the time she breastfed at home for her children's bedtime. LP said in evidence the Claimant had said that in the event of patient safety taking priority she would delay, but the lateness 3 times a week could cause mastitis/engorgement. LP said she understood the Claimant was happy to go to 9pm if she could not be released from the wad any earlier. LP said she asked how it had been on ward B4, and the Claimant explained observations were done at a different time, so it worked better there. LP said she felt the Claimant acknowledged they were making efforts, but that the ward may not be suitable for the Claimant as the ward schedule did not suit the Claimant's expressing schedule. LP said the Claimant also said she felt the setup of using the MLU was inadequate, but understood there were limited closer options.

4.110 LP said in evidence that she discussed breaks because the Claimant wanted to express 3 times a shift which could be up to 3 hours, plus any additional time to eat and drink. The Claimant said she could not eat whilst expressing as it was a health and safety risk, and she also needed a refreshment break. LP said that the Respondent's policy supported breastfeeding mothers expressing within the allocated breaks and additional breaks if required, and she was happy to provide additional breaks, but an absence of more than 3 hours each shift would impact on other staff's ability to take breaks during the night shift. LP said she apologised to the Claimant that the solutions were not forthcoming at the time, and that she would discuss the concerns with CM and the senior nurse team to see what options they could look at if B5 was not going to meet the Claimant's requirements.

4.111 LP also said in evidence there was a misunderstanding about the shift finish time. The Claimant thought she was to finish at 16:00. LP said the phased return hours were calculated to finish at 16:30, but she had initially forgotten to add the 30 minute unpaid break into the hours. She said the change was nothing to do with the time spend expressing. LP also denied that she asked the Claimant to work back any time spent away from the ward expressing. LP she would not have said that because she was aware of the need to allow the Claimant additional breaks.

4.112 On 27 June Ms LP emailed CM saying she had met with the Claimant to sort the shifts for future months, and they had a discussion about how the ward runs and when expressing would best be appropriate. LP said she thought they needed to discuss how the Claimant would manage on the ward due to the timings she needed to express [379].

4.113 The Claimant also emailed CM and LS saying she raised concerns about expressing on maternity because it was so far from the ward, and that with expressing in the MLU and needing to wash and sterilise her equipment she was off the ward for around an hour. The Claimant said in the email she had then met with LP and explained that she normally expressed at 8pm and LP was honest and said it would not be a suitable time as the ward would be busy. She said in the email LP asked if the Claimant could express at a different time because LP did not think any ward would be able to accommodate expressing at that time as it was just after handover. The Claimant said she was at risk of becoming unwell and not being able to breastfeeding successfully and she felt like a burden. She said LP also said that expressing would be taken out of the Claimant's breaks and would run over allocated break times. In the email the Claimant said she asked how she would be able to eat food or have a drink, she could not eat and express at the same time, and breastfeeding mothers were entitled to extra rest breaks. She said LP raised concerns about the amount of time the Claimant would be off the ward expressing, and LP suggested looking into if the Claimant would owe time back. The Claimant said that extra breaks should not lead to a loss of pay. The Claimant said that whilst on shift her end time was updated to 4:30 pm. The Claimant asked whether that had been changed due to taking time to express, or whether there had been miscommunication over the timing [384]. The Claimant said being referred to OH for support would be beneficial.

4.114 CM met with LP on Teams. CM said in evidence that LP explained about the key timings on the ward schedule and the concern about having a staff member off the ward for such a long period of time. CM said LP had said that she had told the Claimant it was not always possible to take a break at an exact time, but the Claimant would be supported to take one as soon as possible and she understood the Claimant was happy to work with LP to balance the needs and could accommodate expressing at 9pm. She accepted that LP expressed concerns that the placement on B5 may be inappropriate for the Claimant's needs and had concerns about managing safe levels of staffing patient routines. CM also said she understood that LP had forgotten to calculate an unpaid 30 minute break into the phased return hours, and that a normal shift is 7am to 19:30 with a 30 minute unpaid break is the same for all staff. CM also replied to the Claimant's email to say it was disappointing to read it and she was due to speak to the director of midwifery about redeployment [382]. On 28 June Mr Thomas also emailed to say the events of 27 June had caused more concerns and he was looking for temporary/permanent redeployment to maternity [380].

4.115 On the disputed issues of fact about 27 June 2023, LP did tell the Claimant it would be difficult to release her to express at around 8pm for the reasons LP gave. We do not find it was said in an unkind way or a way that was intended to not facilitate the Claimant as a breastfeeding mother, but was LP simply telling the Claimant the difficulties there may be in terms of ward needs and patient safety at that time of the evening. We do not find that LP said nowhere in the hospital could accommodate that in the way that the allegation is presented, which again reads as LP being unkind. We find that it is likely LP was enquiring as to how things had worked on B4, because she anticipated that it was likely to be a busy time on most wards and the Claimant then responded that it had been ok there as observations were done at a different time.

4.116 We do not find that LP refused to provide the Claimant with a rest break for the Claimant to eat or drink or that the Claimant was told she needed to use her rest breaks for expressing. We accept there was probably a discussion about rest breaks as LP knew the MLU had said many women took their breaks there at the same time and the Claimant said she could not do so for hygiene reasons. But we do not find that LP then said the Claimant could not have rest breaks or that the Claimant would owe time back. We consider it more likely that LP was expressing

a general concern about the Claimant being absent from the ward for around 3 hours over a whole night shift cycle in terms of staffing levels, patient care, and the impact on other staff's breaks. But we do not find that LP said what the Claimant alleges or in the way the Claimant alleges. We find this because LP knew what the Breastfeeding Guidelines said about the potential need to facilitate more breaks for the Claimant. LP had also, as she said in evidence, spent some time with Mr Thomas discussing it all. In our judgement LP would also have been aware of some sensitivities over the Claimant moving wards and the need to accommodate breastfeeding, given it was a move that had been negotiated by CM. We simply do not see that LP would have conducted the conversation with the Claimant in an insensitive way and it is likely that LP would have been measured in what she was saying to the Claimant, whilst being honest about her concerns from the perspective of being ward manager. What was unfortunate was that LP and the Claimant ended up having to have this conversation this late in the process of the Claimant's return to work, rather than these issues being picked up in advance of the Claimant's return.

4.117 In our analysis we took into account the content of the email that the Claimant sent at the time. But we concluded that was the Claimant's subjective perspective following the discussion with LP, at a point in time at which the Claimant was very upset because she felt that having been through difficulties with expressing in work first time around, and having had a grievance outcome that had told her things would be different next time around, she then felt that things were repeating themselves again. The Claimant was in a heightened state in how she reacted to and interpreted what was said to her.

4.118 That is also reflected in the Claimant's suspicion that extending her work finish time to 4:30pm instead of 4pm was because of time taken expressing. Here we also accept LP's evidence that it was not done for that reason, but was simply due to her making a mistake in calculating the Claimant's shift times to take account of the 30 minute unpaid break (that applied to everyone).

Redeployment to MLU

4.119 On 30 June Mr Thomas asked LS if there was an update or whether he should tell the Claimant not to come in. CM said that she had just met the director of midwifery who was happy to support the Claimant there from the next day to see if it met the Claimant's needs. On 5 July Mr Thomas reported the two shifts the Claimant had done in maternity had gone really well. On 13 July CM confirmed it had been agreed the Claimant would go on a 12 week redeployment and if satisfactory could arrange permanent redeployment [399].

4.120 On 10 July LP contacted CM to find out who the new manager was so she could arrange to complete the forms to transfer the Claimant in ESR. On 18 July LP arranged a call with Ms Sheppard the Claimant's new manager to update her on annual leave, as she said it otherwise may be confusing. On 19 July LP sent to Ms Shepphard the Claimant's PIF [413] and details of annual leave.

Outstanding pay issues

4.121 On 11 August the Claimant emailed CM [400] to say there were a few things unresolved, and in particular she had not received anything since winning her industrial claim. The Claimant said payroll were not aware she had won the claim as nothing had been actioned. The Claimant said part of her grievance was that her maternity pay be looked at because it did not reflect what she had worked, and winning the industrial claim had not been actioned. The Claimant said she was still unsure of her annual leave entitlement.

4.122 On 11 August LS contacted the industrial claim appeal chair, Joanne Wilson [403]. Ms Wilson replied to say she had not been copied into any communication Rebecca Marsh had with payroll. Mr Thomas had asked Ms Wilson and Ms Marsh on 25 April 2023 when the Claimant would receive her backpay and that he had emailed previously on 27 February. On 25 March Ms Marsh had said she would ask payroll for an update.

4.123 On 14 August LS asked payroll to process the payment for two periods of sickness and chased it on 25 August. On 17 August the Claimant sent an email to say her line manager said she was still under B5 on the system and so would not receive enhancements that were worked in August pay [410]. CM replied on 24 August to say B5 had completed the paperwork, and she had asked them to link in with maternity to find out what had happened [409]. The Claimant then said the location was now showing as correct, but she wanted an update on her industrial claims and checking of her maternity leave [409].

4.124 On 30 August LS chased payroll again [414], and a Mr Challingsworth replied on 31 August to say it would go through in September. On 1 September 2023 the Claimant emailed LS to say she had spoken to payroll the day before, and if she had not spoken to them then what she received would have been wrong. The Claimant said pay was calculated on the basis of 3 previous pay slips, and that included statutory maternity leave and an incorrect payslip when B4 had not closed down her maternity and she had gone unpaid. She said payroll agreed to use two accurate payslips instead [416].

4.125 On 3 October 2023 CM wrote confirming the Claimant's permanent move to maternity [419]. The Claimant asked for an update on outstanding issues. Mr Thomas was asked to set out in writing what the outstanding issue was which the clamant did on 7 December 2023. It was said the Claimant's maternity pay was calculated using 2 months sick pay and not 2 months of work and enhancements, and it was due to be recalculated [430]. On 19 January information about shifts was sent through. Mr Thomas said they were from the wrong period [440]. In January 2024 payroll said that they had based maternity pay on full pay and what the Claimant should have been paid on her enhancements. LS understood that the maternity pay had been based on normal pay including enhancements and no further adjustments were required. LS did not understand that it related to industrial injury payments and maternity pay.

