EMPLOYMENT TRIBUNALS

Claimant: **G**

Respondent: **The S NHS Trust**

Heard at: **Birmingham**

On: **25, 26, 27, 28, 29 November, 2, 3, 4, 5, 6, 9, (in chambers) 10 & 11 December 2024**

Before: **Employment Judge Flood**
Mr J Akhtar
Mr D Faulconbridge

Representation
Claimant: In person
Respondent: Mr Williams (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the complaints against the respondent of unlawful detriment on the ground of having made a protected disclosure; unlawful detriment on the ground of having raised health and safety concerns (contrary to ss 44 (1) (c) and 47B of the Employment Rights Act 1996 ("ERA")); direct disability discrimination; direct discrimination on the grounds of religion/belief; discrimination because of something arising in consequence of disability; indirect disability or religion/belief discrimination; failure to comply with a duty to make reasonable adjustments, disability related harassment; harassment related to religion/belief and victimisation (contrary to ss 13, 15, 19, 20, 21, 26 and 27 of the Equality Act 2010 ("EQA")) are not well founded and are dismissed.

REASONS

The Complaints and preliminary matters

1. The claimant ('C') presented her first claim form ('Claim 1') on 27 May 2022 (page 2-24), having completed a period of early conciliation between 23 March 2022 and 4 May 2022. Claim 1 included a complaint of disability discrimination and a complaint of religious discrimination

against the respondent ('R') and a former respondent, AC. In a document appended to Claim 1, C set out that she complained about the "*refusal to honour mask exemption*" from April 2020 to present and referred to her health condition of Chronic Rhinosinusitis. She firstly complained that requiring her to wear masks for more than 30 minutes at a time was not possible due to her health and requiring her to wear masks for the duration of a shift was an act of religious discrimination. She set out a narrative of events and complained about being prevented from working in her contracted role as clinical ward sister for more than 17 months. She secondly complained about being pressurised and coerced to have the Covid 19 vaccination ('Vaccination'). R defended Claim 1 and final amended grounds of resistance (submitted after all the preliminary case management took place) were shown at pages 548-567. C was ordered to provide a disability impact statement and medical evidence which was done. R confirmed on 19 December 2022 that it did not accept that C was disabled.

2. There was a preliminary hearing in private for case management before Employment Judge V Jones on 6 December 2022 ('1st PH') where particulars of the complaints C wished to bring were discussed and she confirmed she wished to amend her claim to include a claim that she suffered a detriment because she made a protected disclosure (s47B and s48 ERA and a claim that she suffered detriments for a health and safety reason s44 ERA. The complaints were identified in summary form and primarily focused on R's requirement for mask wearing with C complaining that this amounted to disability discrimination and discrimination on the grounds of religion and belief (see page 64-68). C was ordered to provide further particulars of the new complaints, which she did on 30 December 2022. R was ordered to serve an amended response, which it did on 3 January 2023. A preliminary hearing in public was listed to determine whether C was disabled; whether the claimant's beliefs were protected by section 10 EQA and also to determine the claimant's amendment application.

3. That came before Employment Judge Faulkner on 1 June 2023 ('2nd PH'). In the time available, the Tribunal was only able to deal with the issue of disability so listed a further preliminary hearing in public. By a reserved judgment and reasons sent to the parties on 23 June 2023 (pages 144-63) Judge Faulkner determined that:

   3.1 C was a disabled person as so defined by reason of the impairment of Hypothyroidism from before March 2020 until April 2021.

   3.2 C was a disabled person as so defined by reason of the impairment of Chronic Rhinosinusitis from November 2020 until May 2022

   3.3 She was not a disabled person as so defined by reason of the impairment of Anxiety disorder at any time during the relevant period.

4. C entered and completed a second period of early conciliation on 30 October 2023 and also presented a second claim form (pages 261-315) on 30 October 2023 ('Claim 2') making further complaints of disability and religious discrimination, protected disclosure and health and safety disclosure detriment against R1 and also two additional former respondents, MC and RA. She also complained about discrepancies in pay. The attached particulars of claim included details of the complaints. R defended Claim 2 and its ET3 and its final amended grounds of resistance after all preliminary case management was complete were at pages 568-590.

5. The matter came before Employment Judge A Smith for a preliminary hearing in public on 1 November 2023 ('3rd PH'). At the 3rd PH, Judge Smith decided to permit C to amend her claim to add complaints of protected disclosure and health and safety detriment. The judge went on to identify, clarify and record the complaints made in a draft list of issues. C also clarified that her claim as made against AC was withdrawn and Employment Judge A Smith issued a judgment upon such withdrawal which was sent to the parties on 6 November 2023. C confirmed during that hearing that she had presented a new claim form. The matter was listed for a further case management hearing.

6. The matter came before Employment Judge Meichen for a preliminary hearing in private on 26 January 2024 ('4th PH'). An order was made that Claim 1 and Claim 2 be consolidated and the issues were further discussed and recorded. The matter was listed for a final hearing with a time estimate of 13 days. It was clarified that in Claim 2, the disabilities relied upon were Chronic Rhinosinusitis and Anxiety/Depression. Whilst the second impairment had been found not to be a disability in Claim 1, it was acknowledged that this may not necessarily be the case in Claim 2. This issue was therefore agreed to be deferred to final hearing. Following the provision of further medical information, R clarified its position in May 2023 which was that it accepted the claimant was disabled as a result of Chronic Rhinosinusitis at the relevant time and that she was disabled as a result of Anxiety/Depression from the end of June 2023 but no earlier. The List of Issues was clarified further and recorded. Judge Meichen observed that C may wish to consider whether the very extensive number of issues which he described as "*repetitious and unfocused*" was required and suggested that she may wish to consider withdrawing some repetitive claims or simplifying if she could. He also observed that there was one central issue in the case which was that C was required to wear a mask.

7. On 7 May 2024, R applied for the final hearing to be for the purpose of merits only (and for any liability issues to be deferred) which C objected to. This application was refused by Acting Regional Employment Judge J Jones by a decision notified to the parties on 7 June 2024 (page 737). On 25 June 2024 C wrote to the Tribunal confirming that she was

withdrawing a number of allegations that had been recorded in the list of issues (Protected Disclosure Detriment complaints listed as issues 3.1.5 & 3.1.6; Direct disability or religion and belief discrimination complaints listed as issues 7.2.1; 7.2.2 and 7.2.3; Discrimination arising from disability complaints listed as issues 8.1.1; 8.1.2; 8.1.3; and Harassment related to disability/ religious belief complaints listed as issues 11.1.1; 11.1.3 and 11.1.4.

8. The final list of issues agreed between the parties ('List of Issues') was then submitted (page 360-394).

9. At a further preliminary hearing in private for case management before Employment Judge Hussain on 4 November 2024 ('5th PH') final case management matters were addressed and a timetable for the hearing was agreed (and it was agreed that the parties and witnesses would attend in person but witnesses (not taking part) and other interested parties would observe by CVP).

10. The final hearing commenced on 25 November 2024 with all participants attending remotely on day 1. Preliminary matters were discussed, and the Tribunal then started its reading which was due to take place on days 1 and 2. It was not possible for the Tribunal to complete its reading in the allocated time. The witness statements were lengthy and detailed, and the Bundle ran to over 5000 pages. The Tribunal notified the parties that an additional reading day would be required and so the evidence began on day 4 with the parties all attending in person. An issue arose at the outset of day 4 when C became very distressed about the presence of certain individuals from R in the hearing room. The hearing had to be adjourned and following a break, C and Mr Williams attended for a case management discussion as to how the hearing might progress. Various options were discussed (including a fully remote hearing by video and some form of hybrid hearing) to assist the participation of C and also the individuals whom C objected to, two of whom were parties to Claim 2 and thus entitled to attend the hearing. After further breaks and discussion, C confirmed that she was withdrawing Claim 2 as it was made against MC and RA which would mean that neither remained as a party to the proceedings and their attendance would only be required as a witness for R. A judgment on withdrawal under Rule 52 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('ET Rules') was issued and sent to the parties on 5 December 2024.

11. At various points during the hearing, C became distressed and reported that she was feeling unwell. Breaks were taken to allow C to rest and compose herself and the support of the Tribunal's clerk and mental health first aider was utilised. The Judge enquired on several occasions as to whether C was well enough to continue but C assured the Tribunal that she was and that she wanted to proceed with the hearing. At the conclusion of the hearing C thanked the Tribunal staff for their assistance

and we also note and acknowledge the significant assistance that the clerk to this hearing provided to C and to the parties generally to ensure that the evidence was able to be completed.

12. The hearing timetable slipped as a result of some of the above issues. The evidence and submissions were completed by lunchtime on day 11 and the Tribunal informed the parties that there would now be insufficient time remaining for it to carry out its deliberation and to deliver an oral judgment. The Tribunal used the remaining allocated time on days 11, 12 and 13 to make its decision and prepare this written judgment and reasons. Prior to the issuing and publication of this judgment, the Tribunal made an order under rule 49(1) and (3)(b) of the Employment Tribunals Procedure Rules 2024 ('ET Rules') and Art 8 of the European Convention on Human Rights that there should be omitted or deleted from any document entered on the Register, or which otherwise forms part of the public record, including the Tribunal's hearing lists, any identifying matter which is likely to lead members of the public to identify the claimant or the respondent.

13. An agreed bundle of documents ('Bundle') was produced for the hearing and where page numbers are referred to in this judgment and reasons, these are references to page numbers in the Bundle, unless otherwise specified. In addition to the Bundle, we had before us a supplementary bundle submitted by C ('Supplementary Bundle') and a further file submitted by R containing all the witness statements, chronology; cast list and the final List of Issues.

The Issues

14. The List of Issues (which the Tribunal has determined) were as follows (those complaints withdrawn and dismissed earlier are shown in strikethrough text below for completeness):

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?

1.2 Were the whistleblowing detriment and health and safety detriment complaints made within the time limit in section 48(3)(a), Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal before the end of the period of three months beginning with date of the act or failure to act to which the complaint relates?

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

1.2.3 If so, was the claim made to the Tribunal within three months of the end of that period?

1.2.4 If not, is the Tribunal satisfied that:

1.2.4.1 It was not reasonably practicable for the complaint to be presented in time?

1.2.4.2 The claim was nevertheless presented within such further period as the Tribunal considers reasonable?

2. Protected disclosure

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says s/he made disclosures on these occasions:

2.1.1.1 15 November 2021, a telephone call with AC,

2.1.1.2 3 December 2021, a telephone call with AC,

2.1.1.3 19 January 2022, the claimant's written grievance,

2.1.1.4 18 March 2022, the claimant's written appeal to her grievance outcome.

2.1.1.5 On 28 March 2023 the claimant wrote to the Chief Executive LB.

2.1.1.6 On 24 April 2023 the claimant had a Teams meeting with LB and after the meeting sent her a list of questions.

2.1.1.7 Grievance dated 27 March 2023 and 12 May 2023.

2.1.2 Did she disclose information?

2.1.3 Did she believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did she believe it tended to show that:

2.1.5.1 a criminal offence had been, was being or was likely to be committed;

2.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

2.1.5.3 the health or safety of any individual had been, was being or was likely to be endangered;

2.1.6 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. Protected disclosure detriment (Employment Rights Act 1996 section 48)

3.1 Did the respondent do the following things:

3.1.1 7 January 2022: AC denied the claimant the opportunity to work in Telford with the Overseas Nurse Team.

3.1.2 January 2022: AC dismissed a phased return to work for the claimant.

3.1.3 19 January 2022: ignored the following Occupational Health recommendations:

3.1.3.1 Phased return,

3.1.3.2 Targeted psychological support,

3.1.3.3 Stress risk assessment.

3.1.4 10 March 2022: DH labelled the claimant's nose surgery as "cosmetic".

~~3.1.5 13th April 2022: EC said that the claimant's concerns were "her perception".~~

~~3.1.6 12th May 2022: MT told the claimant that she could directly or indirectly be a risk to staff, patients and relatives.~~

3.1.7 Loss of pay and pension contributions:

3.1.7.1 Lost enhancements: 14.10.20

3.1.7.2 Lost weekend and night payments: 14.10.20

[Claimant has confirmed lost enhancements and lost weekend and night payments are the same thing. She states that "the payments stopped when I was taken from duty and forced to work from home. 14.10.20"].

3.1.7.3 Sick pay

3.1.7.4 Half pay

3.1.8 2, 16 and 20 May 2022: PW reduced the claimant's annual leave hours from 11.5 to 7.5 and missed COVID payments.

3.1.9 Removed from the ward Facebook group.

3.1.10 LB has not acknowledged or replied to the claimant's questions or replied to her following the meeting on 24 April 2023.

3.1.11 On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

3.1.12 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that she made a protected disclosure?

<u>4. Health and safety detriment (Employment Rights Act 1996 sections 44 and 48)</u>

4.1 Did the claimant do the following:

4.1.1 15 November 2021, a telephone call with AC,

4.1.2 3 December 2021, a telephone call with AC,

4.1.3 19 January 2022, the claimant's written grievance,

4.1.4 25 January 2022, further grievance letter,

4.1.5 18th March 2022, the claimant's written appeal to her grievance outcome,

4.1.6 16 January 2023, the claimant attended an employee wellness and attendance meeting with MC and JR and raised health and safety concerns,

4.1.7 6 February 2023, the claimant attended an employee wellness and attendance meeting with MC and JR and raised health and safety concerns.