4.125 LS said in evidence that during the course of this tribunal claim enquiries were made again with payroll to confirm the maternity calculation was correct, and she was then told that in light of the industrial injury payment the Claimant was still owed some maternity pay. LS said it was a genuine error and a misunderstanding about the calculation, as she thought everything had been previously paid to the Claimant. On 25 July 2024 LS wrote again to say that after a further review from payroll the average enhancements in January 2022 were increased by the industrial injury payment so the maternity average payment was increased, and the maternity pay was incorrect. It meant the claimant was owed £1406.74. [464].

5. Discussion and Conclusions

5.1 Applying our findings of fact and the legal principles to the Issues in the case our conclusions are as follows. In our analysis we address each of the factual allegations in the List of Issues, but seeking where possible to put them into chronological order.

By the time of the Claimant's return to work (from a period on maternity leave) on 6 August 2021, fail to put in place what had been agreed for the Claimant's return to work as a breastfeeding mother/ failed to provide: A lockable room where the

Claimant could express in privacy. The Claimant says this placed her at risk of, and actually resulted in members of staff (including male members of staff), not complying with a "do not disturb notice" and walking in on the Claimant whilst she was expressing and in state of undress

5.2 As a matter of fact we have found that by the time of the Claimant's return to work on 6 August 2021 the Respondent had failed to put in place what had been agreed for Claimant's return as a breastfeeding mother, being a lockable room where the Claimant could express in privacy. We have found that the Claimant understood and expected that a lockable room was going to be provided ready for her return.

5.3 We considered first the harassment complaint. We find that the failure to provide an internally lockable room was unwanted conduct: the Claimant clearly wanted a lockable room. We also find that it was unwanted conduct that was related to sex. In Otero Ramos the CJEU said: "*It follows that the condition of a breastfeeding woman being intimately related to maternity, and in particular "to pregnancy or maternity leave", workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth."* Otero Ramos itself was concerned with a direct discrimination complaint under the Directive relating to a risk assessment, rather than being a harassment complaint. But we find a similar principle applies: breastfeeding is related to maternity and is an activity that that biological women carry out. The claimant wanted privacy due to the intimate nature of the activity she was carrying out as a woman; it was related to sex.

5.4 In terms of the proscribed consequences, we do not find that the failure to provide the lock prior to the Claimant's return was done with the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. No one set out to cause the Claimant upset or harm in that regard.

5.5 The question is therefore whether the conduct had such an effect, taking into account the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. Here we did pay due regard to the case law put forward by Mr Walters as to the appropriate threshold to apply. The proscribed consequences are, we acknowledge, strong words whose significance should not be cheapened.

5.6 Here the Claimant was expecting a lock to be fitted before her first shift when she would be expressing in work for the first time. The hook lock that was ultimately fitted cost £5.50. We were told in evidence that the Estates department considered the fitting of the lock to be non-emergency maintenance and that Estates were short staffed due to Covid. We did not hear evidence directly from the Estates Department. We did not hear why Estates considered it to be a non- emergency. The fitting of the hook lock was a simple, quick task. Even taking to account the impact and the demands of Covid, we do consider that the Respondent as a whole could have done more to ensure the lock was fitted on time before the Claimant's return.

5.7 Expressing is an intimate, personal activity where what are the appropriate arrangements will vary from individual to individual. Different people will have different expectations and preferences as to what constitutes privacy for them. It is important that an expressing mother feels secure and relaxed when expressing because otherwise expressing may not be effective. Here it was known the Claimant wanted a lock and was expecting one to be fitted so that she could feel private and secure. The Respondent's policy talks about what "may" be satisfactory, but it is not proscriptive in every case and again each expressing mother's needs and wishes for privacy will be individual to them. We find that the

absence of the lock left the Claimant feeling worried, apprehensive and anxious, even with the do not disturb sign, about the risk of people walking in. We do remind ourselves that the actual complaint of unwanted conduct is about the arrangements made for the Claimant's return to work, and not the subsequent events when the Claimant was walked in on whilst expressing by two members of staff. We also acknowledge the Respondent's witnesses point that they did not expect staff would walk in on the Claimant when the "do not disturb" sign was in place, and bearing in mind that at nighttime there was no obvious reason why staff should be entering the Ward Manager's office.

5.8 However, on balance we do find the Claimant subjectively felt humiliated by the lack of provision of the lock. She was concerned enough about it to raise it in her email of 6 August. The Claimant understood it would be fitted for her return in accordance with her own expressing needs. Those needs, being promised and then not met, left her feeling anxious and vulnerable to being exposed if someone walked in. She felt belittled by the lock not being provided, by her needs not being met, that her needs were not being taken seriously and by her ongoing resulting vulnerability that could leave her exposed or by not being able to express effectively. In all the circumstances we find it was objectively reasonable for the failure to provide the lock to have that humiliating effect. In particular, in circumstances in which the Claimant understood it would be fitted, where more could have been done to ensure the lock was fitted on time, and the lock's importance to the Claimant's own, individual expressing needs.

5.9 Subject to the important question of time limits which we return to below we would have found this failure to to be harassment related to sex. Because it would constitute harassment, applying section 212 it cannot also be direct sex discrimination, and we therefore have not addressed the equivalent direct sex discrimination complaint.

By the time of return to work on 6 August 2021 fail to put in place what had been agreed for the Claimant's return to work as a breastfeeding mother/ failed to provide: A risk assessment for the Claimant as a breastfeeding mother;

5.10 The risk assessment for the Claimant as a breastfeeding mother had not been completed in advance of the Claimant's return to work but the Claimant had ultimately agreed it could be done on her return on the 6th. The documents were then not immediately available, and the Claimant left work. We considered it likely the document was then prepared in the Claimant's absence on the 6th, and it was gone through with her on the 7th.

5.11 Looking first at the harassment related to sex complaint, not being able to go through a risk assessment with the Claimant on the morning of 6 August 2021 was unwanted conduct from the Claimant's perspective. It was conduct that was related to sex because it was a risk assessment for the Claimant as a breastfeeding mother; an activity inherently linked to the Claimant's biological sex. It was not conduct undertaken with the purpose of harassing the Claimant; CC had struggled to find the right document and had then left it to MK, who then did not have the documents ready and who was also busy at the start of the shift with clinical needs.

5.12 In terms of effect, the Claimant was clearly upset that the risk assessment was not done or ready to be done at the start of her first day back because it caused her to leave the workplace saying she would not return until the risk assessments had been done. The Claimant said at the time she did not feel safe, and was feeling let down and upset. It is, however, also relevant to note that the Claimant was only due to undertake computer based activities that day and not clinical duties. The Claimant also left the workplace meaning that once MK had finished her one on one duties and was able to prepare the risk assessment document, the Claimant

was not there to go through it with MK. On balance, whilst no witnesses memories were particularly strong, we thought it most likely that KG went through both risk assessments with the Claimant the next day. The Claimant did not take issue with the actual content of either risk assessment.

5.13 In such circumstances we find that, even if the Claimant subjectively considered she had suffered the proscribed effect, when viewed objectively it was not reasonable for the conduct to be considered to have such an effect, bearing in mind the very short delay (not aided by the Claimant leaving the workplace), that the Claimant was at low risk in the meantime because of the nature of the computer duties she was undertaking, and knew she would be undertaking that day.

5.14 The complaint is also brought as one of direct sex discrimination. The Respondent's position is that the Claimant would require a male comparator and that any male employee in a similar circumstance who was to be risk assessed would be treated the same way. It is said the alleged failure to do a risk assessment was not less favourable treatment because of sex but occurred because the risk assessment form could not be located and the Claimant left after an hour.

5.15 On the basis of the caselaw authorities we considered that there are circumstances in which a failure to properly undertake a risk assessment specifically required for a pregnant or breastfeeding woman could be brought as, and amount to, direct sex discrimination and would not require a male comparator. The statutory requirement to undertake a specific risk assessment stems from the same European Directive and with the same specific aim, as set out in Otero Ramos, for the particular protection of the mother and child from specific risks, whether pregnant or breastfeeding. Where the reason for the treatment is pregnancy/breastfeeding then applying Geldart a comparator would not be required and indeed there could not be one. As it was put in Otero Ramos in the context of breastfeeding: a breastfeeding worker may not be treated in the same way as any other worker since her specific situation necessarily requires special treatment on the part of the employer. Otero Ramos uses the words "less favourable" treatment (taken from the Directive) as does Section 13(1) and (6) of the Equality Act. However, the caselaw has long provided that where required this can be read as "unfavourable treatment" or that there is no need for a comparator. In Otero Ramos there was no mention of a male comparator and indeed the CJEU specifically said a breastfeeding mother would not be in the same position as anyone else. We consider we are obliged to read Section 13 on that basis in appropriate circumstances. There is modern caselaw authority support for that approach, as we understand Geldart to say that in appropriate circumstances (there pregnancy but outside the protected period) the Webb v EMO Cargo principles would apply to Section 13 Equality Act complaints and a comparator would not be required. To take one other case law authority example about reading the legislation, it was said in Yekkinni v London Borough of Hackney UKEAT/0602/12/SM: "*Less favourable treatment in section 3(A)(1) [at the time the provision in the Sex Discrimination Act] means adverse treatment or unfavourable treatment of the person concerned. It does not require a comparator at all, still less a male comparator: see Equal Opportunities Commission v Secretary of State for Trade & Industry [2007] IRLR 327 at paragraphs 41-47 and 62(ii); a decision which resulted in an amendment to section 3(A)(1) introduced in 2008."*

5.16 In terms of how it is less favourable treatment/unfavourable treatment "because of" sex; in Hardman it was termed, (when the qualifying conditions were met), "automatic" discrimination or perhaps that might be termed inherently a protected characteristic based criterion. One reading of Madarassy would be to say the Court of Appeal agreed with the "automatic" approach. The reasoning in Otero Ramos also seems to be supportive of such an approach. Another approach would be to concentrate on the "reason why" but take a purposive approach to the "reason why", and a purposive approach to what other operative criteria can be

disassociated from pregnancy/breastfeeding as the "reason why" so as to ensure that the special protection for pregnant and breastfeeding mothers is safeguarded. That was one of the rationales behind the decision in Webb v Emo Cargo because, on the facts of that case, to allow the criterion of absence to be separated out from the maternity leave period drove a coach and horses through the protection for pregnant women who were due to take maternity leave. Indeed, one reason why, on its own particular facts, the outcome in Geldart was different, and ultimately the absence dissociable from pregnancy as a reason, when compared with Webb, was also because it involved a matter of pay which has always had its own considerations. In Gould v St John's Downshire Hill [2021] ICR 1 the need in some cases to consider the particular protections given by the law to pregnant women was also put in a similar way. The EAT referred to a quote from O'Neill v Governors of St Thomas Moore RCVA Upper School [1996] ICR 33 that:

"Dismissal for pregnancy is on a ground of sex. Pregnancy is unique to the female sex. The concept of "pregnancy per se" is misleading, because it suggests pregnancy as the sole ground of dismissal. Pregnancy always has surrounding circumstances, some arising prior to the state of pregnancy, some accompanying it, some consequential on it. The critical question is whether, on an objective consideration of all the surrounding circumstances, the dismissal or other treatment complained of by the applicant is on the ground of pregnancy. It need not be only on that ground. It need not even be mainly on that ground. Thus, the fact that the employer's ground for dismissal is that the pregnant woman will become unavailable for work because of her pregnancy does not make it any the less a dismissal on the ground of pregnancy. She is not available because she is pregnant. Similarly, in the present case, the other factors in the circumstances surrounding the pregnancy relied upon as the "dominant motive" are all causally related to the fact that the applicant was pregnant — the paternity of the child, the publicity of that fact and the consequent untenability of the applicant's position as a religious education teacher are all pregnancy based or pregnancy related grounds."

It was then said in Gould:

"*The key point in this regard is that the Appeal Tribunal was applying the then recent decision of the European Court of Justice in Webb v. Emo Air Cargo (U.K.) [1994] ICR 770 which had held that, because pregnancy is unique to women, unfavourable treatment for reasons of pregnancy or related to pregnancy is necessarily sex discrimination. It is neither necessary nor permissible to ask whether a man who had an analogous condition would have been treated in the same way. This conclusion reflected particular policy considerations which apply specifically to pregnant workers and workers on maternity leave and, indeed, European legislation (the Pregnant Workers Directive 92/85/EEC) which gave them particular rights. The general principles of discrimination law therefore do not apply in the same way to pregnant workers and, indeed, their rights continue to be governed by a distinct statutory regime (see, for example, the fact that section 18 of the Equality Act 2010 is not subject to section 23(1) as it provides a definition of discrimination which applies specifically to unfavourable treatment because of pregnancy or maternity, rather than such cases being decided under the generally applicable definition of direct discrimination under section 13 read with 23(1))."*

5.17 That all said, in relation to this particular allegation, we did not consider that there had been a failure to undertake a proper risk assessment for the Claimant as a breastfeeding mother. The caselaw is clear the approach to fulfilling the need for a risk assessment should not be absolutist, and a short delay may not amount to a failure to undertake a risk assessment, depending on the particular facts and any risk faced by the mother in the meantime. Here, given the very short delay in undertaking the risk assessment, during which time the Claimant was not at any

significant risk due to the fact she was only due to undertake computer based activities, and which the Claimant herself compounded by leaving work, meaning the risk assessment was not gone through with her until the following day, we do not find that there was, in fact, a failure to comply with the obligation to carry out a risk assessment. We therefore find there was no less favourable treatment or unfavourable treatment and none because of sex/the Claimant being a breastfeeding mother. These complaints of direct sex discrimination and harassment related to sex are not well founded and are dismissed.

In December 2021 failing to record the Claimant's return to work after a period of absence for work related stress (which in due course meant the Claimant not being paid properly in January and February 2022 and further again once the Claimant was on maternity leave and receiving maternity pay);

5.18 We accepted CC's evidence that the Claimant's absence history had not been properly recorded on the system due to administrative error: Roster Pro had not transferred the data across to the ESR system that recorded absence and calculated pay. It is supported by the emails from March 2022, when the problem was discovered, and in particular that the Claimant had been entered as continually sick from 26 September 2021 to 4 December 2021, rather than each rostered shift being entered as sick leave [239].

5.19 What happened was unfavourable treatment because it later affected the Claimant's pay. But we do not find that it was unfavourable treatment because of pregnancy. Indeed, for the first part of the period when continuous absence was recorded the Claimant was not even known by the Respondent to be pregnant. It happened simply due to administrative error. We could see no evidence that CC had any ill intent towards the Claimant due to the Claimant's pregnancy. All the contemporaneous evidence points towards CC being supportive of the Claimant's pregnancy, and indeed CC later tried to ensure the Claimant was not disadvantaged in terms of pay. Pregnancy was not a reason for the treatment, it was simply a background factor. This complaint of pregnancy discrimination is not well founded and is dismissed.

On or around 7 January 2022, staff member GJ asked the Claimant to work contrary her breastfeeding risk assessment and pregnancy risk assessment by dealing with fluids from a chemotherapy patient;

On or around 7 January 2022 when the Claimant refused to deal with the chemotherapy patient fluids, Deputy Ward sister Maria Kearns then asked the Claimant to work on a ward that was not a green area which again was contrary to the Claimant's breastfeeding risk assessment and pregnancy risk assessment

Initial request by GJ

5.20 As a matter of fact GJ did ask the Claimant to deal with fluids from a chemotherapy patient. It is also factually correct that such a request was contrary to the Claimant's breastfeeding and pregnancy risk assessment GJ's request was unwanted conduct from the Claimant's perspective. But GJ's request was an off the cuff, every day, request by a nurse to a healthcare assistant, at a busy time, to deal with fluids from a chemotherapy patient. GJ did not expressly or knowingly do so on the basis that it was contrary to the Claimant's breastfeeding or pregnancy risk assessment. GJ would not have known the detail of the Claimant's risk assessments. There is no reason to suppose GJ knew the Claimant was breastfeeding with a breastfeeding risk assessment that did not allow working with chemotherapy patient fluids. GJ could not recall knowing the Claimant was pregnant at the time. The Claimant said it was more common knowledge by this point, and she had announced it on Facebook. GJ said she was not on social

media. We did not think it likely that even if GJ had at some point been told the Claimant was pregnant, that the pregnancy was operating at all in GJ's mind at the time she made the request. GJ was simply responding, in the moment, to the situation she was in. In that context we did not consider that GJ's request related to the Claimant's sex (in the sense of being related to pregnancy or breastfeeding). We would not in any event have found that such a comment had the purpose of creating the proscribed consequences, or that it would be reasonable for the request to be seen as causing the proscribed consequences. It was an unwitting off the cuff, everyday request made at a busy time.

5.21 In terms of the pregnancy discrimination complaint, we accept the request was unfavourable treatment from the Claimant's perspective. We do not, however, find that it was because of pregnancy. Again, the Claimant's pregnancy was not operating on GJ's mind when she made the request. We also do not find that the request amounted to direct sex discrimination. It was not less favourable (or unfavourable) treatment because of pregnancy or breastfeeding; again that was not operating on GJ's mind when she made the request. These complaints of harassment related to sex, pregnancy discrimination and direct sex discrimination are not well founded and are dismissed.

Request by MK

5.22 Turning to the second allegation relating to 7 January 2022, the Respondent argues that MK did not ask the Claimant to work on A4 and that at the time the Claimant said it was GJ who had suggested the Claimant go to A4, and that all MK had said is that there was no one Covid positive on A4. The Respondent argues that was a statement of fact and not a request to work on A4.

5.23 We do consider, in the overall context, that it was a request for the Claimant to work on A4. What was said was said in the context of the earlier part of the discussion about whether the Claimant could deal with the fluids of chemotherapy patients, and the staffing difficulties caused by the Claimant's restrictions in view of the number of chemotherapy patients on the ward at the time. GJ then asked why the Claimant could not go to A4 instead, and the Claimant told them both why she could not. We consider when placed in that context, MK saying there was nobody positive on A4, in reality amounted to a request or suggestion that the Claimant go and work there. That the Claimant viewed it as such at the time, and as the recipient of what was said, is shown by the fact she felt the need to respond and say her risk assessment was to work on green wards.

5.24 We therefore find that in substance MK did ask the Claimant to work on A4, and that was not a green ward. The Claimant's Covid pregnancy risk assessment said she would be working in an area with no/low likelihood of coming into contact with patients who are confirmed or suspected Covid positive (i.e. areas where patients are unlikely to be assessed for admitted). We accept that the basis of this was that the Claimant had been told she should be working on a green ward and that MK was, in effect, asking the Claimant to work contrary to her risk assessment. CC in her witness statement at paragraph 76 accepts the Claimant's risk assessment identified green zones for the Claimant to work on.

5.25 In terms of the harassment claim, we find that the request was unwanted conduct from the Claimant's perspective. We find that it did relate to sex in the sense of relating to pregnancy and relating to breastfeeding, which were inherently part of the Claimant being a biological woman. The request came out of the inconvenience caused by the Claimant's pregnancy and breastfeeding risk assessments which said she was to avoid the bodily fluids of chemotherapy patients when so many patients on that main, green ward were chemotherapy patients. GJ and, in turn, MK then thought the Claimant could go to A4 where there were no chemotherapy

patients. By this point in time there had been an express discussion between all involved about the Claimant's pregnancy and pregnancy risk assessments. MK as part of the management team who knew the detail of the Claimant's risk assessments also knew the Claimant's risk assessment said she should be working on a green ward. The request therefore related to pregnancy and breastfeeding as it came from the restrictions on handling the bodily fluids of chemotherapy patients and also related to the Covid pregnancy risk assessment, which was known to MK.