4.1.8 On 28 March 2023 the claimant wrote to the Chief Executive LB.

4.1.9 On 24 April 2023 the claimant had a Teams meeting with LB and after the meeting sent her a list of questions.

4.1.10 Grievance dated 27 March 2023 and 12 May 2023.

4.2 In doing so, did the claimant raise circumstances connected to her work?

4.3 Did the claimant reasonably believe that the circumstances were harmful or potentially harmful to health and safety?

4.4 If so, did the claimant bring these matters to her employer's attention by reasonable means?

4.5 The claimant accepts that the respondent had a health and safety committee. Was it not reasonably practicable for the claimant the raise the matters with the health and safety committee?

4.6 Did the respondent do the following things:

4.6.1 Required the claimant to work from home from 14 October 2020?

4.6.2 In a meeting on 7 February 2022, did DH and MM describe her recent nose surgery as "cosmetic";

4.6.3 The Respondent pressurised, coerced and bullied the Claimant to have a covid-19 vaccine on multiple dates including:

4.6.3.1 November 2021 (35-minute impromptu telephone call from second Respondent (AC));

4.6.3.2 3 December 2021 (35-minute impromptu telephone call from AC);

4.6.3.3 6 December 2021 (email call from AC);

4.6.3.4 8 December 2021 (email call from AC);

4.6.3.5 10 December 2021 (20-minute impromptu telephone call from AC while the Claimant was off sick);

4.6.3.6 13 December 2021(email from the Respondent while the Claimant was off sick);

4.6.3.7 17 December 2021 (2 emails while the Claimant was off sick (Trust and AC));

4.6.3.8 5 January 2022 email while the Claimant was off sick (Trust);

4.6.3.9 12 January 2022 email (Trust);

4.6.3.10 26 January 22 letter (Trust);

4.6.3.11 7 January 22 email (Trust).

4.6.4 LB has not acknowledged or answered the claimant's questions or communicated with her following the meeting on 24 April 2023.

4.6.5 KM and TD arranged weekly meetings, putting the claimant in an impossible situation. The claimant felt intimated and harassed to consent to a redeployment register or return to the ward that caused trauma or drop a band in pay from band six to band five. This unwanted behaviour caused extreme anxiety and distress. It started in June 2023.

4.6.6 On 28.07.23 Claimant left the meeting room and witnessed KM and TD laughing in amusement.

4.6.7 On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

4.6.8 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

4.7 By doing so, did it subject the claimant to a detriment?

4.8 If so, was it done on the ground that she made a health and safety disclosure (i.e. on the grounds set out in ERA section 44(1)(c))?

5. Remedy for detriment

5.1 What financial losses has the detrimental treatment caused the claimant?

5.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the claimant be compensated?

5.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

5.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

5.6 Is it just and equitable to award the claimant other compensation?

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

5.8 Did the respondent or the claimant unreasonably fail to comply with it?

5.9 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

5.11 Was the protected disclosure made in good faith?

5.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

6. Disability

6.1 The claimant was a disabled person by reason of:

6.1.1 hypothyroidism before March 2020 until April 2021, and

6.1.2 chronic rhinosinusitis from November 2020 until May 2022.

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

6.2.1 Did she have a physical impairment: chronic rhinosinusitis and/or a mental impairment: anxiety/depression?

6.2.2 Did the impairments have a substantial adverse effect on her ability to carry out day-to-day activities?

6.2.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairments?

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

6.2.5 Were the effects of the impairments long-term? The Tribunal will decide:

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

6.2.5.2 if not, were they likely to recur?

7. Direct disability or religion and belief discrimination (Equality Act 2010 section 13)

7.1 The claimant describes her religion and beliefs as follows:

7.1.1 She is a practising Christian and a Jehovah's witness. Her faith guides her in every decision she makes.

7.1.2 She believes in doing good by others/in doing no harm.

7.1.3 She believes God has created her with a safe and effective natural immune system and that breathing fresh air is essential to that immune system;

7.1.4 She believes body autonomy should be respected;

7.1.5 She believes in homeopathy and natural medicines and believes that nature has everything we need to heal ourselves;

7.1.6 She believes that where there is risk there should be choice.

7.2 Did the respondent do the following things:

~~7.2.1 On 19.01.23 MC excluded the claimant from working clinically as she 'poses a risk to patients on this area without the required PPE as per policy'. MC also said she has 'found a placement where masks are not required …. this should integrate her within a team offsite at Telford College'.~~

~~7.2.2 On 12.05.23 MC informed Occupational Health that the claimant believes masks "are not required due to religious beliefs". The claimant believes this choice of words to be prejudicial and offensive.~~

~~7.2.3 On 04.08.23 MC said "I have not denied any possibility of disability which Helen considers she may have." As a result of this the claimant believes the respondent has not taken her disability seriously or as a fact.~~

7.2.4 On 23.2.23 MC gave RA the claimant's vaccination status without her consent. As a result RA's behaviour towards the claimant changed and in particular she described the claimant as a risk in a covid risk assessment. The claimant will also rely on RA's behaviour in the meeting on 21 March 2023 where she alleges RA was negative and judgmental.

7.2.5 The claimant's unvaccinated status was used to prohibit her from returning to work.

7.2.6 On 21.3.23 RA and MC asked if the claimant could wear a mask for short periods – they did not understand it was not an option for the claimant and did not take her seriously. They were judging and shaming the claimant. The claimant was not given any feedback on her 5week phased return. They revoked the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there. MC blamed the claimant for the loss of the opportunity saying it was "your choice" and "your beliefs".

7.2.7 On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

7.2.8 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

7.3 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 s/he was treated worse than someone else would have been treated.

7.4 If so, was it because of disability or religion or belief?

7.5 Did the respondent's treatment amount to a detriment?

<u>8. Discrimination arising from disability (Equality Act 2010 section 15)</u>

8.1 Did the respondent treat the claimant unfavourably by:

~~8.1.1 Requiring her to wear a surgical mask throughout her shift from 7 April 2020 to 14 October 2020.~~

~~8.1.2 Removing her from her role as ward sister, with a consequent reduction in pay from 4 October 2020 to 19 October 2023.~~

~~8.1.3 Forcing her to work at home from 4 October 2020 until 4 June 2023. (The respondent says the claimant did not work from home during her phased return to work in February 2023, and therefore questions whether the 4 June 2023 date is correct.)~~

8.1.4 LB has not acknowledged or answered the claimant's questions or communicated with her following the meeting on 24 April 2023.

8.1.5 Putting pressure on the Claimant to have a Covid 19 vaccination on:

8.1.5.1 SAR (Subject access Request) 0956 14.01.21 impromptu telephone call from Line Manager PW.

8.1.5.2 SAR (Subject Access Request) 0.36 18.04.21 impromptu telephone call from Line Manage PW.

8.1.5.3 SAR (Subject Access Request) 1210 14.06.21 impromptu telephone call from Line manager PW

8.1.5.4 15.11.21 (35 min) impromptu harassment telephone call- second responder.

8.1.5.5 3.12.21 (35 min) impromptu harassment telephone call- second responder.

8.1.5.6 06.12.21 Mask and vaccine harassment email- second responder.

8.1.5.7 08.12.21 Mask and vaccine harassment email-second responder.

8.1.5.8 10.12.21 (20 minutes) impromptu harassment telephone call second responder.

8.1.5.9 17.12.21 second responder forwarded mandatory vaccination email to claimant.

8.1.5.10 17.12.21 Sath.commsteam mandatory vaccination email.

8.1.5.11 17.12.21 sathVCOD detailed coercion and harassment vaccine email.

8.1.5.12 24.12.21 sathcommsteam covid-19 vaccine booster coercion vaccination email.

8.1.5.13 29.12.21 sathcommsteam covid-19 vaccine booster, 1stt or 2nd dose walk in email.

8.1.5.14 30.12.21 sathcommsteam covid-19 vaccine booster, 1st or 2nd dose clinic email.

8.1.5.15 31.12.21 sathcommsteam covid-19 vaccine booster email.

8.1.5.16 05/01/22 sath VCOD intimidation to give private medical information email.

8.1.5.17 12.01.22 Mandatory vaccination email from second responder to Claimant and phone call 16:22 27 minutes.

8.1.5.18 19.01.22. Phone call with second responder. TEAMS

8.1.5.19 19.01.22 SATH Covid-19 Winter Update email 'An agreed process for ending employment as a last resort for colleagues who are not compliant with the regulations on 1 April 2022'.

8.1.5.20 26.01.22 Posted letter RE: mandatory covid-19 vaccination requirements.

8.1.5.21 27.01.22 sathVCOD vaccine harassment email from mandatory vaccines team.

8.2 Did the following things arise in consequence of the claimant's disability:

8.2.1 The Claimant had breathing difficulties associated with her medical conditions and was unable to wear a mask continuously for long periods.

8.2 Was the unfavourable treatment because of any of those things?

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

8.5 The Tribunal will decide in particular:

8.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

8.5.2 could something less discriminatory have been done instead;

8.5.3 how should the needs of the claimant and the respondent be balanced?

8.6 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

<u>9. Indirect discrimination (Equality Act 2010 section 19)</u>

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

9.1.1 A requirement for nursing staff to wear surgical masks throughout their shift.

9.2 Did the respondent apply the PCP to the claimant?

9.3 Did the respondent apply the PCP to persons without the claimant's disability or without her religion or belief or would it have done so?

9.4 Did the PCP put persons with whom the claimant shares the characteristics at a particular disadvantage when compared with persons with whom the claimant does not share the characteristics?

9.5 Did the PCP put the claimant at that disadvantage?

9.6 Was the PCP a proportionate means of achieving a legitimate aim?

9.7 The Tribunal will decide in particular:

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

9.7.2 could something less discriminatory have been done instead;

9.7.3 how should the needs of the claimant and the respondent be balanced?

<u>10. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)</u>

10.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

10.2.1 A requirement for nursing staff to wear surgical masks throughout their shift.

10.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the Claimant had breathing difficulties associated with her medical conditions and was unable to wear a mask continuously for long periods?

10.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

10.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

10.5.1 An exemption from the requirement to wear a mask.

10.5.2 A transfer to a different work environment where she would not have to wear mask all the time, such as Telford. The claimant says that a reasonable adjustment was initiated to facilitate her working in Telford on 14 February 2023, but this was revoked on 21 February 2023. The claimant also relies on an allegation that she was not informed that she would have to move roles after her 5-week phased return in February 2023 and this caused her anxiety and was not reasonable. She refers in particular to the comments made by RA on 10 March 2023 "Introducing herself as a PEF…".

10.6 Was it reasonable for the respondent to have to take those steps and when?

10.7 Did the respondent fail to take those steps?

11. Harassment related to disability and/or religion or belief (Equality Act 2010 section 26)

11.1 Did the respondent do the following things:

~~11.1.1 In a meeting on 7 February 2022 did DH and MM describe the claimant's recent nose surgery as "cosmetic";~~

11.1.2 The Respondent pressurised, coerced and bullied the Claimant to have a covid-19 vaccine on multiple dates including:

11.1.2.1 November 2021 (35-minute impromptu telephone call from second Respondent (AC));

11.1.2.2 3 December 2021 (35-minute impromptu telephone call from AC);

11.1.2.3 6 December 2021 (email call from AC);

11.1.2.4 8 December 2021 (email call from AC);

11.1.2.5 10 December 2021 (20-minute impromptu telephone call from AC while the Claimant was off sick);

11.1.2.6 13 December 2021(email from the Respondent while the Claimant was off sick);

11.1.2.7 17 December 2021 (2 emails while the Claimant was off sick (Trust and AC));

11.1.2.8 5 January 2022 email while the Claimant was off sick (Trust);

11.1.2.9 12 January 2022 email (Trust);

11.1.2.10 26 January 22 letter (Trust);

11.1.2.11 27 January 22 email (Trust).

~~11.1.3 On 19.01.23 MC excluded the claimant from working clinically as she 'poses a risk to patients on this area without the required PPE as per policy'. MC also said she has 'found a placement where masks are not required …. this should integrate her within a team offsite at Telford College'.~~

~~11.1.4 On 12.05.23 MC informed Occupational Health that the claimant believes masks "are not required due to religious beliefs". The claimant believes this choice of words to be prejudicial and offensive.~~

11.1.5 The claimant was excluded from working her contracted role as a clinical ward sister from 14 October 2020 to 4 June 2023.

11.1.6 On 23.2.23 MC gave RA the claimant's vaccination status without her consent. As a result RA's behaviour towards the claimant changed and in particular, she described the claimant as a risk in a covid risk assessment. The claimant will also rely on RA's behaviour in the meeting on 21 March 2023 where she alleges RA was negative and judgmental.

11.1.7 On 21.3.23 RA and MC asked if the claimant could wear a mask for short period – they did not understand it was not an option for the claimant and did not take her seriously. They were judging and shaming the claimant. The claimant was not given any feedback on her 5week phased return. They revoked the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there. MC blamed the claimant for the loss of the opportunity saying it was "your choice" and "your beliefs".

11.1.8 On 04.08.23 MC said, "I have not denied any possibility of disability which Helen considers she may have." As a result of this the claimant believes the respondent has not taken her disability seriously or as a fact.

11.1.9 KM and TD arranged weekly meetings, putting the claimant in an impossible situation. The claimant felt intimidated and harassed to consent to a redeployment register or return to the ward that caused trauma or drop a band in pay from band six to band five. This unwanted behaviour caused extreme anxiety and distress. It started in June 2023.