5.26 We do not find that MK's purpose was to create the proscribed consequences. She was seeking to staff the wards and would not, in our judgement, have ever intended to place the Claimant at risk of harm. Turning to that effect, we find that subjectively the conduct did have the effect of creating a humiliating environment for the Claimant. In reaching that conclusion we took account of again the high threshold of the meaning of proscribed consequences and that they are strong words. We also took into account that it was, in effect, a request that the Claimant was able to, and did, reject. However, the interaction with MK happened in public in front of GJ and other staff, and from the Claimant's perspective the Claimant as a healthcare assistant was being asked by a senior member of staff to work against her risk assessment and in circumstances where the Claimant perceived there was a risk to her health and that of her unborn child. What happened also made the Claimant feel like she was being seen as a problem. The interaction made her feel belittled.

5.27 On balance we also find that it was reasonable for MK's action to be seen to have that belittling, humiliating effect. Again, it was an interaction that took place in front of others. Further, it was reasonable for the Claimant to be concerned about the risk to her health and that of her unborn child. Whilst we accept that MK would not have set out to do something she thought would place the Claimant at risk, we find it likely that MK knew the outcome of the risk assessment was that the Claimant was to work on green wards. We accept that MK thought there was no real risk to the Claimant as the patients on A4 had not tested positive for Covid. But we also acknowledge the Claimant's point that Covid testing was happening repeatedly over a 72 hour period. It was not a guarantee that a patient who tested negative on day zero would still test negative on day three. If testing once on day zero was adequate, then the Respondent would not have had a three day quarantine and repeat testing system in place to start with. Further, it was reasonable for the Claimant to rely on what she had been told that she would be working on green wards. Subject to the important question of time limits, dealt with further below, we would find that MK's action in asking the Claimant to work on A4 was harassment related to sex on that basis.

5.28 As the complaint (subject to time limits) would succeed we did not go on to consider the equivalent complaint as a pregnancy discrimination or direct sex discrimination complaint.

In the period 7 January 2022 to 16 January 2022, the Claimant was being allocated to assist nurses on the ward that involved dealing with the fluids of chemotherapy patients and contrary to her pregnancy risk assessment and breastfeeding risk assessment;

5.29 We took this complaint to relate to 7 January 2022 and to the earlier part of the interaction between MK and the Claimant where MK told the Claimant that she could take away bedpans from patients receiving chemotherapy. The Respondent argues that the Claimant was not "allocated" by MK to assist nurses on the ward in activities that involved dealing with the fluids of chemotherapy patients. It is argued that at the most GJ had asked the Claimant to do so on one occasion, and

that even if MK said the Claimant could handle chemotherapy waste, then this was not an allocation to do so.

5.30 We consider that this is an over literal approach to the pleaded allegation in the List of Issues. The Claimant had been scoffed at by GJ when the Claimant raised her risk assessment, and GJ had then gone to speak to MK as the nurse in charge about whether the Claimant could deal with such bodily fluids. The Claimant had then been asked to go to speak to MK about it and MK told the Claimant she could deal with such bodily fluids. MK was in reality (initially) telling the Claimant that she could deal with the bodily fluids and could therefore assist GJ with such activities. The Claimant was in effect being told she could and therefore should be assisting GJ with such activities. It was also an interaction that gave sufficient cause for CC to later go and discuss it, and the Claimant's risk assessment, with MK.

5.31 It was unwanted conduct and conduct which related to sex in the sense of being related to both the Claimant's pregnancy and her being a breastfeeding mother. Again, we do not find that MK had the purpose of creating the proscribed consequences for the Claimant. We would, however, find that subjectively the Claimant found it to be humiliating. Again, it was an interaction that took place in public, including in front of GJ. The Claimant was also being told she could do something that the Claimant understood was contrary to her risk assessment and could pose a risk when pregnant and when breastfeeding. For those reasons, in our judgement, it was also reasonable for the conduct to be seen as having a humiliating effect. We did take into account the fact that MK later in the conversation backed down when challenged by the Claimant about the risk assessments. But that was after the Claimant had had to make that challenge, and in circumstances in which MK had commented about how many patients on the ward were receiving chemotherapy. Whilst it was therefore a short lived direction by MK, we considered that it still had that humiliating effect, and it was reasonable for the Claimant to view it as such. To the extent that the Respondent may suggest there was less of a risk, in the Claimant's second trimester, that would not take account of the Claimant's breastfeeding. Moreover, that there were different safety considerations in a second trimester was never communicated to the Claimant and she was entitled to, and it was reasonable for her to, rely on the risk assessment that had been communicated to her. Furthermore, the policy says the adoption of such risks should on the basis of informed, voluntary consent, which was not present here. Subject to the question of time limits, dealt with below, we would therefore uphold this complaint of harassment related to sex.

In the period 7 January 2022 to 16 January 2022, the Claimant was allocated shifts to work on a separate part of the ward that looked after Covid patients/potential Covid patients which was contrary to her pregnancy risk assessment and breastfeeding risk assessment. As well as the impact on the Claimant in being asked to carry out tasks that put the Claimant and her baby at risk, this should not have happened if the risk assessments had been followed and appropriate work allocation arrangements put in place. The situation also caused bad feelings amongst other staff members;

5.32 We have already dealt with about the allegation relating to working on A4 on 7 January 2022. In relation to 16 January 2022, the Claimant had told HB that she was too upset to continue her shift and was going home. In the Claimant's own email of 16 January 2022 she identified that HB "offered" for the Claimant to work on A4. It was just that, an offer made in the circumstances as an alternative to the Claimant going home. We consider that in the particular circumstances, even if the allegation is looked at with some flexibility, it did not amount to the Claimant being allocated a shift to work on A4. The complaint fails on its facts and the complaints of harassment related to sex, pregnancy discrimination are not well founded and are dismissed.

In around early February 2022, fail to update the Claimant's risk assessments once it was known there was a potentially violent patient on the ward (who had hurt another member of staff). This resulted in the Claimant being put at risk, including when the patient approached the Claimant and was aggressive towards her;

5.33 A review of the risk assessment was due if there was a significant change. Any risk assessment must be suitable and sufficient. We accept that there was a de-facto updated risk assessment done relating to the Claimant, albeit not written down, as the patient was marked on the board as one for the Claimant not to deal with. On the evidence before us we did not, however, find that the risk assessment review was suitable and sufficient for the Claimant as a pregnant worker. In particular, we were given no evidence about the circumstances in which the other member of staff, who had been carrying for the patient, was injured whilst caring for the patient. We therefore have no substantive evidence as to why, in light of this, the Respondent says they did not expect the patient to be aggressive on the day in question. On what we do know, we consider that this potential eventuality should have been reasonably anticipated and risk assessed. This was a patient who had lost capacity, was under DOLs, had been allocated a one on one worker to be with him. He was known to be wandering the wards outside of his side room and was not going to be prevented from such wandering. The patient had previously injured someone who was caring for him. Ultimately measures that could have been considered would have included giving the Claimant alternative duties or medical suspension whilst the patient's condition was got under control.

5.34 We therefore do find that there was a failure to undertake a suitable and sufficient update as to the Claimant's risk assessment. Such a failure was unwanted conduct. It was unwanted conduct that related to sex because it related to the Claimant's pregnancy. We do not find it had the purpose of creating the proscribed consequences; there were efforts made to risk assess the situation and protect the Claimant. The failure was not deliberate. But we do find that it had the effect of creating the proscribed consequences. The Claimant was left vulnerable to the behaviour of the patient and thus facing an intimidating environment in the workplace. We consider that it was reasonable for the conduct to have that effect given our findings that the risk assessment review/update was not, in the circumstances, suitable and sufficient. Subject to the important question of time limits we would find this to be harassment related to sex. In such circumstances we did not go on to consider the equivalent pregnancy discrimination complaint.

In February 2022 failing to facilitate a GP request for the Claimant to work on amended duties (and ultimately resulted in the Claimant being placed on medical suspension);

5.35 We do not find that this complaint was made out as a matter of fact. JB in particular went to extensive efforts to facilitate the GP request for the Claimant to work amended duties, but despite those efforts alternative duties were not available. The Claimant did not in evidence or cross examination suggest any other alternative work (nor did she or her trade union representative at the actual time). The complaint would fail on its facts. Alternatively, there was no unfavourable treatment, or, in terms of harassment, it would not be reasonable for any unwanted conduct to have the proscribed consequences given the efforts that were made to find amended duties. The complaints of harassment related to sex and pregnancy discrimination are therefore not well founded and are dismissed.

In February 2022 delaying in referring the Claimant to occupational health, as requested by the Claimant, for advice on finding the Claimant appropriate duties;

5.36 We do not find as a matter of fact that there was delay referring the Claimant to OH. The Claimant was asked about an OH referral and she did not respond to that part of the email enquiry. The OH referral was then made in any event on 17 February 2022. The complaint is not made out as a matter of fact. The complaints of harassment related to sex and pregnancy discrimination are therefore not well founded and are dismissed.

In February 2022 requesting the Claimant take annual leave because the Respondent had not sorted out amended duties/ the Occupational Health referral;

5.37 If amended duties could not be found then strictly speaking the Respondent should have medically suspended the Claimant on full pay. They did in due course do so and backdated the medical suspension. But at the time of the actual events that had not yet happened. At the actual time of events the Claimant was, in effect, being asked to facilitate more time to the Respondent to try to find alternative duties for her at her own expense in the sense of using her own annual leave.

5.38 In terms of the harassment complaint, we find this was unwanted conduct. The Claimant wanted to work if there was something she could do that was suitable and safe. It was conduct that related to pregnancy because it related to the pregnancy redeployment or suspension process the Respondent should have been following. The situation also arose out of a need to find alternative work for the Claimant because of pregnancy related risks and the pregnancy related advice of her GP.

5.39 We do not find that it was conduct that had the purpose of creating the proscribed consequences. We find that JB was just trying her best to find something for the Claimant and asked the Claimant to take annual leave as a way to allow more time to find something suitable. The request may have been misadvised, but there was no ill intent behind it. We also do not find that the request had the effect of creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant or could reasonably be viewed as such. It was a simple request. It was not in any way oppressive, and we do not consider that the effect can be seen as reaching the requisite high threshold of the proscribed consequences.

5.40 Turning to the pregnancy discrimination complaint, we find that being asked to take annual leave was unfavourable treatment. A reasonable person in the Claimant's shoes would view it as such when the onus was on the Respondent to find alternative duties or medically suspend, rather than, in effect, the Claimant bearing the cost of the Respondent seeking more time. It was unfavourable treatment that took place in the protected period.