11.1.10 On 28.07.23 Claimant left the meeting room and witnessed KM and TD laughing in amusement.

11.1.11 On 19.01.2023. MC documented that she would complete a stress risk assessment and covid assessment. MC handed the covid assessment to RA to complete. A stress risk assessment was not completed. The claimant alleges this amounted to failing to take reasonable care to protect her from distress and it made her feel they did not take her stress and anxiety seriously.

11.1.12 In March 2023 the claimant was not informed that she would only be able to stay in her new role during her 5-week phased return. The claimant contends she felt humiliated and as though her anxiety had not been taken into account.

11.1.13 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

11.1.14 The claimant was not personally contacted to infirm her of the policy change regarding wearing mask announced on 26 May 2023, even though she had been excluded from the site for more than 2.5 years as a result of the previous policy.

11.2 If so, was that unwanted conduct?

11.3 Did it relate to disability and/or religion or belief?

11.4 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?

11.5 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.

12. Victimisation (Equality Act 2010 section 27)

12.1 Did the claimant do a protected act as follows:

12.1.1 Grievance dated 27 March 2023 and 12 May 2023.

12.1.2 On 28 March 2023 the claimant wrote to the Chief Executive LB.

12.1.3 On 24 April 2023 the claimant had a Teams meeting with LB and after the meeting sent her a list of questions.

12.2 Did the respondent do the following things:

12.2.1 LB has not acknowledged or answered the claimant's questions or communicated with her following the meeting on 24 April 2023.

12.2.2 On 19.01.23 MC excluded the claimant from working clinically as she 'poses a risk to patients on this area without the required PPE as per policy'. MC also said she has 'found a placement where masks are not

required …. this should integrate her within a team offsite at Telford College'.

12.2.3 On 12.05.23 MC informed Occupational Health that the claimant believes masks "are not required due to religious beliefs". The claimant believes this choice of words to be prejudicial and offensive.

12.2.4 The claimant was excluded from working her contracted role as a clinical ward sister from 14 October 2020 to 4 June 2023.

12.2.5 On 23.2.23 MC gave RA the claimant's vaccination status without her consent. As a result RA's behaviour towards the claimant changed and in particular, she described the claimant as a risk in a covid risk assessment. The claimant will also rely on RA's behaviour in the meeting on 21 March 2023 where she alleges RA was negative and judgmental.

12.2.6 On 21.3.23 RA and MC asked if the claimant could wear a mask for short periods – they did not understand it was not an option for the claimant and did not take her seriously. They were judging and shaming the claimant. The claimant was not given any feedback on her 5week phased return. They revoked the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there. MC blamed the claimant for the loss of the opportunity saying it was "your choice" and "your beliefs".

12.2.7 On 04.08.23 MC said, "I have not denied any possibility of disability which [C] considers she may have." As a result of this the claimant believes the respondent has not taken her disability seriously or as a fact.

12.2.8 KM and TD arranged weekly meetings, putting the claimant in an impossible situation. The claimant felt intimated and harassed to consent to a redeployment register or return to the ward that caused trauma or drop a band in pay from band six to band five. This unwanted behaviour caused extreme anxiety and distress. It started in June 2023.

12.2.9 On 28.07.23 Claimant left the meeting room and witnessed KM and TD laughing in amusement.

12.2.10 On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

12.2.11 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information.

The claimant contends these criticisms were unwarranted and were done behind her back.

12.3 By doing so, did it subject the claimant to detriment?

12.4 If so, was it because the claimant did a protected act?

12.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

13. Remedy for discrimination or victimisation

13.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

13.2 What financial losses has the discrimination caused the claimant?

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

13.4 If not, for what period of loss should the claimant be compensated?

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

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

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

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

13.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

13.10 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

13.11 Should interest be awarded? How much?

Findings of Fact

15. In the judgment, the Tribunal has used initials to identify the people listed below rather than their full names.

Witnesses and other individuals

13 The following people attended to give evidence on behalf of the claimant:

13.1.1 The claimant ('C');

14 The following people attended to give evidence on behalf of the respondent ('R'):

14.1 'KP' - Deputy Lead Nurse for Infection Prevention and Control;

14.2 'KT' - Health and Safety (H&S) Team Manager;

14.3 'AC' - Matron for Oncology & Haematology;

14.4 'DH' - Jan 2020 – June 2022 – Centre Manager for Cardiology, Stroke and Care of the Elderly at R at the time;

14.5 'MT' - Inpatient Therapy Manager and Head of Inpatient Physiotherapy. Currently working as the Acting Therapy Centre Manager;

14.6 'MC' - Divisional Director of Nursing – Surgery, Anaesthetics, Critical Care and Cancer;

14.7 'RA' - Head of Non-Medical Education. Previously Lead Nurse for Post Registration Education;

14.8 'KM' - Deputy Divisional Director of Nursing (for the Surgery Division);

14.9 'AW' - Deputy Director of Operations, Surgery, Anaesthetics and Cancer Division and Centre Manager Patient Access, Theatres, Anaesthetics and Critical Care; and

14.10 'ND' - People Advisory Service & Governance Manager

15 The following individuals were referred to during the evidence:

15.1 'JE' - People and OD Business Partner;

15.2 'PW' - Ward Manager / C's line manager whilst on Ward 23;

15.3 'LB' - ex CEO;

15.4 'LiB' - Lead Nurse – Recruitment and Resourcing Governance / nMABS triage team;

15.5 'DM' - Deputy of Nursing, Unscheduled Care;

15.6 'JR' - People Adviser;

15.7 'SK'- HR employee;

15.8 'EC' - HR employee;

15.9 'SMcK' - Divisional Director of Operations and Divisional Medical Director;

15.10 ‘HJ’ - Consultant Clinical Psychologist, R’s staff psychology service;

15.11 ‘LC’ - Divisional Director of Operations Surgery, Anaesthetics, Cancer and Critical Care;

15.12 ‘DG’ - the Senior PEF who led the OSCE preparation programme;

15.13 ‘NP’ - Divisional PA, Surgery, Anaesthetics, Cancer and Critical Care;

15.14 ‘GG’ - Regional Officer • RCN West Midlands;

15.15 Mr R Karter (‘RK’), Union representative from Workers of England; and

15.16 Mr J Bellamy (‘JB’), Union representative from Workers of England.

16 The evidence contained continual use of technical terms and so for ease of reference the following glossary defines the terms that were used frequently in the evidence:

16.1 DHSC - The Department of Health and Social Care

16.2 IPC – Infection Prevention and Control

16.3 PHE – Public Health England

16.4 UKHSA – UK Health and Safety Agency

16.5 PPE – Personal Protective Equipment

16.6 NHSEI – National Health Service England and Improvement

16.7 NHSE – NHS England

16.8 OSCE - Objective Structured Clinical Examination which international trainee nurses must pass to become a UK registered nurse.

16.9 RPE - Respiratory Protective Equipment

16.10 FFP - Filtering Facepiece Respirator manufactured to three standards FFP1, FFP2 or FFP3 with FFP3 offering the highest level of filtration of airborne contaminants (or aerosols)

16.11 AGP – Aerosol Generating Procedures

16.12 PAPR - powered air purifying respirators units with P3 filters, colloquially known as “hoods”.

16.13 FRSM or Surgical Mask– Fluid resistant surgical mask

16.14 Type IIR FRSM- FRSM for use in higher infection areas adopted by NHS for use by staff in clinical and non-clinical areas.

16.15 NIPCM - National infection prevention and control manual (NIPCM) for England published 14 4 22.

16.16 SaTH – The S NHS Trust

16.17 RCN – Royal College of Nursing

16.18 WEU – The Workers of England Union

16.19 Yellow Card Scheme - operated by the Medicines and Healthcare products Regulatory Agency (MHRA), which safeguards medicines, vaccines, medical devices, blood products and e-cigarettes quality and efficacy in the United Kingdom. Through the Yellow Card scheme, the MHRA collects and monitors information on suspected safety concerns involving healthcare products, like side effects caused by a medicine, or adverse incidents involving medical devices.

Credibility

17 We found all those witnesses who gave evidence before us to be truthful and we did not believe that anyone was setting out to deliberately mislead the Tribunal. R's witnesses gave clear and credible evidence and for the very large part, much of what they said was supported by contemporaneous documents in the form of the very many e mails that we were directed to read in pre reading and in cross examination. Those witnesses were measured and willing to make concessions stating where they felt that things could have been handled better.

18 C's evidence was extremely detailed and there is no doubt in our mind that C strongly believes that she has been subject to unlawful action by R. However we accept the submissions of R that the "*fountainhead of this claim*" is based on C's vehement objections to the decisions of the UK Government in relation to mask wearing and vaccinations. These beliefs are shared by many in society and C attacks the science and morality behind the decisions that were made during this most unprecedented of times. We find that this led her to become so single minded in her beliefs that she was simply unable to accept any view to the contrary. Her initial inability to wear a mask for physical reasons changed over time to an objection to wearing a mask at all for reasons of principle. The announcement of the Government's mandatory vaccination policy (which C and very many others were opposed to) made C even more vehement and entrenched in her beliefs and more strident in her objections to what R was doing. In our view, this clouded her ability to see or appreciate why steps were being taken in relation to her situation and she became convinced that there was a malicious motive to almost everything that R did. C was entirely focused on how R's actions made her feel rather than considering whether there was a valid legal complaint underlying what had happened. This did affect her credibility before this Tribunal in assessing in each situation what in fact was the reason why things had occurred why they did.

19 In order to determine the issues, it was not necessary to make findings on all the matters heard in evidence. We have made findings though not only on allegations made as legal complaints but on other relevant matters raised as background. We made the following findings of fact on the balance of probability:

19.1 R is an NHS Trust that provides healthcare services, principally from two major hospitals in its region. It employs in excess of 8,000 people.

19.2 C was employed by R as a Ward Sister on the Oncology Ward 23. C's contract of employment was shown at page 830 and the NHS Terms and Conditions of Service applicable to her role at page 4726. Relevant provisions of these contractual terms that we considered were the following:

"11.3 The maximum periods of sick pay will be.

Length of recognised NHS service	*Full pay entitlement*	*Half pay entitlement*
During first year of service	*1 month*	*2 months*
During second year of service	*2 months*	*2 months*
During third year of service	*4 months*	*4 months*
During fourth and fifth years of service	*5 months*	*5 months*
After completing five years of service	*6 months*	*6 months*

19.3 The job description for this role was shown at page 802. C was line managed by PW and worked predominantly night shifts. There were many relevant policies that applied to C's employment, but we were referred to the following relevant parts of such policies:

R's Guide to Managing Alternative Employment Policy (pages 2307-2315) provided that redeployment was initiated,

"when an employee cannot perform their role due to health issues, organisational changes, or performance management. The employee fills out a form to be added to the redeployment register. The recruitment team then seeks suitable roles matching the employee's essential criteria within their salary band or one band below. Vacancies are held for three days while the

employee decides whether to apply. Pay protection does not apply for redeployment due to ill health or disciplinary reasons. Employees remain on the register for a defined period; if no position is found, their employment may be terminated".

19.4 The Oncology & Haematology department/service offers specialist care for, often, critically ill/immunosuppressed patients suffering from common and rare haematological disorders and for patients with complications or requiring treatment for solid tumours. Patients may receive chemotherapy, radiotherapy, symptom control or palliative care on the oncology ward and therefore are incredibly susceptible to the risk of infection. Prior to the Covid 19 pandemic there were times where mask wearing was required, for example during influenza outbreaks. Staff were required to wear Surgical Masks inside rooms or bays where influenza positive patients were located. This generally occurred during winter months and we accepted AC's evidence that each winter there were at least two or three occasions when ward staff would have needed to wear masks, usually for anywhere between 3 and 7 days each time but only when attending to specific patients and not for the entire shift. Surgical Masks were also required for certain procedures such as some head and neck procedures in the Oncology outpatient clinic, again with cases or suspected cases of influenza or other respiratory diseases (which required FFP3 masks to be worn).

<u>Mask use in the NHS.</u>

19.5 A significant amount of evidence was heard about the various masks being used within R and the wearing of masks generally. Much of C's evidence and questioned focused on the efficacy and safety of different types of masks and the use they were and should have been put to and her very strong views about this. However for the purposes of this claim, it was not the role of the Tribunal to make any form of assessment of the efficacy and safety of masks, nor were we qualified to do so. To very briefly summarise, masks being used that offer the higher level of protection were the FFP type that were manufactured to one of three standards (FFP1, FFP2 or FFP3) with the increasing number offering a higher level of filtration of airborne contaminants. FFP3 respirators are the most effective and can filter airborne pathogens including viruses, bacteria and fungal spores. FFP3s are used in AGPs within R where a patient has a disease spread by aerosols. FFP3 fit tightly to the wearer's face and have a negative pressure which forms a seal. A worker required a face fit testing procedure (fit testing) to ensure that the specific make and model is suitable for the size and shape of face. This fit test will be 'failed' if the seal to the face is inadequate, but a 'pass' indicates the mask is capable of protecting the worker from airborne contaminants. The FFP3 was the appropriate respirator to wear when working with patients with suspected or confirmed Covid-19, although during 2020 FFP3 masks were for a period of time in short supply.

19.6 The FFP2 mask offered a lower level of protection against airborne contaminants and was not generally used in clinical areas within R during the

pandemic. C showed the Tribunal an example of such a mask during the hearing. This is mask which does not create a tight seal, has a more rigid structure and is secured by either a head strap or an ear loop design. Surgical Masks are the more commonly used (often light blue coloured) masks in healthcare generally and are intended to limit the transmission of infection by forming a barrier to infection plus fluid resistance but giving less protection than an FFP3 respirator. It was agreed that the Surgical Mask did not act a filtering device or respirator for airborne particles. Surgical Masks were manufactured to type 1 (for use in low infection areas, principally by patients) or Type II and Type IIR (for use in higher infection areas and by healthcare professionals). Early in the pandemic the NHS and R in particular took the decision to use Type IIR masks as standard stocks. Surgical Masks could be of a head tie or ear loop design and were intended to fully cover the nose and mouth. Face visors were not considered to be an appropriate substitute for a surgical mask as they did not offer any filtration but were used together with other PPE in appropriate circumstances.