5.41 We turn to the question of whether the unfavourable treatment was because of pregnancy. The Respondent argues that it was not, and that the reason for the treatment was because no amended duties could be found at that point in time. We find that it was unfavourable treatment because of pregnancy. The Respondent was under a positive statutory obligation, as a specific pregnancy related health and safety measure, because of the Claimant's pregnancy, to find amended duties and, if not, medically suspend. The request to take annual leave was made because the Respondent at the time could not find the amended duties they were obligated to find for Claimant (or alternatively medically suspend) because of the Claimant's pregnancy and risks associated with it. The inability to find the alternative duties, in our judgement, particularly when viewed through the purpose of the statutory protection, and the resulting request to take annual leave, was not dissociable from the Claimant's pregnancy. To use the language of O'Neill v Governors of St Thomas Moore RCVA the need for amended duties was part of the surrounding circumstances of pregnancy that really become part of the pregnancy. Like in Webb the reason why the Claimant was not available for her

main duties was because she was pregnant and the associated risks of that pregnancy. That JB had a benevolent motivation when doing so, does not, in our judgement affect the position. Subject to the question of time limits we would uphold the complaint.

On 10 March 2022 and thereafter, failing to carry out a pregnancy risk assessment at 26 weeks gestation (which the Claimant requested several times by email and was required under the Health Board policy);

5.42 The Claimant had been signed fit for amended duties by her GP and had been waiting the provision of such duties. Then on 28 February she commenced a period of pregnancy related sickness. On 2 March the Claimant's GP then issued another fit note saying the Claimant may be fit for work, if available, for amended duties (citing pregnant/risk concerns) for 28 days. By 10 March the Claimant was at 26 weeks pregnancy with a further pregnancy risk assessment due because of increased risks relating to Covid. As subsequently pointed out by OH, from 26 weeks Welsh Government guidance was that close contact with people you do not normally meet should be avoided. Under the Respondent's own risk assessment document, after 28 weeks pregnancy the employee should work from home or in a non-patient facing role in a Covid secure workplace where 2m physical distancing could be stringently maintained at all times.

5.43 The Respondent's position is that a pregnancy risk assessment was not needed because the Claimant was medically suspended. However, as of 10 March 2022 the Claimant was not medically suspended at that time. It was not known that she would be medically suspended when, for example, the Claimant requested the updated risk assessment on 4 March. That medical suspension was later backdated does not change the position at the actual time of the events. In our judgement, if the Respondent had undertaken the updated risk assessment it probably would have resulted in the expedition of the Claimant's medical suspension rather than the Claimant being left on sick leave (given she was under a fit note recommending amended duties which had not been found). Being on sick leave rather than medical suspension on full pay could have ultimately affected the Claimant's pay.

5.44 In those circumstances we find that failing to carry out an updated pregnancy risk assessment was unwanted conduct. It was unwanted conduct related to pregnancy and therefore related to sex. We do not find that it had the purpose of creating the proscribed consequences. Individuals like CC and JB were genuinely seeking to resolve things for the Claimant; it was just done in a misguided way. We do find that it had the effect of creating a humiliating environment for the Claimant. The Claimant was left on sick leave with a GP recommendation for amended duties, with her requests for a pregnancy risk assessment not responded to. The Claimant was left feeling unappreciated and feeling not looked after in having to repeatedly ask. She was left not knowing what was going on. It was reasonable for the Claimant to feel that way in the circumstances. Subject to the question of time limits we would uphold the harassment complaint. In such circumstances we have not gone on to consider the equivalent pregnancy discrimination complaint.

In or before March 2023 not updating payroll that the Claimant's maternity leave was coming to an end and the Claimant was then taking a period of annual leave. (The Claimant was at risk of losing pay – it in fact did not happen because on her own initiative the Claimant rang payroll on 13 March 2023 to check);

5.45 We considered that this happened because lots of people became involved in the Claimant's return to work and move to a different ward, but no one person was given clear responsibility for updating payroll as to the dates. It was incredibly poor administration and should not have happened, but we do not find that it was

harassment related to sex, or unfavourable treatment because of maternity leave or direct sex discrimination. It was due to administrative incompetence.

5.46 In terms of the harassment complaint, it was unwanted conduct, but we do not find that it was related to pregnancy/maternity leave or otherwise related to sex. That the background was the Claimant's return from maternity leave does not, in our judgement, amount to a sufficient connection to make it "related to" sex. Likewise, it was not because of maternity leave, or pregnancy, or sex (in the sense of being a material influence). These complaints are not well founded and are dismissed.

In the run up to the Claimant's return to work in May 2023 (following medical suspension and then maternity leave), failing to action promises made in a Respect and Resolution (grievance) outcome for the Claimant's return to work, including not responding to the Claimant's emails, or to arrange a meeting before the Claimant's maternity leave ended to discuss the return to work plan and have risk assessments ready (including a breastfeeding risk assessment and suitable arrangements for expressing) for a smooth return to work;

5.47 CM had proposed a meeting in the week commencing 13 February 2023. CM also said once a suitable work base had been confirmed with the Claimant then CM would meet with the ward manager to identify an appropriate private room for the Claimant's breastfeeding needs and discuss them with the Claimant. Under the return to work plan the risk assessments were to be updated in a timely manner prior to the first shift back and to be completed prior to the first shift on duty or at least a week prior to the return. Information about the arrangements for expressing was to be shared with the Claimant the week before the first rostered shift on duty.

5.48 The meeting between CM and the Claimant did not happen. Nor did a discussion with CM happen following CM meeting with the ward manager to identify a private room for breastfeeding. CM said in evidence it was not possible to have the meetings due to operational demands as she was dealing with strike action (which indeed is referred to in one of the contemporaneous emails). CM said she knew that the management at B5 were more than capable of making the arrangements for the Claimant's return to work and that B5 previously had expressing mothers who had not had any problems. In effect, she sought to handover the responsibilities to the new management team. The return to work plan at [290] does place the detailed responsibilities on to the ward manager.

5.49 Notwithstanding the demands on CM's time, we considered that CM should have remained involved in overseeing the arrangements and held the promised meeting/discussion with the Claimant. CM knew far more than B5 management about the particular background relating to the Claimant's previous experiences, her return to work and her particular needs. CM knew the fundamental importance to the Claimant of having an internally lockable room for expressing, reflected in CM's grievance outcome letter where CM said to the Claimant she would work with the ward manager to identify an appropriate private room and discuss it with the Claimant. CM knew about the Claimant's previous experiences of staff walking in on her and therefore the sensitivity of the issue. CM also had the power and influence to ensure the ward/location the Claimant returned to was suitable both for the Claimant and indeed the Respondent's own needs. When things subsequently went wrong CM was in a position to pick the situation back up and find a resolution, but to us, whilst not wishing to minimise the workload pressures CM most likely faced, it does also indicate that she could have been in a position to also do so at the relevant time (and indeed would have avoided the subsequent work sorting an eventual resolution entailed).

5.50 Whilst we acknowledge the Claimant viewed the rooms with LP and did not initially raise an issue, we considered it was still more likely that the issue with an internally

lockable door would also have come to a head at an earlier stage through the envisaged discussion. It appears there was some confusion in relation to that from various perspectives. The Claimant had not initially thought through the keypad point and also initially had thought the doctor's room was lockable. But CM also appears to have thought the doctor's room had an actual internal lock when in fact it did not (other than the keypad) [see 365] and in circumstances in which the return to work plan envisaged a lockable room with keys [see 291]. (Although we would add that as a staff only room the doctors' room potentially had more scope to be made internally lockable like CC's office was with a hook lock). We thought it likely that LP did not have knowledge of the importance and history of the Claimant having an internally lockable room. We thought it more likely that if CM had viewed the rooms with LP as promised and then discussed them with the Claimant it was more likely this lockable room issue, along with availability at likely expressing times, would have to a head at an earlier stage. CM only got involved in the assessment and offer of specific rooms following a discussion with LP on 23 June. As already stated, we consider that if CM had done so earlier, understanding the Claimant's particular needs and history, it is likely the problems and potential resolution would have come to a head far earlier and without the stress and upset the Claimant then experienced.

5.51 We also considered that if CM had remained more in touch with the Claimant and her TU representative and ensured there was a detailed plan in place for the Claimant's return it was more likely that the eventual clash between the Claimant's proposed expressing times and the ward's own needs would have come to light at an earlier stage such that it could have been remedied in advance and without the Claimant and LP ending up in the position that they did. In particular, to identify an appropriate room CM would have need to know the times when the Claimant was going to be expressing and, in our judgement, would be likely to have also entailed consideration as to what the ward's need were too (indeed CM said she knew the ward well). Likewise, it was more likely that the correct information would have been communicated properly to payroll as part of a smooth return to work. CM undertaking more proactive overseeing would also have stopped the lengthy going round in circles as to the calculation of the Claimant's annual leave and impact on the Claimant's return to work date (although likewise we accept the Claimant could have pointed out earlier the information CM had provided about that calculation although she also would not necessarily have known LP did not have that information). We considered that CM also had a responsibility to follow up with the ward manager to make sure that everything that was supposed to be done had been done and in a timely manner.

5.52 The Claimant wanted the meeting, and interaction with CM, she was chasing it up. The failure was unwanted conduct. It was unwanted conduct that was related to sex as it related to the Claimant's breastfeeding needs. There was no intent for the conduct to have the proscribed consequences. But we find that it did have that effect. In particular, there was a humiliating environment for the Claimant in the sense that she was left feeling diminished, and with uncertainty at a point in time at which she wanted certainty, and clarity that her return to work would be smooth with appropriate arrangements in place and without what she feared would be a repeat of her previous experiences following her first pregnancy/maternity period and which indeed she then felt followed. It also impacted on the Claimant's remaining time on her maternity leave/annual leave prior to her return to work when she was trying to enjoy her remaining time at home with her young family. We consider and find it was reasonable for the Claimant to feel that way in the circumstances. Promises had been made to the Claimant in the outcome of her grievance and not withstanding the workload pressures on CM we considered that more could have been done, given the particular sensitivities of the situation, to ensure the Claimant did have a smooth return to work. It needed someone with CM's authority to oversee it as opposed to what appeared to be LP, LH and LS

trying to muddle through but with lack of one person having overall responsibility and authority. Subject to considerations of time we would uphold the complaint of harassment related to sex. We therefore did not go on to consider the equivalent maternity/direct sex discrimination complaints.