19.7 There was also much discussion and evidence in the hearing about whether various masks amounted to PPE or not and met the various regulatory standards for such PPE. This again was not a matter we had to or could determine. However we accept that during the Covid-19 pandemic, R and other NHS trusts used the term PPE to include FFP3, Surgical Masks and other items including gloves, aprons, gowns, visors and protective eyewear.

C's Health Issues

19.8 C's various health conditions were discussed again in detail, and we heard much evidence from C about her health during the hearing. In relation to her physical impairments, as there is no dispute that C is a disabled person as a result of Chronic Rhinosinusitis from November 2020 until at least August 2023 (the date of the last act of alleged discrimination), we do not need to set out in full the extent of this health condition. C was also disabled by reason of Hypothyroidism from before March 2020 until April 2021 (although this bears less relevance to the issues before this Tribunal). The judgment of Employment Judge Faulkner on disability (pages 144-63) addresses in detail such matters and where relevant we have taken account of its findings and conclusions. In November 2019 C had septo-rhinoplasty surgery and was off work until December 2019. C suffered pain and discomfort after this surgery, and we accept was unable to tolerate pressure being applied to her nose.

The onset of the Covid-19 Pandemic

19.9 In January 2020 R began its preparedness for Covid-19. PHE published a letter and guidance on 10 January 2020 set out the PPE to be worn in a case of confirmed or suspected infection which required those in a room with such a patient had to wear a long sleeved, fluid-repellent disposable gown, gloves with long tight fitted cuffs, FFP3 respirator and eye protection. This was also reflected in the policy R put in place titled "*Middle East Respiratory*

Syndrome CoronaVirus (MERS-CoV) & Wuhan Novel CoronaVirus (WN-CoV)" on 31 January 2020 (pages 4512-41). The NHS declared COVID-19 a Level 4 National Incident on 30 January 2020, which meant that NHS England National Command and Control supported the NHS response. This was stepped down in May 2022. On 17 March 2020 the day after the first national government announcements instructing people to stop non-essential contact and travel, NHSEI sent a letter to all senior managers in the NHS setting out actions required in all parts of the NHS to free up capacity and prepare for the expected large number of patients requiring respiratory support (pages 4542 – 4559). This also included steps to support staff and maximise staff availability including testing, self-isolation and remote working,

19.10 On 21 March 2020 shielding began for the clinically vulnerable which included all patients being treated on Ward 23 and on 26 March 2020, the first national lockdown began and FRSM Surgical Masks began to be worn in all clinical areas.

<u>The Mask Mandate and its operation within R between April 2020 and March 2024</u>

19.11 From 3 April 2020 R implemented a policy that all staff within two metres of a patient would wear a mask (FFP3 or FRSM Surgical Mask dependent of inherent risk of the area). Mask wearing was no longer confined to suspected or confirmed covid cases (pages 4559 and 4560) This was reflected in version 9 of the Covid 19 Policy dated 6 April 2020 (page 4561 to 4600). On 12 June 2020 PHE published guidance entitled "*New government recommendations for England NHS hospital trusts and private hospital providers*" (pages 4601 to 4603) followed by the PHE 'Covid-19: Infection Prevention and Control guidance' (page 3389 to 3444). This specified that in all settings that are unable to be delivered as COVID-19 secure, all hospital staff (both in clinical and non-clinical roles) should wear a facemask. R implemented this guidance by a decision of its 'silver command' Covid-19 response incident centre (chaired by an executive member of R's Board and attended by heads of divisions, health and safety, procurement, microbiology and emergency planning) which was responsible for updating and disseminating guidance to staff. The decision was communicated in trust-wide communications on 20 June 2020 (pages 4340 to 4387) as follows:

"• All staff must now wear a surgical face mask when entering our hospitals. Further information is available in a series of FAQs here and in staff information posters here.

• Non-clinical staff working in the same room as one person or more must wear a face mask until a workplace self-assessment and a workplace risk assessment has been completed and agreed for their area. These documents will confirm whether or not an area of work is 'COVID-secure'."

The hospitals were designated into red, amber and green zones but in all such zones a FRSM was required to be worn, even where an area of a hospital had been designated a low-risk pathway (see page 4371).

19.12 The terminology "Universal masking" first started to be used in November 2021 and reflected the ongoing practice that on entry to the building staff, patients and visitors were expected to wear a face mask. Only patients and visitors were able to claim mask exemptions. The UKHSA guidance, entitled 'Infection prevention and control for seasonal respiratory infections in health and care setting (including SARS-CoV-2) for Winter 2021 to 2022', published on behalf of the Department of Health and Social Care, PHE, NHSE (amongst others) (page 1336) recommended that the universal use of face masks for staff and face masks or coverings for all patients and visitors was to remain an IPC measure within health and care settings over the Winter period.

19.13 The Living with COVID-19 guidance was released in February 2022 which set out changes to COVID guidelines in the community, however masks were still required in healthcare settings and staff were expected to continue to abide by existing IPC requirements (pages 3648 to 3650). Specifically, the guidance stated.

"*There are no immediate changes to IPC requirement. This includes the requirement for staff, patients and visitors to wear a mask / face covering in healthcare settings. The consistent application of IPC measure, alongside the roll out of the vaccine programme and staff and patient testing, remains the most effective defence against the entry and spread of COVID-19 in healthcare settings"*.

The "Midlands Next Steps principles and options for IPC and related activities in healthcare settings to accommodate living with COVID-19" released on 5 April 2022 (pages 3682 - 3701 set out minimum standards but also recognised (at page 3683) that different organisations were experiencing different levels of pressure in relation to capacity and flow as well as the impact of COVID-19 and some organisations "*may wish to work above and beyond*". NHS trusts were expected to complete their own risk assessments and tailor their response to their organisational requirements, but that masks still needed to be worn in all circumstances (page 3688). Any references to exemptions were in relation to patients and visitors only. There was no explicit mention in any COVID guidance for healthcare in relation to staff exemptions to mask use in clinical (and non – clinical) areas. R interpreted this as meaning that there was no such exemption, and we find that this was the correct interpretation of the various pieces of guidance published at the time.

19.14 On 1 June 2022 NHSE confirmed the continued use of facemasks in clinical settings on a risk assessed basis, but that non-clinical areas were no longer generally required to wear facemasks. A risk assessment was undertaken by R (pages 3146 - 3150) and as of 10 June 2022 mandatory

mask use in non-clinical areas was withdrawn and was communicated in the Director of Nursing message (page 4349). Masks were kept in clinical areas at the Trust at this point.

19.15 From 5 June 2023, in line with local risk assessments and following on from NHSE stepping down COVID-19 from the national level 3 incident on 18 May 2023, there was a withdrawal of mandatory mask wearing in clinical areas. This was communicated by R to its staff on 26 May 2023 (page 4355). Due to the nature of the patients on ward 23, mask use was still required initially, this included staff and visitors to the ward. This requirement was then removed on 30 June 2023 following specialist advice and guidance from within Oncology and Haematology. Masks would continue to be worn for patients with COVID and when advised by the IPC team on the basis of an outbreak of a respiratory virus (see R risk assessment at page 3211-3217 written into V6.6 of the Seasonal respiratory policy approved on 14 August 23 (page 4255- 4271).

19.16 Mask wearing for staff, patients and visitors was temporarily reinstated at the Trust on 18 October 2023 in high-risk areas, (including ward 23 (and this was communicated via Trust wide communications on 18 October 2023 (page 4356) and was written into V6.7 of R's seasonal respiratory infections policy (pages 4272 - 4336). Mandatory mask wearing was finally withdrawn in all areas on 14 March 2024 on the basis of a risk assessment (pages 3246 - 3255) taking into consideration local reduction in case numbers, outbreaks and staff absence.

<u>C raises issues with AC about mask wearing</u>

19.17 On 30 April 2020 C messaged AC to say she was experiencing pain and discomfort when wearing a FRSM Surgical Mask (page 884). She mentioned that her nose had been sensitive since her surgery the previous November and stated that she had tried to manage but stated,

"as this situation with COVID is ongoing I cant continue to wear them continuously for a full shift as it's unbearable and the Pain is too distracting", going on to add

..And obviously there are risks not wearing them .

19.18 AC responded that she would speak to Patient Safety but thought there may not be an alternative that did not have the same issues with C's nose. She made suggestions that C work shorter shifts (so she was able to take more breaks) or day shifts (with more staff on duty allowing more breaks) or consider temporary redeployment to an admin role where mask wearing was not necessary (886-7)). C responded stating that she wanted to stay where she was and also mentioned using a face shield. AC asked whether she was OK to work that evening and suggested a tie back mask which she thought may be more comfortable (page 889). C suggested cutting down use of the mask, so it was just for patient contact only. AC agreed that whilst she was

waiting to speak to a health and safety colleague that C should wear the mask for patient contact only but use a face shield (with the mask over her mouth only) in corridors or when at her desk (pages 889-891). In early May 2020 AC had various discussions with IPC and H&S to seek advice about mask wearing and possible alternatives but was advised there was no alternative to full and correct mask wearing. She informed C of this on 1 May 2020 (see AC file note of the conversation at page 840 and text message at page 895-6). Following further conversations with health and safety AC informed C that she had to wear the mask over her nose and mouth but take additional breaks. It was recorded that the ward was quiet with a number of empty beds (page 840-1).

19.19 In May 2020 there was a Covid-19 outbreak in Oncology involving 11 patients and resulting in patient deaths. C contracted Covid-19 and was absent on sick leave from 12 May 2020 being signed off work from 20 to 31 May 2020. On 18 June 2020 AC telephoned C who informed her that was managing to wear a mask and taking additional breaks which she said was working well as the ward was quieter (see note at page 843). During cross examination, C stated that even then she was never able to wear the mask over nose for more than a few minutes and does not recall telling AC that she was managing well. We find that this may well be true, but that AC understood from her conversation with C on this date that C was wearing the mask as required over her nose and mouth at work and was managing pain and discomfort by taking additional breaks.

<u>Absence from work and surgery</u>

19.20 On 28 July 2020 C e mailed AC following a period of unexpected leave following the attempted suicide of her daughter which had been initially categorised as annual leave but was then corrected to be recorded as carers leave/compassionate (page 846-853). In this e mail C expressed concerns about the treatment of her leave and felt that staff on the ward were negative to her as she was about to take time off for explant surgery. This surgery had been planned before the onset of Covid-19 but had been postponed and C had to petition to her healthcare provider with medical evidence to support its necessity and had been able to get it rescheduled (see documentation at pages 847-851). She expressed concerns about pressures on Ward 23 and that even though there were empty beds it was still difficult to complete the job on time. She stated that she was anxious and struggling to cope mentioning family matters and her own health concerns (which she hoped would be remedied by the forthcoming explant surgery). AC spoke to C on this day (see file note at page 853-4) and reassured her that there was no negativity towards her suggesting that as C was feeling vulnerable this may be impacting her perception. AC noted that C was emotional on the call and became hysterical at times and AC offered OH support which C declined. There was brief mention of mask wearing with C stating that she had "*persevered*" with it. C ended the discussion by thanking AC for her support.

19.21 On 30 July 2020 C commenced sick leave due to explant surgery. On 22 September 2020 an OH appointment and report occurred (pages 856 – 859). This recommended a phased return over 2 weeks and that C avoid heavy lifting and night shifts. It further suggested a mix of day and night shifts may be more beneficial. On 1 October 2020 C returned to work on a phased basis.

Issues with correct mask wearing October 2020

19.22 On 12 October 2020 AC received an email (page 863) and phone call from DM stating that on a visit to the ward over the weekend C had raised various concerns with her about masks and how uncomfortable they were and also asked whether masks were still necessary after contracting Covid-19 as she believed this made her immune. In her email DM noted that when she discussed with C

"that there is no evidence to suggest that this makes them immune but also about the image we are giving to our patients and other staff who may be very fearful allay any fears in patients and other staff, many of whom were frightened."

On 13 October 2020, KP had conducted a routine visit and contacted AC to say that C had not been wearing her mask correctly. AC noticed that when she arrived at work, C was wearing her mask over her mouth only.

Instruction to C to leave Ward 23

19.23 On 13 October 2020 a Band 6 meeting took place attended by C and AC. A told us that after that meeting, she spoke to C and informed her she would have to wear the mask properly over her nose and mouth. AC said that C then broke down in tears and told her she could not wear a mask properly as it caused her too much pain and felt she did not need to because she had already contracted Covid-19. C told her that she,

"could not and would not wear a mask".

There was a dispute as to what happened next. AC said she then instructed C to go home on paid authorised leave until they figured out what to do and rang her later that day to ensure she was home safely and signposted her to staff counselling service. AC's note of this conversation she had with C was at page 865. C gave evidence that she recalled being told by AC that she had to wear the mask properly but did not recall being sent home by AC that day (stating that it was the following day, and it was PW who instructed her that she had to go home). None of the issues we had to decide ultimately turned on which date this took place, but we preferred the evidence of AC as to what took place on 13 October 2020, as it was supported by a detailed file note. We also note that C was extremely upset and distressed that day which may have affected her recollection. Nonetheless we also accept that C in fact attended work on 14 October 2020 and started her shift and was then

instructed by PW to go home. AC was not on the ward on this date so was unable to say whether C was at work or not.