Failing to provide, on the Claimant's return to work on 25 May 2023, suitable arrangements for her to express. The Claimant was told she could use a lockable office belonging to a staff member not in work that day but the Claimant was not given a key to enable her to lock the door;

5.53 We have found as a matter of fact that the office the Claimant was given on 25 May 2023 (which was a one off) was lockable with a twist lock but the Claimant unwittingly did not realise this. This complaint therefore does not succeed on the facts and the complaints of direct sex discrimination and harassment related to sex are not well founded and are dismissed.

On the Claimant's further return to work in June 2023 (following the Claimant taking a further period of annual leave), refusing the Claimant permission to express at around 8pm saying the arrangement did not meet the needs of the ward and nowhere in the hospital could accommodate that;

5.54 The Respondent argues that the Claimant was not refused permission to express that day at 8pm, because the Claimant was working a day shift and thereafter did not in the event work a further shift on that ward. We consider this is an over literal approach to the complaint. There was a conversation between the Claimant and LP about how things were going to work going forward, including when the Claimant was working her regular night shifts. This is what the allegation refers to and will always have been known to the Respondent as LP accepts she had that conversation with the Claimant.

5.55 In the conversation LP did say, as she accepts, that it would be difficult for the Claimant to express at 8pm because it was a busy time on the ward and there was a need to maintain safe staffing levels at that time. It was a two way, pleasant exchange at the time. We did not find as a matter of fact that LP said nowhere in the hospital could accommodate an 8pm break for expressing in the pejorative way the allegation is set out. We found it more likely that LP, as set out in her witness statement, asked if 8pm had been a good time on B4, probably because she anticipated it was a time of evening that would be likely to be busy on many wards with patients being settled for the night etc. The Claimant then said observations had been done at a different time on B4 so it had worked out ok there. We consider it likely that at the time the Claimant could understand what LP was saying from the perspective of the ward. But the Claimant, although she may not have obviously communicated it to LP at the time, was feeling increasingly upset that she had been transferred to B5 on the basis that they could accommodate her needs, and that was now proving not to be the case. Like our finding above in relation to the complaint about the overseeing by CM, she felt it should have been figured out and headed off earlier.

5.56 In terms of the harassment complaint, being told this by LP was unwanted conduct from the perspective of the Claimant. It related to sex in the sense of being related to breastfeeding. LP's purpose was not to create the proscribed consequences. In terms of the effect, the Claimant saw what she was told as being humiliating. We did not, however, in all the circumstances consider it reasonable for the conduct to meet the threshold of the proscribed consequences. 8pm on the ward was a critical time and there were serious safety considerations that LP explained to the Claimant. LP discussed with the Claimant the timings when it was more likely she could be safely released. They were important considerations that reasonably could be understood. The harm here really resulted from this not having been

figured out earlier in the return to work process, as dealt with in the above, earlier allegation relating to that.

5.57 In terms of the direct sex discrimination complaint, we did not consider that the treatment was because of sex, or because of the Claimant being a breastfeeding mother. The reason for the treatment was the fact this was a critical time on the ward; there were safety considerations and staffing levels needed to be maintained. This is not a particular circumstance where there is a positive health and safety statutory obligation on an employer to facilitate expressing at a set time (compared, for example, to the obligation to risk assess) and the Respondent was not seeking to prevent or obstruct the Claimant breastfeeding as an activity in itself; it would have been accommodated as soon as it was safe to do so and LP wanted to accommodate the Claimant provided the needs of patient care were met. We consider the reason to be dissociable from the Claimant being a breastfeeding mother/a woman. As such, a comparator would be required, and any member of staff needing an absence at that time would have faced the same obstacle. The harassment related to sex and direct sex discrimination complaints are therefore not well founded and are dismissed.

On the Claimant's return to work in June 2023 failing to provide facilities for the Claimant to wash and sterilise her equipment on the ward;

5.58 In oral evidence LP accepted the washing facilities on the ward were not great. But on the Claimant's return to work in June 2023 she was expressing in the MLU where there were washing and sterilising facilities. The Claimant had not expressly said the washing and sterilising facilities on the ward were inadequate or that she had a specific need until very late in the day and when and CM had arranged the trial in the MLU because of other concerns raised by the Claimant. We consider that if the Claimant had raised it then or in their earlier discussions it is likely LP would have looked into what facilities could be made available there or nearby. The Claimant had raised other needs around her expressing in their conversations. To LP's knowledge other expressing mothers had used the facilities on B4 without issue and she was not on notice without the Claimant raising it.

5.59 If the absence of washing/sterilising facilities the Claimant required was in fact unwanted conduct from her perspective and related to sex in the sense of being related to breastfeeding, we do not consider it would be reasonable for the treatment to be considered to have the proscribed effect. In particular, in circumstances in which the Claimant had not raised a specific concern about the ward or a particular request for the ward when making her return to work arrangements with LP, it had not been raised by other expressing mothers in the past, and in circumstances in which there were alternative suitable facilities on the MLU.

5.60 In relation to the direct sex discrimination complaint, we consider that the treatment in question was not because of sex. It was due to the physical make up of the ward and because, as it had not been raised earlier, LP had not been able to look into alternatives. The complaints of harassment related to sex and direct sex discrimination are not well founded and are dismissed.

On the Claimant's return to work in June 2023 not providing the Claimant with a rest break where she could eat or drink, as the Claimant was told she needed to use her rest breaks for expressing;

5.61 On the Claimant's actual return to work on 27 June 2023 she was not refused rest breaks on the day. There was a conversation about how things would work going forward and it may be that LP made a reference to the MLU having said that often breastfeeding mothers took their break there, with the Claimant saying that would

not work for her. But we have not found as a matter of fact that LP said that the Claimant could not have a rest break for eating or drinking or that the Claimant would have to use her rest breaks for expressing. We have found that the Claimant had a heightened reaction to what was actually said to her at the time and misinterpreted what LP actually said. We have not found that LP was that insensitive or unmindful of the obligations owed to the Claimant as a breastfeeding mother to say such things. The complaints of harassment related to sex and direct sex discrimination are therefore not well founded and are dismissed.

On the Claimant's return to work in June 2023 telling the Claimant that she would owe the Respondent time back because she needed to use her breaks for expressing but the time the Claimant would take to walk to the maternity unit, express and wash and sterilise her equipment was longer than her rest break;

5.62 We also have not found as a matter of fact that the Claimant was told she would owe the Respondent time back because the time spent going to and at the MLU was longer than a rest break. LP was aware from the Combining Breastfeeding and Returning to Work Guidelines that there may be a need to give extra breaks for expressing milk. We found that the most LP would have said that three hour long trips to the MLU for expressing on a shift was quite a long time away from duty and that as ward manager she would be worried about that time away from ward duties. We considered that by this time the Claimant thought that barriers were being deliberately put in her way, she was in a heightened state of alert thinking she was again facing obstacles to maintaining breastfeeding, and read too much into what LP said taking it to mean that LP was saying the Claimant had to use her break to express and would end up owing time back. The complaints of harassment related to sex and direct sex discrimination are therefore not well founded and are dismissed.

On 27 June 2023, then extending the Claimant's work finish time to 4:30pm instead of 4pm (because of the time taken expressing);

5.63 The finish time was changed because LP made a mistake in the calculation of timing of the shift, having accidently left out the standard unpaid 30 minute rest break. It was not anything to do with the time taken expressing. It was not conduct that related to sex (including breastfeeding) and the harassment complaint is not well founded and is dismissed. It was also not less favourable treatment because of sex; it happened because of an administrative, technical mistake. A comparator would be required and would be treated the same way if a mistake were made in shift timings. The direct sex discrimination complaint is also not well founded and is dismissed.

After 27 June 2023, not actioning the Claimant's request to be referred to occupational health;

5.64 The request for an OH referral was made by the Claimant on the evening of the 27 June. She had already expressed a wish to be redeployed to the MLU earlier in the day and thereafter that redeployment was effected. The Claimant's next shift was in the MLU where the Claimant was content. There was no need for an OH referral. As the Respondent said, if there had been problems in the MLU such a referral could and would have been made. In terms of the direct sex discrimination claim we do not consider there was any less favourable treatment. In any event, any such treatment was not because of sex but because a referral was not required as the redeployment had been effective. In terms of the harassment complaint, even if it could be said to be unwanted conduct from the Claimant's perspective (albeit why she says the referral remained necessary is unclear), we would not find that the lack of a referral either had the purpose of creating the proscribed consequences or that it would be reasonable in the circumstances to view it as

having those effects. The complaints of direct sex discrimination and harassment related to sex are not well founded and are dismissed.

On the Claimant's return to work in June 2023 not providing a safe place to express on the ward or nearby (unless after 9pm);

5.65 In our judgment the grievance outcome was that the Claimant was going to be provided with a lockable room. Different expressing mothers will have different needs, but to the Claimant having a lockable room was what she needed to feel safe and to express effectively. CM knew that and a lockable room was what the Claimant was promised in the return to work plan. The reference to there being a safe place after 9pm was a misunderstanding on the Claimant's part because at the time she had not realised there was a potential issue with the keypad lock system in the doctor's room; she had initially thought it was internally lockable. Likewise, as we have already mentioned, CM also seemed to mistakenly believe that room was actually lockable or capable of being locked. Again, as already set out above, it is likely that LP did not appreciate how important an issue it was subjectively to the Claimant or the Claimant's experiences in the past. There was in fact therefore no internally lockable room at all on the ward at the time that the Respondent would make available to the Claimant (data protection issues being raised with other offices with actual locks such as LP's), and the doctor's room was not always going to be available to the Claimant for use in any event if she was to express before 9pm.

5.66 Not being given an internally lockable room on the ward was, in our judgement, unwanted conduct that related to sex in the sense of being related to breastfeeding. It did not have the purpose of creating the proscribed consequences. It did, however, have the effect of creating a humiliating environment for the Claimant where she was yet again left feeling unsupported and, if she were to express on the ward, at risk of being walked in on. The alternative ultimate provision of the MLU also then led to the discussion between the Claimant and LP about the difficulties accommodating the Claimant being absent for 3 hours on a night shift; it taking the Claimant around an hour to get to the MLU, express, and wash and sterilise as needed and return to the ward, each time. Again, whilst understanding LP's concerns, this made the Claimant feel unsupported and a problem as a byproduct of there not being a suitable provision of a lockable room on the ward to start with. It was in our judgement objectively reasonable for the Claimant to feel humiliated and unsupported in that way in the circumstances, given the express promise that had been made to her in the grievance outcome process at the outset of a lockable room, and even taking into account the apparent lack of suitable rooms on the ward. This point is closely allied to the earlier one: the potential problem should have been picked up at an earlier stage when there was more time for the issue to be appreciated and resolved. But it was not, and given the importance of the known issue, it remained objectively reasonable for the Claimant to feel humiliated when faced with the circumstances she ended up in. This complaint of harassment related to sex succeeds and so we did not go on to consider the direct sex discrimination complaint.

In August 2023 failing to recalculate the Claimant's maternity pay or take account of the fact an industrial claim had been won;

5.67 We find this occurred due to administrative error, in large part due to the complexities of the initial errors and the various recalculations that had to take place at various stages, including due to the industrial claim succeeding. The email exchanges in the hearing file with those involved in payroll and such calculations show them engaging in and attempting to do the calculations even if that was not always completely successful. Even if it could be said what happened was unwanted conduct related to sex, in the sense of being related to maternity leave,

we do not find the conduct had the proscribed consequences whether in terms of purpose or effect. What happened was not deliberate and it cannot reasonably be seen as meeting the threshold of the proscribed effects. In terms of maternity discrimination, the conduct in question, as pleaded, did not take place in the protected period. But the conduct was in any event not because of sex or maternity but due to the complexity of the situation and administrative error. It is a dissociable reason. The complaints of harassment related to sex and pregnancy/maternity discrimination are not well founded and are dismissed.

Indirect sex discrimination complaints

5.68 We would not find that the majority of the pleaded PCPs were in fact PCPs either because they were not made at as a matter of fact or because there would not be the required aspect of repetition/likely repetition so as to amount to PCPs. But in any event, we do not consider that these PCPs were applied or were capable of being applied to men because none of them are PCPs that would have any application to men. We also did not see how they could be sensibly (and to the Respondent, fairly) recast to do so. The complaints of direct sex discrimination are therefore not well founded and are dismissed.

Time Limits and overall outcome

5.69 The complaints that we would find succeed subject to time limit considerations were: the complaints of harassment relating to the lockable room on the Claimant's initial return to work in August 2021, and then a gap until 7 January 2022 when there was the request to work on the amber area, and the indication that the Claimant could work with the bodily fluids of chemotherapy patients. In February 2022 there was the failure to update the Claimant's risk assessment, and the request for the Claimant to take annual leave because the Respondent had not found amended duties for her (found to be harassment related to sex and pregnancy discrimination, respectively). In March 2022 there was then the failure to carry out a further risk assessment at 26 weeks gestation, found to be harassment related to sex. There is then a gap of around a year until the run up to the Claimant's return to work in 2023. We then found there was a harassment related to sex in relation to the arrangements (or lack thereof) made prior to the Claimant's return to work in May 2023, and on the Claimant's return to work in June 2023 not providing a safe place (internally lockable room) to express on the ward.

5.70 We would not find the totality of this conduct amounted to a discriminatory act extending over a period. These were events that happened on two different wards involving two different sets of managers and were events that happened due to their own particular circumstances and reasons. That the Claimant considered that these were events repeating themselves is not, in our judgement, sufficient. We consider there is a clear demarcation between the Claimant's first period on ward A4, and then on B4 following her return from a second period of maternity leave.

5.71 In relation to the first series of events up to March 2022, we also do not consider it to be just and equitable to extend time for these earlier events. The delay in bringing the complaints relating to 2021 and 2022 caused very clear and real prejudice to the Respondent in relation to their witnesses' abilities to remember specific events that would not have been likely to stand out to them at the time. We observed this for ourselves when the witnesses were giving evidence. Indeed, even the Claimant at times had difficulties remembering some points, and that was even with the benefit of her contemporaneous emails. Whilst we appreciate that the Claimant was seeking to resolve matters internally both informally and via a grievance procedure, that was not in our judgement good enough reason to delay in bringing the complaints until when she did, particularly bearing in mind she had

the assistance of a TU representative throughout. Moreover, the pursuit of internal processes does not remedy the greater prejudice caused to the Respondent's witnesses due to the passage of time. The complaints from 2021 and 2022 were therefore presented out of time, are outside of the Tribunal's jurisdiction, and are dismissed on that basis.

5.72 Turning to 2023, the complaint about the provision of a lockable room ready for the Claimant's return to work on 27 June 2023 was brought in time. Acas early conciliation was entered into on 24 September 2023 which lasted until 5 November 2023 and the ET1 was presented on 3 December 2023. The complaint relating to not meeting the promises made in the grievance outcome, relates to the period mid February 2023 onwards until 25 May 2023. However, what happened there is very closely allied to the specific complaint about the provision of a lockable room. Our reasoning for both overlaps and is interlinked; the later flowing from the former. We find that these two complaints were therefore a continuing act of discrimination that was in time and those complaints succeed and are upheld. We would have in any event extended time for the February 2023 to May 2023 complaint given its overlap with later events and the lack of forensic prejudice to the Respondent (particularly when compared to 2021/22).

5.72 The successful complaints will be listed for a remedy hearing. The Claimant is, however, encouraged to seek some professional advice about a sensible quantification of an injury to feelings award given only parts of the claim have been upheld, and it would ordinarily be an issue that the parties would be able to resolve by agreement.

Employment Judge R Harfield

Date 28 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 December 2024

Adam Holborn
FOR EMPLOYMENT TRIBUNALS

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

Appendix – List of Issues

The Issues

1. The issues the Tribunal will decide are set out below.

1. Time limits

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

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

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

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

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

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

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

2. Direct sex discrimination (Equality Act 2010 section 13)

2.1 Did the Respondent do the following things:

2.1.1 By the time of the Claimant's return to work (from a period on maternity leave) on 6 August 2021, fail to put in place what had been agreed for the Claimant's return to work as a breastfeeding mother/ failed to provide:

2.1.1.1 A lockable room where the Claimant could express in privacy. The Claimant says this placed her at risk of, and actually resulted in members of staff (including male members of staff), not complying with a "do not disturb notice" and walking in on the Claimant whilst she was expressing and in state of undress;

2.1.1.2 A risk assessment for the Claimant as a breastfeeding mother;

2.1.2 On or around 7 January 2022, staff member Gypsy [surname unknown] asked the Claimant to work contrary her breastfeeding risk assessment and pregnancy risk assessment by dealing with fluids from a chemotherapy patient;

2.1.3 On or around 7 January 2022 when the Claimant refused to deal with the chemotherapy patient fluids, Deputy Ward sister Maria Kearns then asked the Claimant to work on a ward that was not

a green area which again was contrary to the Claimant's breastfeeding risk assessment and pregnancy risk assessment;

2.1.4 In the period 7 January 2022 to 16 January 2022, the Claimant was allocated shifts to work on a separate part of the ward that looked after Covid patients/potential Covid patients which was contrary to her pregnancy risk assessment and breastfeeding risk assessment. As well as the impact on the Claimant in being asked to carry out tasks that put the Claimant and her baby at risk, this should not have happened if the risk assessments had been followed and appropriate work allocation arrangements put in place. The situation also caused bad feelings amongst other staff members;

2.1.5 In or before March 2023 not updating payroll that the Claimant's maternity leave was coming to an end and the Claimant was then taking a period of annual leave. (The Claimant was at risk of losing pay – it in fact did not happen because on her own initiative the Claimant rang payroll on 13 March 2023 to check);

2.1.6 In the run up to the Claimant's return to work in May 2023 (following medical suspension and then maternity leave), failing to action promises made in a Respect and Resolution (grievance) outcome for the Claimant's return to work, including not responding to the Claimant's emails, or to arrange a meeting before the Claimant's maternity leave ended to discuss the return to work plan and have risk assessments ready (including a breast feeding risk assessment and suitable arrangements for expressing) for a smooth return to work;

2.1.7 Failing to provide, on the Claimant's return to work on 25 May 2023, suitable arrangements for her to express. The Claimant was told she could use a lockable office belonging to a staff member not in work that day but the Claimant was not given a key to enable her to lock the door;

2.1.8 On the Claimant's further return to work in June 2023 (following the Claimant taking a further period of annual leave), refusing the Claimant permission to express at around 8pm saying the arrangement did not meet the needs of the ward and nowhere in the hospital could accommodate that;

2.1.9 On the Claimant's return to work in June 2023 failing to provide facilities for the Claimant to wash and sterilise her equipment on the ward;

2.1.10 On the Claimant's return to work in June 2023 not providing the Claimant with a rest break where she could eat or drink, as the Claimant was told she needed to use her rest breaks for expressing;

2.1.11 On the Claimant's return to work in June 2023 telling the Claimant that she would owe the Respondent time back because she needed to use her breaks for expressing but the time the Claimant would take to walk to the maternity unit, express and wash and sterilise her equipment was longer than her rest break;

2.1.12 On 27 June 2023, then extending the Claimant's work finish time to 4:30pm instead of 4pm (because of the time taken expressing);

2.1.13 After 27 June 2023, not actioning the Claimant's request to be referred to occupational health;

2.1.14 On the Claimant's return to work in June 2023 not providing a safe place to express on the ward or nearby (unless after 9pm);

2.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The Claimant has not named anyone in particular who they say were treated better than they were.