IPC advice and OH appointments October and November 2020

19.24 On 14 October 2020 AC telephoned an IPC nurse, who confirmed that mask wearing was still essential (see file note at pages 866 – 867). Between 14 and 31 October 2020 C was on authorised leave (followed by a pre-planned week of annual leave until 8 November 2020). On 28 October 2020 C attended an OH appointment and the report produced following this appointment (page 870-871) noted that C reported breathing difficulties (stemming from her sinus issues) when wearing a mask which caused increased anxiety. The OH reported that the reaction of increased anxiety around wearing a mask was normal and not a mental health difficulty. It recommended a further OH appointment to assess her sinus condition and the impact of wearing a mask on her physical health. That OH report following a review on 13 November 2020 (pages 873 – 874) recorded that C said she was,

unable to wear any type of mask for longer than 5 mins, due to pain. She states that since she underwent an operation on her nose in November 2019, she has experienced ongoing symptoms of pain, difficulty breathing and pins and needles in her nose"

it further recorded,

"Unfortunately; due to COVID 19 it is a requirement of the trust for surgical masks to be worn in all clinical areas, which has resulted in her current absence.

[C] states that her only alternative would be to wear a visor. However, I understand that this is against trust policy. Therefore, I would advise that a meeting be arranged with HR to discuss the next steps."

C's alternative non-clinical work

19.25 On 3 November 2020, AC contacted C by text to suggest that she conduct some staff interviews for R over Teams which could be done from the Ward 23 flat on site and there would be no requirement for C to wear a mask. C was happy with that suggestion, stating that it was "*wonderful*", and that news of this possible work had "*made her day*" (see pages 900-1). This work started on 19 November 2020 and C texted AC this day to say she had really enjoyed the work and it had done her the "*world of good*" (page 905) That work continued on an ad hoc basis during November, December and into January (see text messages at pages 906-12). In mid-January 2021 C commenced audit work working in an office alone where mask wearing was also not required (page 912-13). On 14 January 2021 during an informal review meeting with PW by telephone C reported that mask wearing still made her very anxious and she could not do it for longer than 5 minutes.

During this conversation PW asked C whether she would have the Covid-19 vaccinations (which were just starting to be rolled out) and he reported that C became tearful and upset and ended the call (see file note at page 913).

C suggestion of use of FFP2 mask

19.26 C continued to carry out the audit work during January and February 2021. On 10 February 2021 C sent a text message to AC to say she'd seen her surgeon the day before who confirmed she had internal swelling /trauma (in her nose), and she would be referred to ENT. C raised at this time that she had been trying a different mask which was easier to tolerate, and AC spoke to IPC about this. She sent a message to C in response asking her to confirm the type and variety of mask so that they could check it was acceptable and that they would need assurance from C that she could wear it the whole time. C replied to state the mask was an FFP2 mask and in her message also stated,

"*I completely understand that it's a safety issue and you need full compliance.*

I am struggling with any mask. This one is comfortable and doesn't cause the pain on my bridge but the sinus issues are exacerbated with anything covering my face. All I can do is try my best, I can't promise that I won't need time out."

She further added.

"*You and [PW] have been amazing to me…..I honestly am so thankful".* (text messages, 964-7).

When asked about the wearing of the FFP2 mask during cross examination, C agreed that she could still only 'tolerate' this mask for short periods of time and not continuously.

19.27 From 12 April 2021 C started to carry out work for Ward 35 (working for the matron there, EB in her own workspace in the cataract suite. At pages 917-8 we saw e mail correspondence between AC and EB about this work with AC stating that C could not work clinically as she was unable to wear a mask. AC mentioned that space would need to be available where C would not need to wear a mask and mentioned that C had been wearing alternative masks when carrying out other works but were not approved clinically. C was provided with her own workspace and attended on approximately 3 days per week carrying out ad hoc interviewing on other days. During a catch up by telephone between PW and C on 18 April 2021, PW recorded C as still not being able to tolerate a mask for more than 5 minutes and still being anxious and tearful. He noted that she did not want to discuss vaccination (see notes at page 919). On 10 May 2021 AC telephoned C for a catch up and recorded in her notes (page 921) that C was well in herself. C reported that she was still unable to wear a mask but wanted to get back to nursing. There was a

further informal catch up between C and PW on 14 June 2021 (pages 926 – 927) where PW records that C "*didn't want to talk about Covid vaccination*" On 7 July 2021. C e mailed AC asking about the possibility of training in aesthetics and setting up her own business, mentioning that the mask situation was "*so uncertain*" .AC told C she had no objection provided this did not interfere with her contracted hours (page 928).

OH report and further discussions about mask wearing August 2021

19.28 C attended a routine OH review on 3 August 2021 and the report issued following it (931 – 934) stated that C had been diagnosed with sinus related problems that were likely to last at least 12 months. It also reported that C could tolerate an FFP2 mask and suggested that she was able to return to clinical duties if this was worn. Following this recommendation on 5 August 2021 a teams call took place between C and KT during which C showed KT the mask she wanted to wear. We accepted the evidence of KT that during this call, C demonstrated wearing it in such a way that it covered her mouth but was pulled away from her nose. KT told us that this type of mask was designed to fit closely across the bridge of the nose and usually had a malleable metal strip fitted to the top of the mask for this purpose. KT told C that she could not support the use of the mask demonstrated being worn in this way as the mask did not cover C's nose. KT asked C whether she had tried the tie style Surgical Mask and suggested she come in to look at the range of masks and take some away to try at home. On 6 August 2021 C attended a fit testing appointment for an FFP3 mask and had managed to complete this but became very distressed after it. AC spoke to C on 8 August 2021 about how the test had gone and C agreed to pick up some alternative masks to try at home to see if she could build up mask wearing tolerance (note at page 937 – 938).

19.29 A further OH report produced after a review on 19 August 2021 which R received on 6 September 2021 (page 941) reported that C had been "*diagnosed with rhinosinusitis for ongoing symptoms of nasal dripping, nasal congestion and catarrh; and uses a nasal spray to help with this. She states the nasal spray, however does not resolve the symptoms and she finds that wearing a face mask or any face covering results in a feeling of panic, breathing difficulties and pain on her nose from pressure exerted on the nose*". It mentioned that C could only tolerate wearing a mask for a few minutes, and went on to mention difficulties with sleeping caused by her mouth breathing issues. It further stated,

"in my clinical opinion, if the home working arrangement can be accommodated long term, it would hopefully enable Helen to continue working". It continued, "*C advises me that if possible, not having to wear the mask or continuation with working from home would be helpful in enabling her to manage the nose health issues and continue working*". The report concluded that it felt that the EQA was likely to apply (pages 942 – 945).

Contact between RCN and KT

19.30 On 23 August 2021 GG emailed KT on behalf of C (page 4669) raising the issue of mask wearing and asking KT about C's choice of mask, whether it was suitable and if not whether an alternative was available. KT then spoke to GG and explained that the issue was that C had wanted to wear this particular make and model of FFP2 in such a way as it would not cover her nose. KT also stated that R did not stock this style as it was an earloop design. KT also communicated that C had been invited in to look at the range of masks available and try some at home in a less pressured situation, but that this had not gone well. KT told us she felt that GG was satisfied with the response given and did not raise any further issues with her about C.

19.31 On 27 October 2021 AC contacted C for a catch-up and the notes taken by AC of this discussion were at pages 952-3. C explained that she could wear a mask for 15 minutes only and was now worried about her job. She also raised the issue that as not working clinically she was no longer receiving unsociable hours payments. There was a discussion about possible redeployment with AC stating that currently there was no other role at C's level that enabled her to work from home. At this time AC mentioned that C could go on R's redeployment register and that this was usually for a period of 12 weeks maximum. C then said she felt that there may be a psychological issue causing her issues with wearing a mask as she was anxious about the pain it would cause her. AC suggested a referral to OH and the possibility of counselling or maybe some CBT therapy and noted that C was reluctant and thought this may not help but agreed to a referral. C agreed that she would try using some padding under the mask on the bridge of her nose. On 29 October 2021C sent a text message to AC to tell her she had collected dressings from the ward to thanked AC" for *being such a great support*". In her response AC suggested that C should "*try what she can and see if you can build up some tolerance*" (pages 970-1).

19.32 AC emailed C a summary of their conversation on 29 October 2021 (page 973-4) which stated that R would "*do whatever we can to support you to see how we can best get you back into clinical work in some form*" but also noted that "*the expectation of staff wearing clinical masks within the Trust is not likely to go away any time in the near or middle future".* The email concluded with a summary of the plan moving forward which was to refer for further OH support to see if any counselling/CBT could be arranged; that C would collect dressings and try to build up tolerance to a mask at home; that conversations would continue regularly each week to discuss progress and that,

"*If in six weeks you have made little or no progress and there is no prospect of you returning to work clinically then we would seek further OH support with a request for their support for permanent redeployment in an alternative role".*

The e mail clarified that this did not mean that AC expected her back working 12.5-hour shifts in 6 weeks' time as she felt this was unrealistic but that.

"we do need to see some progress and some likelihood of you coming back clinically."

It went on to make further suggestions including that C build up tolerance to mask wearing for short periods at home initially and then try to do some office work on ward 23 wearing the mask for a couple of hours at a time, then moving to work clinically for similar periods with the mask on. It suggested that C would need some "buddying up" before returning to clinical work after having been away for over 12 months. The possibility of working some shorter shifts or temporarily deploying to a day unit was also mentioned. AC asked C to reply to confirm her understanding of the conversation and C sent an e mail on 2 November confirming that this was the case and that she would try out dressings and mask endurance training. She also mentioned that steroid sprays helped for short periods of time and a change in her diet also had brought improvement in symptoms. She told AC she was having weekly counselling with the RCN, but they did not offer CBT "*so if that is possible I would be happy to try anything".*

<u>The proposed Vaccine Mandate</u>

19.33 On 9 November 2021 the DHSC announced that individuals undertaking CQC regulated activities in England must be fully vaccinated against COVID-19 no later than 1 April 2022 to protect patients, regardless of their employer, including secondary and primary care (the government guidance and communications from NHSE to R in relation to this was at pages 3766 – 3849). This was referred to as 'Vaccination as a Condition of Employment' (VCOD) and the law was due to come into effect from 1 April 2022, which would have meant it would be illegal for R to employ anyone unvaccinated in a frontline role after that date. This also meant that the unvaccinated needed to have had their first dose of the vaccine by 3 February 2022, in order to have received their second dose by the 1 April 2022 deadline. NHSE encouraged one to one conversations with unvaccinated staff members to support colleagues to make an informed choice as stated in guidance published in December 2021 (pages 3769 – 3771),

"it is vital that we continue to drive up vaccination by engaging in meaningful conversations with unvaccinated staff to minimise the potential impact of VCOD".

R set up a 'Mandatory Vaccine Team' (made up of HR employees who assisted the project alongside their normal duties) which was headed by ND with the objective of ensuring that R complied with the legal requirements. This involved drafting policies and detailed communications to staff and managers about how VCOD would be delivered and responding to queries. R's decision and its messages / communications were based on national guidance (pages 3766 – 3849). Various 'round robin' communications were issued from the SathCommsteam e mail addressed operated by R's Communications team. The emails were sent Trust-wide and the 'senders'

generally would not know anything about the recipients other than their email addresses.

Telephone call with AC on 15 November 2021

19.34 AC telephoned C on 15 November 2021 and we accept that this was an 'impromptu' telephone call in that it had not been arranged in advance. C's brief diary note of this conversation was at page 4879 which records that there was a 32-minute conversation during which potential redeployment to Telford for 3 months; mask wearing and the possibility of building up tolerance to this and CBT and her vaccination status was discussed. She references the Health Secretary, Sajid Javid and notes that in order to have had 2 vaccinations by April, the first would have to take place by the end of December 2021. C further notes her reaction recording "*crying*" and "*shock*", and a further note is made as "*legality of proposal*". It also records C asked for a risk assessment and insurance cover which was refused. C contends that during this conversation she made protected disclosures and raised health and safety concerns with AC. C did not give an account of this conversation in her witness statement, simply stating that it took place. When asked of the detail of what was said that was alleged to be a qualifying disclosure C referred the Tribunal to the further particulars she provided on 30 December 2022 (page 98-121) as follows:

"1. Raised concerns about safety and efficacy of covid-19 vaccines and no long-term safety data.

2. Requiring risk assessment.

3. The growing lists of adverse reactions on the VEARS and Yellow Card Scheme.

4. Mandating vaccines is unlawful and violation of medical ethics".

19.35 AC's detailed file note made of the same conversation was at page 976-7 (which is broadly repeated in her witness statement). This note records that she was calling for a catch up. There was a discussion about C's feelings about mask wearing and noted that she was "*very anxious*" about mask wearing and could not wear it for more than 15 minutes at a time. The possibility of CBT is discussed but AC notes that C is reluctant. She then notes a discussion about C's anxiety about working clinically which records suggestions for how this could be managed if C were able to return including building up hours in a clinical setting, buddying up or shorter shifts. AC then records that she told C that she could not return to clinical work without wearing a mask and that this was an IPC requirement. It is further noted that C expressed surprise she had been supported so long and that AC said a long term solution needed to be found as she was concerned of the impact being at home was having on C and that she was not completing the 30 contracted work hours doing ad hoc tasks. AC's note also records C asking why a mask was required as she had already had Covid and was not a risk

and AC stating that this did not mean C could not catch it again or pass it to patients and staff.

19.36 AC further records a discussion about vaccines recording that C asked her if this was a requirement with AC stating she was not clear about whether this would be a requirement but would update her as soon as she knew. AC records asking C what her concerns about vaccinations were with C mentioning the potential effect on her own health. AC records C asking her whether she had been vaccinated with AC saying she had but it was a decision for C to decide what was best for her. It also records C raising potential side effects of the vaccine including paralysis, blindness and death and that she had been researching online with AC then cautioning C to be careful to check that information was scientifically sound and to discuss her situation with her own GP. AC's note made no mention of vaccine efficacy, risk assessments nor that mandating vaccines was unlawful or a breach of medical ethics.

19.37 We prefer the more detailed evidence of AC and find that AC's file note is a broadly accurate summary of the discussions and that during this conversation C raised her concerns about the effect of the vaccine on her own health and side effects of the vaccine more generally. We were not satisfied that on this occasion issues of vaccine efficacy, the legality of the vaccine mandate, the need for a risk assessment and insurance were discussed as, given the amount of detail contained in AC's note, if such matters had been raised we find they would have been noted down. These additional matters are noted separately in C's diary where she records her feelings about the call which we conclude were added following the conversation when C reflected on some of the matters discussed.

<u>OH Referral and Report 19 November 2021</u>

19.38 On 19 November 2021 an OH report was sent to AC following C's attendance at an appointment on 9 November 2021 (pages 980-3). AC had suggested the possibility of CBT when making this referral (see page 982) or "*anything else you can think of to support [C] in management of the psychological element of this issue*". AC also commented that that R needed to see "*some progress and has some realistic return to work date*" otherwise C may have to be referred back for support into permanent redeployment into an alternative role. AC expressed her doubt as to the feasibility of this as there are "*few roles at her levels which can be done at home*". The OH report then recommended CBT "*as this is likely to stop negative cycles by breaking down perceptions/barriers she has regarding wearing masks".* It went on to suggest the claimant being *"phased back to clinical duties"* when half the CBT sessions had been completed It went on to note that if C was *"unable to tolerate working on the ward despite accessing CBT sessions then you may wish to consider redeployment to an office based/administrative role until a time when mask are not mandatory in all areas"*.

<u>Telford International Nurse Education Team opportunity</u>

19.39 In November 2021, C was contacted by RA about a potential opportunity for her to work with her in the International Nurse Education Team, to shadow/observe Practice Education Facilitators (PEFs). PEFs teach international trainee nurses as part of an OSCE preparation programme. PEFs are predominantly seconded roles from substantive nursing posts that typically last 12 months or less (and the number of PEFs required to deliver training is dictated by the international business case submitted annually). Each OSCE preparation programme was approximately 12 weeks long, often with three cohorts in training at any one time. The OSCE PEFs teach for the majority of their time but also provided pastoral support in the clinical environment (going onto the wards and into clinical areas, weekly to observe and support the trainee nurses and then on an ongoing basis for up to 12 months). During 2021 and 2022, those pastoral visits were not being carried out and OSCE teaching was taking place at an external venue in Telford (as the onsite teaching facilities had been utilised as a Covid vaccination centre) where mask wearing was not in late 2021/early 2022 required.

19.40 C had encountered RA when she was carrying out interviewing duties and had found her to be supportive. RA was aware that C was unable to work in a clinical setting because she was unable to wear a mask but did not know why at this time. RA thought that she may be able to accommodate C as this was a role that did not at the time require mask wearing. On 30 November 2021, RA contacted C and asked her if she was interested. RA said that it was during this conversation that C told her that she was unvaccinated and that she could not wear a mask for respiratory reasons. C denied that she said anything to RA about vaccination during this phone call. We find that C did tell AC that she was not vaccinated because when RA was in discussions with MC about C taking up a role in Telford on the second occasion in January 2023, RA specifically mentions C having told her previously that she was unvaccinated (see paragraph 19.95 below.

19.41 At page 984 we saw a copy of an email from RA to AC and DG also copying C. This e mail asked DG to contact C to arrange a visit to see if C would like to pursue it. This e mail stated,

"I have talked to [C] today and whilst she is very keen to be involved, she is concerned about her travel to TUFC as she lives in Oswestry, I have suggested she has a trial period with us so she can ascertain whether the traveling is achievable".

RA gave unchallenged evidence that DG spoke to C and that C told DG that she did not want to travel to Telford, and she had enough work at the time interviewing. It appears from a later e mail sent by C that she did not hear from DG or RA after this e mail. It is unclear whether there was such a discussion but it is clear that RA did not directly contact C, nor did C contact RA about this possible opportunity.

<u>Telephone call with AC on 3 December 2021</u>

19.42 On 3 December 2021 AC telephoned C and we again accept that this was an impromptu call as it had not been prearranged. C's brief diary note of this conversation was shown at page 4880 which notes that vaccination was discussed with C noting her own health was discussed, as were potential side effects being reported on the Yellow Card Scheme. Her witness statement does not give an account of this conversation and again she relies on the further particulars of what this disclosure is said to amount to provided on 30 December 2022 (as referred to in paragraph 19.34 above. AC recounts detail of the same conversation in an e mail sent to C on 6 December 2021 (which is broadly repeated in her witness statement) shown at pages 986-7. C also references this e mail in her further particulars document (and no alternative account is given by C at the time when she received this e mail) so we consider that this email is an accurate account of the conversation.

19.43 During this call, C's OH review and report was discussed mentioning that C was building up time spent mask wearing but also noting that C could only manage 20-30 minutes wearing a mask at home. It went on to mention CBT and AC mentioned that during the conversation she was unclear whether OH or she needed to refer C for this. It further mentioned the opportunity that had arisen for C to work in RA's team in the new year with AC stating that this would be a "*temporary redeployment*" for 3 months with a view to returning to clinical practice in April 2022 to enable C to have "*additional time to adapt to mask wearing*". The e mail further noted, "*You will arrange working hours and days with [RA*]" and that C "*had some concerns about commuting to Telford during rush hour but hoped when you started the role you would overcome these fairly quickly*". It is clear that at this time, AC was under the impression that the Telford role would be happening and had left it to C to contact AC to arrange the detail around working arrangements.

19.44 AC and C then went on to discuss Vaccination with AC noting that this was a "*distressing and stressful conversation*" for C. AC went on to note,

"*You clarified that you had not received the vaccination as you had concerns about the amount of information available about the vaccination and whether it was clinically approved and safe. You had concerns about how it may affect you given your previous health issues."*

AC then gave C some information that she had about the vaccine and suggested C contact her GP to discuss how it might affect her. C told AC that she had been conducting research and had come across examples online of people suffering severe reactions post vaccination (such as loss of sight and paralysis) with AC stating that she had not come across anyone with such severe symptoms in her experience. The e mail further noted,

"You continued to have concerns about the safety of the vaccine and I explained that I could not give you full written assurance of the safety of the vaccine, or provide insurance for you if you were badly affected by the

vaccine. You continued to feel that you needed full assurance of the safety of the vaccine"

19.45 The discussion then moved to the Vaccine Mandate policy with AC noting,

"You queried whether this was lawful and whether it could be enforced".

AC then looked up the announcement and referred C to powers of *"the government under the 2012 Health & Social Care Act which ' required persons to ensure the provision of safe care and treatment'"* with the discussion then moving to how this policy had been implemented in care homes. AC went on to note that C*,* "*continued to doubt whether this was lawful".* AC went on to explain why she was discussing mandatory vaccination with C and that this was because the expected date of implementation was April 2022 for staff to have had both vaccinations which meant the first vaccination would need to have occurred by the end of December. AC's note then records,

"I reiterated that I was not forcing you to have the vaccination, that only you could make that decision for yourself. I explained that it was not yet clear what would happen post 1st April 2022 to any staff who had not received the vaccination and that we were currently working through this within our HR department.

C became distressed and AC apologised for this but stated that she needed to provide C with the facts as she knew them at the time. She also stated,

"If you made the decision not to have the vaccination then I would work through the outcome of that with you in the future as and when it became clearer."

19.46 On 6 December 2021 AC emailed C a summary of their conversation (from 3 December and made it clear that if she had misunderstood anything or if C needed further clarification that she should not hesitate to contact AC (pages 986 – 987). C responded by e mail on 8 December 2021 saying that she had now been asked 3 times to get vaccinated but that the Vaccine Mandate had not yet come into force, and she would not agree to anything without discussing with her union (page 990-1). AC responded the same day (page 989-90) explaining why she had sent C an e mail to summarise the conversation, stating that she as a manager had a responsibility to check in regularly with C and to discuss the plans for the RA temporary redeployment. She also added,

"As discussed with you in that conversation I am not pressuring you into having the vaccine, I thought I was very clear that only you are able to make that decision for yourself. And I completely understand that you wish to undertake more research before making any decision about the vaccine."

AC also went on to apologise if C felt that the conversation on 3 December or the e mail on 6 December was putting pressure on C to have the

vaccination as this was not her intention. She explained that the date of the end of December was mentioned as if both doses of the vaccine were to be had by 1 April, the first would need to take place by the end of December. AC said she was giving C the information about what was planned with the Vaccine Mandate further adding,

"If a decision is legislated that all front facing NHS clinical staff in England do have to be double vaccinated then I would expect that our HR department will clarify for me how we manage this within our staff groups and I will then be able to provide this information for you"

She further acknowledged that this was a difficult issue for C and suggesting just calling C every couple of weeks to check in how she was doing in terms of building up mask wearing and how the planned temporary redeployment was going, She said would not mention the Vaccine unless C did or unless further information was available. She also suggested C provide dates and times of availability so that the check in calls could be arranged in advance.

19.47 C texted AC later that evening (8 December 2021) requesting emergency annual leave because she felt stressed but did not feel she was off sick (page 995). AC responded also via text (page 1023 – 1024) saying that C could take annual leave but that if she was not fit to work, there was no issue in taking sick leave. She enquired where C was working that week asking her whether she was with RA and asked C whether anyone should let them know. AC also suggested another OH referral. C replied stating that she would contact her GP and that she was *"not able to function normally right now*" and AC responded to say C should just keep her updated once she had seen her GP and again asked C whether AC should let anyone know she was unable to work to which C responded that she had been working for HR and would get in touch direct (pages 1024-5).

19.48 As AC had not heard from C, she telephoned her on 10 December 2021 and AC's file note of that conversation was at pages 999-1000. C was tearful on the phone and mentioned various factors making her feel stressed including the Vaccine, feeling isolated and mask wearing C told AC she was upset by AC's email (dated 8 December 2021) because it referred to redeployment to the Telford role. AC reassured C she was trying to do whatever R could do to support her and find alternative temporary roles to enable her to have more time to build up mask wearing. C's concerns regarding the Vaccine were discussed with C stating she felt the choice was to have the Vaccine or be sacked. AC stated that she did not say that but also apologised if this was C's interpretation and this had caused distress. AC referred C to the staff counselling service and also asked C if she would prefer someone else to maintain contact with her which C said was not needed but asked for email or text contact. Later the same day C emailed AC stating she would prefer to receive an email in advance of any phone call (page 998).

<u>Vaccine Mandate Comms e mails</u>

19.49 On 13 December 2021, an e mail was sent from R's 'SathCommsteam', e mail address to all staff (which included C) announcing plans for the Vaccine Mandate. It reminded staff of the importance of being vaccinated and stated that frontline NHS workers were more likely to be exposed to Covid-19. It further added that research had shown the Vaccine helped to reduce the risk of getting seriously ill with Covid-19; reducing the risk of catching or spreading Covid-19 and protecting against Covid-19 variants. It gave information about how to obtain the Vaccine and also gave information on exemptions. It announced Q&A sessions and links to information on the intranet. It also included the following statement,

"Evidence-based Information

We know that some colleagues have questions about the vaccine. It's so important to get information from reliable sources.

• The NHS website contains reliable, evidence-based information about the vaccines. It provides information on known side-effects, pregnancy and breast-feeding, vaccine ingredients and information for those from BAME communities. You can access it here.

• This includes a one-minute YouTube video explaining why the vaccine is safe here.

• There are also FAQs and other resources on the intranet here."

19.50 On 17 December 2021 an e mail was sent from R's then CEO, Mr N Lee via the 'SathCommsteam', e mail address to all staff (which included C and AC). This e mail gave a general update and communicated information on the Vaccine Mandate advising that "*from 1 April 2022, all frontline healthcare workers must have had two doses of the Covid-19 vaccination*". It went on to state that a team had been set up to manage this within R and that someone would be contacting individuals who R understood had not been double vaccinated to make sure they were aware of the new legislation, explain what was needed and discuss concerns. It specifically stated,

"We know that some colleagues may choose not to be vaccinated and the team can provide you with more information about next steps."

It informed staff that there was a briefing/Q&A session arranged for 21 December by teams and the slides and the FAQs would be placed on the intranet and provided a contact e mail address for any questions to be directed to. This e mail also gave an update on IPC and stated,

"There is no change in the requirement for all colleagues to wear a surgical mask at all times and maintain two-metre distancing."

19.51 AC forwarded the relevant extract of the email she received to C later that day to forewarn her that the Mandatory Vaccine Team had now been set up within the Trust to manage this (page 1010) and that C may be contacted.