The Tribunal may also need to consider whether, in fact, a comparator is required for any alleged less favourable treatment of the Claimant as a female worker due to her being a breastfeeding woman if breastfeeding is generally a biological female activity and/or the decision of the European Court of Justice in *Otero Ramos.*

2.3 If so, was it because of sex?

2.4 Did the Respondent's treatment amount to a detriment?

3. **Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)**

3.1 Did the Respondent treat the Claimant unfavourably by doing the following things:

3.1.1 In December 2021 failing to record the Claimant's return to work after a period of absence for work related stress (which in due course meant the Claimant not being paid properly in January and February 2022 and further again once the Claimant was on maternity leave and receiving maternity pay);

3.1.2 On or around 7 January 2022, staff member Gypsy [surname unknown] asked the Claimant to work contrary her breastfeeding risk assessment and pregnancy risk assessment by dealing with fluids from a chemotherapy patient;

3.1.3 On or around 7 January 2022 when the Claimant refused to deal with the chemotherapy patient fluids, Deputy Ward sister Maria Kearns then asked the Claimant to work on a ward that was not a green area which again was contrary to the Claimant's breastfeeding risk assessment and pregnancy risk assessment;

3.1.4 In the period 7 January 2022 to 16 January 2022, the Claimant was allocated shifts to work on a separate part of the ward that looked after Covid patients/potential Covid patients which was contrary to her pregnancy risk assessment and breastfeeding risk

assessment. As well as the impact on the Claimant in being asked to carry out tasks that put the Claimant and her baby at risk, this should not have happened if the risk assessments had been followed and appropriate work allocation arrangements put in place. The situation also caused bad feelings amongst other staff members;

3.1.5 In around early February 2022, fail to update the Claimant's risk assessments once it was known there was a potentially violent patient on the ward (who had hurt another member of staff). This resulted in the Claimant being put at risk, including when the patient approached the Claimant and was aggressive towards her;

3.1.6 In February 2022 failing to facilitate a GP request for the Claimant to work on amended duties;

3.1.7 In February 2022 delaying in referring the Claimant to occupational health, as requested by the Claimant, for advice on finding the Claimant appropriate duties;

3.1.8 In February 2022 requesting the Claimant take annual leave because the Respondent had not sorted out amended duties/ the Occupational Health referral;

3.1.9 On 10 March 2022 and thereafter, failing to carry out a pregnancy risk assessment at 26 weeks gestation (which the Claimant requested several times by email and was required under the Health Board policy);

3.1.10 In or before March 2023 not updating payroll that the Claimant's maternity leave was coming to an end and the Claimant was then taking a period of annual leave. (The Claimant was at risk of losing pay – it in fact did not happen because on her own initiative the Claimant rang payroll on 13 March 2023 to check);

3.1.11 In the run up to the Claimant's return to work in May 2023 (following medical suspension and then maternity leave), failing to action promises made in a Respect and Resolution (grievance) outcome for the Claimant's return to work, including not responding to the Claimant's emails, or arrange a meeting before the Claimant's maternity leave ended to discuss the return to work plan and have risk assessments ready (including a breast feeding risk assessment and suitable arrangements for expressing) for a smooth return to work;

3.1.12 In August 2023 failing to recalculate the Claimant's maternity pay or take account of the fact an industrial claim had been won;

3.2 Did the unfavourable treatment take place in a protected period?

3.3 If not did it implement a decision taken in the protected period?

3.4 Was the unfavourable treatment because of the pregnancy?

3.5 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

3.6 Was the unfavourable treatment because the Claimant was on compulsory maternity leave / the Claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

4. **Harassment related to sex (Equality Act 2010 section 26)**

4.1 Did the Respondent do the following things:

4.1.1 At the time of the Claimant's return to work (from a period on maternity leave) on 6 August 2021, fail to put in place what had been agreed for the Claimant's return to work as a breastfeeding mother/ failed to provide:

4.1.1.1 A lockable room where the Claimant could express in privacy. The Claimant says this placed her at risk of, and actually resulted in members of staff (including male members of staff), not complying with a "do not disturb notice" and walking in on the Claimant whilst she was expressing and in state of undress;

4.1.1.2 A risk assessment for the Claimant as a breastfeeding mother;

4.1.2 On or around 7 January 2022, staff member Gypsy [surname unknown] asked the Claimant to work contrary her breastfeeding risk assessment and pregnancy risk assessment by dealing with fluids from a chemotherapy patient;

4.1.3 On or around 7 January 2022 when the Claimant refused to deal with the chemotherapy patient fluids Deputy Ward sister Maria Kearns asked the Claimant to work on a ward that was not a green area which again was contrary to the Claimant's breastfeeding risk assessment and pregnancy risk assessment;

4.1.4 In the period 7 January 2022 to 16 January 2022, the Claimant was being allocated to assist nurses on the ward that involved dealing with the fluids of chemotherapy patients and contrary to her pregnancy risk assessment and breastfeeding risk assessment;

4.1.5 In the period 7 January 2022 to 16 January 2022, the Claimant was allocated shifts to work on a separate part of the ward that looked after Covid patients/potential Covid patients which was contrary to her pregnancy risk assessment and breastfeeding risk assessment. As well as the impact on the Claimant in being asked to carry out tasks that put the Claimant and her baby at risk, this should not have happened if the risk assessments had been followed and appropriate work allocation arrangements put in place. The situation also caused bad feelings amongst other staff members;

4.1.6 In around early February 2022, fail to update the Claimant's risk assessments once it was known there was a potentially violent patient on the ward (who had hurt another member of staff). This resulted in the Claimant being put at risk, including when the patient approached the Claimant and was aggressive towards her;

4.1.7 In February 2022 failing to facilitate a GP request for the Claimant to work on amended duties (and which ultimately resulted in the Claimant being placed on medical suspension);

4.1.8 In February 2022 delaying in referring the Claimant to occupational health, as requested by the Claimant, for advice on finding the Claimant appropriate duties;

4.1.9 In February 2022 requesting the Claimant take annual leave because the Respondent had not sorted out amended duties/ the Occupational Health referral;

4.1.10 On 10 March 2022 and thereafter, failing to carry out a pregnancy risk assessment at 26 weeks gestation (which the Claimant requested several times by email and was required under the Health Board policy);

4.1.11 In or before March 2023 not updating payroll that the Claimant's maternity leave was coming to an end and the Claimant was then taking a period of annual leave. (The Claimant was at risk of losing pay – it in fact did not happen because on her own initiative the Claimant rang payroll on 13 March 2023 to check);

4.1.12 In the run up to the Claimant's return to work in May 2023 (following medical suspension and then maternity leave), failing to action promises made in a Respect and Resolution (grievance) outcome for the Claimant's return to work, including not responding to the Claimant's emails, or arrange a meeting before the Claimant's maternity leave ended to discuss the return to work plan and have risk assessments ready (including a breast feeding risk assessment and suitable arrangements for expressing) for a smooth return to work;

4.1.13 Failing to provide, on the Claimant's return to work on 25 May 2023, suitable arrangements for her to express. The Claimant was told she could use a lockable office belonging to a staff member not in work that day but the Claimant was not given a key to enable her to lock the door;

4.1.14 On the Claimant's further return to work in June 2023 (following the Claimant taking a further period of annual leave), refusing the Claimant permission to express at around 8pm saying the arrangement did not meet the needs of the ward and nowhere in the hospital could accommodate that;

4.1.15 On the Claimant's return to work in June 2023 failing to provide facilities for the Claimant to wash and sterilise her equipment on the ward;

4.1.16 On the Claimant's return to work in June 2023 not providing the Claimant with a rest break where she could eat or drink, as the Claimant was told she needed to use her rest breaks for expressing;

4.1.17 On the Claimant's return to work in June 2023 telling the Claimant that she would owe the Respondent time back because she needed to use her breaks for expressing but the time the

Claimant would take to walk to the maternity unit, express and wash and sterilise her equipment was longer than her rest break;

4.1.18 On 27 June 2023, then extending the Claimant's work finish time to 4:30pm instead of 4pm (because of the time taken expressing);

4.1.19 After 27 June 2023, not actioning the Claimant's request to be referred to occupational health;

4.1.20 On the Claimant's return to work in June 2023 not providing a safe place to express on the ward or nearby (unless after 9pm);

4.1.21 In August 2023 failing to recalculate the Claimant's maternity pay or take account of the fact an industrial claim had been won

4.2 If so, was that unwanted conduct?

4.3 Did it relate to sex?

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

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

5. **Indirect sex discrimination (Equality Act 2010 section 19)**

5.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

5.1.1 A practice of failing to carry out risk assessments relating to pregnancy/maternity and breastfeeding;

5.1.2 A practice of not honouring breastfeeding/expressing arrangements;

5.1.3 A practice of failing to comply with their own breastfeeding risk assessments and pregnancy risk assessments;

5.1.4 A practice of not complying with their policy to provide a reasonable time to express milk which may include longer or more frequent breaks;

5.1.5 A practice of not allowing expressing mothers to express at the required time if it does not meet the requirements of the ward;

5.1.6 A practice of not providing washing and sterilising facilities on ward;

5.1.7 A practice of claiming back time if time spent expressing (including travel and washing and sterilising) is longer than rest break time;

5.1.8 A practice of not providing a safe place to express on the ward or nearby (unless after 9pm);

5.2 Did the Respondent apply the PCP to the Claimant? The Claimant says these PCPs were applied to her:

5.2.1 In the run up to and on her return to work on 6 August 2021;

5.2.2 In the run up to and on her return to work in May and June 2023

5.3 Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic, e.g. "men" or would it have done so?

5.4 Did the PCP put persons with whom the Claimant shares the characteristic, e.g. "women" at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, e.g. "men" in that pregnancy/maternity/breastfeeding are female specific and these are steps required to support breastfeeding and the health and wellbeing of mother and child.

5.5 Did the PCP put the Claimant at that disadvantage?

5.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.6.1 [**TO BE SET OUT IN AMENDED GROUNDS OF RESISTANCE]**

5.7 The Tribunal will decide in particular:

5.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.7.2 could something less discriminatory have been done instead;

5.7.3 how should the needs of the Claimant and the Respondent be balanced?

6. **Remedy for discrimination**

6.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the Claimant?

6.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the Claimant be compensated?

6.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9 Did the Respondent or the Claimant unreasonably fail to comply with it by [specify breach]?

6.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?