She assured C that she was not contacting her to try and cause distress but to ensure that C was aware that the VCOD team may be in touch directly. As it happened, C had been sent an e mail from VCOD team that same day (page 1011-1018). This e mail stated that C had been identified as a frontline worker and that either the records indicated that she was not double vaccinated, or they were unaware of her vaccination status. It asked for a reply to clarify what the current status was and C's intentions. It included a specific section about those who chose not to be vaccinated as follows:

"If you are not planning to be vaccinated

We encourage all staff to be vaccinated, however we respect your individual right to choose. This regulation will become law from 1st April 2022 and it will be illegal for the Trust to employ you in a frontline role after that date. We want to support staff in this situation and will attempt to adjust your role so that it's no longer frontline or redeploy you to a non-frontline role. Unfortunately, if we are unable to do this we will have to end your employment with the Trust. We are awaiting national guidance that will outline the process this will follow. In the meantime, please let us know via email if you do not intend to be vaccinated so we can make sure we provide you with updates as soon as possible. Please email us if you have any questions or concerns about this.

Some staff may be exempt (see FAQs below). If you believe you have a valid exemption please provide us with the details by return email."

19.52 In then set out lengthy FAQs and provided details of a contact e mail address, resources on the intranet and how employees could access wellbeing support locally or nationally. The FAQs dealt with possible exemptions for clinical reasons or if pregnant and also clarified that there were no exemptions for "*religious beliefs or other type of belief*". It also clarified that if someone was "*currently away from work (e.g. maternity leave, employment break, long term absence)*" *that they would* "*not be in scope unless, and until they return to having any face to face contact".* During cross examination ND confirmed that this may well have applied to C's situation given that she was not at the time working in a clinical setting due to her inability to wear a mask and that this could have been discussed with her in the event that the Vaccine Mandate was ultimately implemented.

19.53 On 20 December 2021, C e mailed the VCOD e mail address asking "*under what legislation do you require my vaccination status"* with a reply being sent to her on 5 January 2022 (which ND confirmed was a template standard response prepared by the VCOD team to respond to similar queries) clarifying that vaccination information was being requested to prepare for the Vaccine Mandate (page 1074-5). It acknowledged that staff were concerned about the request and did not want to share the information, and that R wanted to support staff. It further stated that if the information was not shared and a role was in scope of the Vaccine Mandate, steps would have to be taken to remove the individual from the role in April 2022.

19.54 Further e mails sent to all employees by the 'SathCommsteam', e mail address on the following dates in 2021 and early 2022:

19.54.1 24 December 2021 (pages 1041-7) which have a general update on matters related to Covid 19 and infection control measures but did not address the Vaccine Mandate. It encouraged staff to take up their Covid 19 booster vaccination.

19.54.2 29 December 2021 (pages 4782-3) which gave a general update on Covid 19, encouraged staff to get vaccinated or a booster and informed them of vaccination clinics taking place.

19.54.3 30 December 2021 (pages 1048-52) which did not mention the Vaccine Mandate but informed staff of a vaccination clinic taking place that evening.

19.54.4 31 December 2021 (pages 1053-57) which gave an update on infection control measures and Covid 19 treatment pathways and encouraged staff to get vaccinated.

19.54.5 19 January 2022 (pages 4859-60) which again gave a general update and then went on to set out the guidance that had been published by NHSE on the implementation of the Mandatory Vaccine. This mentioned that consultation was taking place with staff representatives and information would be provided about what job roles were in scope, how staff would be consulted with about supporting vaccination of seeking alternative non frontline employment and an agreed process for "*ending employment as a last resort*".

C's Sickness Absence

19.55 On 22 December 2021 C texted AC stating she had been signed off work by her GP for two weeks with work related stress (page 1029). AC replied by e mail asking for clarification of the dates of her sick note enquired as to whether the C was starting work in RA's team in the New Year and whether C wanted AC to get in touch with RA to let her know she was off sick so that cover could be arranged as needed. A further OH referral was also suggested (page 1030). Again at this stage, AC was under the impression that C would be going to work for RA in the new year and we accepted her evidence that she was keen for C to take up this temporary role. C responded on 23 December attaching the sick notes and stating that she had not heard from RA or DG since the earlier contact at the end of November. AC then responded stating that she will update RA that C was unfit to work until 16 January 2022 but that if anything changed and C felt better, she could get a further fit note (pages 1036 – 1038). Plans were discussed for a meeting involving C's union representative in January and C agreed to a further OH referral.

Mandatory Vaccine information for Managers

19.56 On 23 December 2021, AC was provided with a pack of documents produced by the VCOD team to start to carry out discussions with their team members who were not vaccinated (pages 1031-35). The guidance explained that trust wide communications would be sent during December and into 2022 and that managers were encouraged to discuss the messages with all staff. It suggested encouraging staff to have the vaccine but if staff did not plan on being vaccinated that managers could direct them to the VCOD team for further information. There was also a template for holding a 1:1 discussions with unvaccinated staff and the guidance gave managers the following advice as to how these should be carried out,

"Some staff may have significant phobias, fears and concerns about vaccination. Your conversations must always be kind and supportive and you should respect the views and choices of your employees.

You must not provide any clinical advice around vaccination, only signpost staff to reputable resources on the Intranet and contained within Appendix A."

On 31 December 2021,NP emailed AC forwarding instructions to have supportive conversations with all those unvaccinated (page 1058).

<u>nMABS triage role January 2022</u>

19.57 On or around 4 January 2022, LiB from the nMABS triage team contacted C directly regarding C possibly supporting with triage of the Clinical Medical Day Unit Service and at pages 1082-89 we saw copies of text messages between C and LiB making arrangements for this work. In these messages LB asked C about a possible phased return and C also acknowledged that she had said she was going to do some work for RA but had not heard from her about this. On 5 January 2022, C asked LiB to contact AC to confirm that she was happy and again mentioned that she had not heard from RA since before Christmas so did not know whether RA still wanted her. C went on to state that she would check in with RA to make sure she was not "*leaving her short"* but it does not appear that this did take place. On 4 January 2022,SK contacted AC to let her know that LiB had been in touch with C and that C had agreed to work with her from 5 January 2022. On 5 January 2022, SK forwarded a redeployment form for AC to complete in respect of this new role (page 1097).

19.58 On 7 January 2022 C emailed AC (at 5:54 pm Friday evening) to inform her that she wanted to start the nMABS team from the following Monday working from home and asked for confirmation that her contract of employment had not changed in any way. C also stated that she had attempted to contact RA but had no reply and that she had not heard from the Telford team so had *"no idea what has happened or if they are expecting me*". We accepted AC's evidence that she found this comment "*strange*" as she had told C by e mail on 23 December 2021 that AC would contact RA to inform her of C being signed off sick. AC replied to C to let her know she was

happy for C to start the nMABS role (page 190). She asked for C to let her know of such matters with more notice in future so that support could be provided. She confirmed there would be no change in contract and also stated that a redeployment form needed to be completed. She further clarified with C that as far as AC was concerned she had left it between C and RA to sort out the arrangements for the Telford role and that RA had informed AC that as she had not heard from C to make arrangements, RA had assumed that C did not want to take up the role and had made other arrangements (e mails at pages 1090 – 1091).

OH Report 6 January 2022

19.59 C was referred to OH by AC on 30 December 2021 (referral form at pages 1062-5) and informed C on 31 December 2021 a summary of the basis of this referral. On 6 January 2022 C attended an OH appointment and the report produced was at pages 1076 – 1081. It confirmed that C was absent from work suffering stress which is attributed to pressure that C felt R was placing on her to wear a mask and to have the Vaccine. It noted that C reported breathing difficulties and that mask wearing "*restricts her breathing significantly, triggering an anxiety response.* It advised R to meet with C,

"to explore the option of an alternative mask" and that *"Management may wish to seek advice from Infection Control or Health and Safety teams to discuss the different selection of masks that are available via the trust".*

The report noted that C became.

"extremely distressed during our meeting and disclosed and demonstrated symptoms which could be associated with Post Traumatic Stress Syndrome." It suggested that C would benefit from *"targeted psychological support"* although noting that GP waiting times were in excess of 18 months. The report noted that this could be facilitated through OH but would require cost authorisation by a line manager. It further stated:

"Please support with phased return to work over a two week period to allow adjustment back into working environment. This should be agreed locally in the first instance.

19.60 On 10 January 2022 AC emailed OH to enquire about the cost of psychological support sessions as recommended by OH (page 1144). AC also enquired with HR re any alternative options and was advised HJ could provide support. She received a response from OH on 19 January 2022 (page 1143) and AC reverted to OH on 20 January 2022 (at which time C had submitted her grievance) stating that she would need to get back to OH after taking HR advice as to what to do given that a grievance had been submitted (page 1143).

19.61 Between 11 – 12 January 2022 there was an email exchange between AC and LiB about the arrangements for the temporary nMABS role (pages1104

– 1106). LiB said that C had informed her she was doing a phased return but did not know what hours had been discussed. AC replied stating that from her reading of the OH report she had received that a phased return would be needed to "*support a return back into the working environment*" which she had read as being if clinical work were being returned to. She further noted that no hours had been suggested in the OH report for a phased return. She then stated,

"As she is returning to an admin role then I personally don't forsee phased return would be necessary especially as she is working from home and therefore there are no issues in terms of needing support to physically attend the workplace. Also she has only been off sick for three weeks in total and her workrelated stress was due to perceived pressure she feels for mask wearing and mandatory vaccination. Obviously if [C] felt she needed phased return even into this new role working from home then, of course, I would support that."

LiB then spoke to C and agreed her working hours would be 9-3.30pm Monday to Friday and confirmed this with AC (page 1105) and we accept that there was no phased return agreed between LiB and C or worked at this time.

19.62 On 12 January 2022 AC and C completed the temporary redeployment form over the telephone and agreed to meet on 19 January to discuss the OH report. AC e mailed C following that telephone conversation (page 1109) to summarise the discussion. It confirmed that C had been temporarily redeployed from 10 January until 30 March 2022 and her terms and conditions remained the same. Later on 12 January 2022 AC forwarded C an email from the Trust's Communications Team entitled "Covid-19 & Winter Update (which would also have been sent directly to C's e mail address). This included details of a webinar for staff about mandatory vaccination plans where staff could obtain information as well as ask questions (page 1113). In her covering forwarding mail, AC added,

"I really don't want to suggest you attend it if it will cause you further stress but may be worth thinking about so no pressure but wasn't sure whether you would have seen it via your e-mail or not hence why I'm sending it to you."

<u>Health and Wellbeing meeting 19 January 2022</u>

19.63 On 19 January 2022 a Health and Well-being meeting took place by Teams attended by AC, C and RK and the notes of that meeting as taken by AC were shown at pages 1139 – 1141. This was a difficult meeting, and AC gave evidence (which we accepted) that she started by summarising what had happened around mask wearing and C when RK interjected to say that 'forcing' C to wear a mask was breach of legislation (reading details from pieces of legislation from a screen). RK stated that C had an exemption from wearing a mask under a 'reasonable excuse clause' and that she had been discriminated against because of her inability to wear a mask. RK stated that

other trusts were allowing staff to work clinically without masks and when asked to provide details he declined to do so. He also questioned the safety and efficacy of surgical masks and the Vaccine and again read from a screen information about components of surgical masks and information about trials that indicated that surgical masks had caused harm. He then went on to ask about a personal risk assessment in relation to mask wearing. There was then a discussion about C feeling pressured into having the Vaccine and AC apologised if any of the conversations she had with C about vaccination had this effect, explaining that she was required to explain the implications of the Vaccine Mandate.

19.64 Both RK and C raised the issue of the Vaccine being a clinical trial and that C had conducted research and that she could not be forced into taking part. AC's file note also recorded the following,

"*She stated she had a human right to have her body respected. She also stated that she felt current policies needed to consider how it affected people as human beings and to respect her God given right to make her own decisions about her body",*

And AC further noted,

"*I stated that she did have the right to make any decision she wished about her body and what vaccine or not to receive".*

RK then raised that as C had already contracted Covid-19 that she had antibodies and so did not need a vaccine and felt that there should be an individual risk assessment. C then started to read from a document and said she would be submitting a grievance about the way that R had treated her which she regarded as "*constant harassment and threats*" and the impact this had on her personally. AC then apologised and felt that she was then unable to continue with the meeting as it had not covered the matters she needed to cover around health and wellbeing. We accepted the evidence of AC that she had intended to follow up and discuss in more detail the recommendations of the OH report during this meeting but had been unable to do so as C was reluctant to discuss the matter and it felt inappropriate for further discussions to take place when C had made an allegation that AC had bullied and harassed her. AC noted the following about her attempts to discuss the matters raised in the OH report,

"At several points she stated that previously she had been trying to adapt to what was required of her in terms of mask wearing but 'had come to realise the problem wasn't her the problem was other people expecting me to conform to what they want from me'. She also stated that she had no intention therefore of wearing a mask for clinical reasons, because it was distressing and uncomfortable for her, but also because she felt she should be exempt from this'. She did not therefore see the point of CBT or counselling to enable her to wear a mask as she did not feel she should have to wear a mask."

We accepted AC's evidence that she finished the meeting as she felt unable to continue and told C that if she decided to submit a grievance it would be dealt with in accordance with policy.

Stage 1 Grievance

19.65 On 19 January 2022 C emailed AC a Stage 1 Grievance form (dated 14 January 2022), shown at page 1119 and accompanying lengthy formal Grievance Letter (page 1122 – 1138) which was also copied to JE. This letter stated that C was supported by the WEU. C stated that she was submitting her grievance "*in line with The Shrewsbury and Telford Hospital NHS Trusts W4 Freedom to Speak Up: Raising Concerns Policy*" further stating that she,

"reasonably believe the trust has omitted to recognise its 'statutory duties' to 'health and safety' at work. The detriment is the fact that my health and well-being has been affected and continues to be affected due to my employer's relevant failure of s.1(1)(a) Health and Safety at work Act 1974, viz: to observe a statutory duty of care for my health, safety, and welfare at work or otherwise as negligence in respect of your fiduciary duties"

C also stated that she felt intimidated and discriminated against relating to the,

"1) The wearing of face masks 2) Working from home and 3) Recent plans to make COVID-19 vaccinations mandatory for all frontline healthcare workers from 1 April 2022."

C went on to outline the events since the introduction of the Mask Mandate in April 2022 and complained about being *"harassed"* to wear face masks, and being prevented from working in a clinical role, contending that she was *"clinically exempt"* from the requirement to wear a mask. She went on to complain about lack of training and equipment for the work she was doing from home and that her isolation had harmed her and made her a figure of hate. She went on to request "*the personal risk assessment that has been completed by the trust on implementation of masks*" going on to mention "*mounting evidence that face coverings cause harm*".

19.66 C's grievance further went on to complain of intimidation and coercion including sections said to be from section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'). She further complained that she had been subject to harassment (referring to section 26 EQA) and stated that the treatment was,

"discriminatory against my belief in natural healthcare and homeopathic medicine, this asserts that the optimum way to achieve health is to live in harmony with our environment and support our immune systems."

C gave a further account of the difficulties she had around wearing a mask, mentioning that when she had been wearing it, she was constantly pulling it

down to get relief and that her offer to wear a face shield was denied. She went on to mention her Chronis Rhinosinusitis and that despite having tried various remedies she, *"can't wear masks for longer than 30 minutes".* She went on to allege that she had PTSD symptoms also suggesting that her Chronic Rhinosinusitis was related to being required to wear a mask. There was then further discussion about what should be done as a *"facemask Risk Assessment".*

19.67 C then went on to complain about telephone calls and e mails received related to the Vaccination Mandate stating that these had advised her that she, *"may be sacked in April 2022 due to my vaccination status"* and referring to her *"human right to have bodily autonomy respected".* She went on to mention the e mail from AC on 6 December 2021 where AC acknowledged her concerns about vaccine safety but that she could not assure safety or provide insurance before having the Vaccine. C went on to state that *"evidence strongly suggests that natural immunity is superior to any of the vaccinations* and that *"vaccinating someone with natural immunity can cause harm.* She further raised the *"risk to my health due to my medical history of autoimmune disease, the lack of long term safety data and growing yellow card scheme list of vaccine injuries".* She cited various further pieces of legislation which she said that R was in breach of and mentioned her own personal research suggesting that the Vaccine was.

"neither safe nor effective and that 'safe and effective therapeutics have been suppressed from the public' . SARS/Cov2 vaccine trial is ongoing. Animal tests were skipped and the study unblinded"

She further went on to mention that there was a legal statutory duty to be given a risk assessment by R before vaccination and that she felt consent to the Vaccine was not free and informed if it was a condition of continued employment to have it. Her letter finished with a series of questions about insurance, the legislation under which the Mandatory Vaccine policy was being implemented under and what actions had been taken to address her concerns and prevent her from experiencing stress and anxiety. She ended by stating that she would take legal advice if the *"no jab, no job*" policy was implemented and that this could amount to constructive dismissal, and she was accepting pay under protest. C attached to her grievance two letters from Dr Harris, her ENT consultant dated 30 April and 3 September 2021 (pages 1237-9). These letters confirmed that C's nose was extremely rhinitic and that "*Air flow through both nostrils is possible but is poor*". Dr Harris noted that C reported difficulties with mask wearing and recommended some treatments including a steroid spray and nasal rinse. He also confirmed that it was likely that rhinosinusitis was causing nasal obstruction symptoms.

19.68 AC forwarded this grievance to HR and on 25 January 2022, JE sent an e mail to C acknowledging her grievance. She explained that stage 1 of R's grievance procedure was the informal stage and would normally involve a meeting with a line manager. JE enquired of C whether she would be comfortable if JE contacted AC to arrange.

Further grievance letter to JE 25 January 2022 – Alleged HS4

19.69 On 25 January 2022 C sent a letter by e mail to JE (pages 1151 – 1153). This sought the assistance of JE in resolving C's grievance and says that its purpose is to add further evidence of unwanted behaviour from AC that,

"*intimidates, threatens, victimises and is offensive to me personally as an individual. - This repeated behaviour has had a direct impact on my mental health."*

She asked to be managed by another member of staff contending that AC had not demonstrated care or compassion to her medical reasons for not wearing a mask. It went on to make several allegation relating to AC including issues around revalidation, the Telford opportunity (suggesting that it was AC who had spoken to RA and then the role had been removed); that AC had refused a phased return to work; that AC had failed to implement OH recommendations; that there would be a risk of employment being terminated at the end of the current placement; that AC had "*gaslighted*" her in relation to phased return, CBT therapy, psychological support and the Telford opportunity. In this letter she stated that AC's actions had a detrimental effect on her mental health and wellbeing. We accepted AC's evidence that once C had submitted this grievance complaining about AC, that AC felt she was unable to contact C to discuss anything further as she did not want to "*worsen an already difficult situation or increase her distress*".

19.70 On 26 January 2022, C was sent a letter by post from R's VCOD Team (pages 4954-5). This set out details of the Vaccine Mandate and indicates that C's role had been identified as being in scope and asked her to confirm her vaccination status. It further stated,

"We encourage all staff to be vaccinated, however we respect your individual right to choose. This regulation will become law from 1 st April 2022 and it will be illegal for the Trust to employ you in a frontline role after thatdate. Please be reassured that we are very much committed to supporting you during this time. However, I must advise you that although dismissal is very much a last resort, this may be a possible outcome if we are unable to identify or reach agreement on adjustment or redeployment."

The letter went on to again set out information on medical exemptions and also contained the following statement,

"Short Term Exemptions

Some staff may be exempt for a limited time. This includes staff who are pregnant, on maternity leave or on employment breaks. Further information on temporary exemptions is available in the Mandatory COVID-19 Vaccination Policy, on the HR policies Intranet page here. If you have a short term exemption please tell us by emailing sath.vcod@nhs.net"

We accepted the evidence of ND that this may well have been an exemption that C could have taken advantage of, given that at that particular time she was not carrying out a frontline role at all. Although she was still recorded on R's systems as being a ward sister in ward 23, she had not in fact been in a clinical setting for some time which may have meant that she could have availed herself of this exemption had R's VCOD team known about it. C did not communicate the fact that she was not at that time a frontline worker to R's VCOD team.

19.71 On 27 January 2022 the Health Protection (Coronavirus, Wearing of Face Covering in Relevant Place) (England) Regulations 2020 ("2020 Regulations") were revoked.

Stage 1 Grievance Meeting 7 February 2022

19.72 On 7 February 2022 C attended a Stage 1 Grievance meeting (accompanied by RK) conducted by DH with HR support provided by MM)). A full transcript of that meeting (which was recorded) was contained at pages 1171 – 1205. Many matters were raised and discussed but for the purposes of this claim, there is one particular issue that we need to address and that is the allegation made as part of the health and safety detriment claim that DH and MM during this meeting described C's surgery as 'cosmetic'. The relevant discussion is recorded in the transcript at pages 1189-90. It was part of a discussion about when C's difficulty with mask wearing arose and MM asked her to elaborate on the circumstances leading to her nose surgery in November 2019. C explained, *"I had lumps all over my nose... I went privately to get them removed, but [the surgeon] ended up breaking my nose as well, which I wasn't expecting*." MM then asked the question,

"So it's not a cosmetic surgery you had on your nose",

and explained that his question was aimed at determining whether the surgery was medically necessary or elective, stating,

"If the surgery was planned surgery (medically required), it affects how a manager supports a staff member whose going for an operation."

C then responded by saying,

"Right, does it, well I don't know maybe I'm just like some lunatic who had cosmetic surgery."

There was then a side discussion about whether it had been necessary for C to have taken annual leave for this particular surgery.

19.73 During her evidence C denied that she had ever stated to anyone that the surgery was cosmetic and that labelling it in this manner upset her. R was able to produce the recording during the course of the hearing which C listened to and confirmed that she did in fact make the comment recorded in the transcript.

19.74 On 10 March 2022 a Stage 1 Grievance outcome meeting was held and the transcript of the recording of this meeting was contained at pages 1280-4). At that meeting DH broadly read out the contents of the grievance outcome letter contained at pages 1285-7) confirming that C's grievance had not been upheld. When addressing the first concern raised by C, DH stated the following,

"Concern 1, wearing a facemask, the fact find has highlighted that HG, that's yourself [C], raised concerns with her line manager around discomfort when wearing a facemask following cosmetic surgery to her nose."

She then went on to give the outcome on this and the other concerns raised. DH made a number of recommendations as part of her decision not to uphold C's grievance which were that a facilitated discussion be held to rebuild professional relationships; that a renewed risk assessment be undertaken and that a stress risk assessment also be undertaken. She stated that MC would appoint "*a senior staff to undertake this duty*".

19.75 On 15 March 2022 Covid-19 vaccination as a Condition of Deployment (VCOD) was formally revoked (see pages 1285 – 1287).

19.76 During a catch up conversation between PW and C on 18 March 2022 (see notes at page 1306-7), when PW raised the issue of how she was getting on with building up to mask wearing, C became instantly upset and alleged that PW was harassing her and causing her to have a panic attack. C stated to PW, "*I will not be bullied or forced to wear a mask*" and said that she would contact MC and HR to discuss the matter.

<u>Stage 2 Grievance/appeal</u>

19.77 On 18 March 2022 C submitted a Stage 2 grievance/appeal letter against the Stage 1 Grievance Outcome (shown at pages 297– 1303). This was again a lengthy document in which C outlined the full background chronology and why she disagreed with the outcomes of her stage 1 grievance. In her letter she stated R was in breach of the 'Health and Safety Act 1974' and the EQA in relation to alleged failure to comply with OH recommendations. She complained again about a lack of risk assessment and equipment to work at home. She further stated,

"Refusal to honor my mask exemption is a breach of section 6",

and complained about harassment relating to mask fitting, training the suggestion of CBT therapy and the fact that her nose surgery was labelled cosmetic, stating that she never said this was the case and she felt the comment was "*judgmental and hurtful"*.

19.78 C then cited various pieces of legislation including EQA which meant that she had an exemption from wearing a mask and was not legally obliged to. She further made reference to the revocation of the Face Covering Regulations on 27 January 2022 and stated that there was "*no longer a legal*

basis to justify an employer imposing blanket mandates for employees to wear face coverings in the working environment". She went on to mention various pieces of health and safety legislation including the Personal Protective Equipment At Work Regulations 1992, the Control of Substances Hazardous to Health Regulations 2002 (COSHH) Management of Health and Safety at Work Regulations 1999 stating that a risk assessment was required and that, "*the onus is on the employer to provide the evidence that the benefits of wearing a face covering, outweigh the risks imposed by wearing it, and that on balance it is in the employee's best interests to wear the appropriate PPE being provided".* She went on to state that surgical masks were not RPE and did not mitigate against exposure to aerosol viruses. She further stated that a failure to recognise an employee's self-exemption to wearing a mask was a breach of section 6 EQA.

19.79 C then stated employers were wrongly assuming surgical masks were an effective way of controlling transmission of airborne respiratory viruses stating that there was no clinical evidence for this and further that,

"the full time wearing of masks by personnel carry far more harms and infection risks, than by not wearing them at all. There is a risk of fibrosis of the lung due to inhalation of fibers from the textile of which the mask is manufactured."

19.80 The letter went on to address the Vaccine Mandate and acknowledged that it was no longer a condition of employment (as the Vaccine Mandate was no longer applicable) going on to state that the "*damage is done*". She set out that there had been a disproportionate level of coercion from AC describing it as an "*assault*". She went on to refer to R's "*pressure and threats to take part in a clinical trial of a novel experimental gene therapy that has no long term safety data, and that has been proven not to prevent infection or transmission*" and that R "*supported and facilitated the administration of experimental technologies that cause psychological and physiological harm*" describing these as a "*war crime*". C then listed a large number of treaties and pieces of legislation including the "*Rome Statute of the International Criminal Court*", the Offences against the Person Act 1861 (mentioning the administering of poison); the Human Rights Act 1998; the Environmental Protection Act 1990; the Infant life (Preservation) Act 1929; the Health and Social Care Act 2012; and the Disability Discrimination Act 1995. She concluded by stating that her letter was not a letter before action but was a "*notice to you that your policy may leave you and your company open to legal claims or challenges by members of staff*." It concluded that the resolutions proposed by the WEU representative on 11 February 2022 were still sought.

<u>Stress Risk Assessment 2022 and referral for psychological counselling</u>

19.81 On 22 March 2022, SY e mailed C and stated that MC had asked her to support C in the completion of a stress risk assessment and that she was very happy to do this (pages 1320-1). She attached a copy of the risk

assessment management policy to her e mail and directed C to the section of this document that needed to be completed. She asked C for her availability that week which C then provided. C gave evidence that she and SY "*later completed this together via Teams*" and that SY was friendly and gave her *"personal advice on how to manage stress like wild swimming*". On 25 March 2022, SK from HR e mailed HJ to see if she could meet with C for a consultation (page 1898). HJ responded that she would be happy to if C agreed and asked for contact details to get in touch. This took place and HJ met with C on two occasions in March and April 2022. C met with HJ on two further occasions at her request in June and July 2022, but HJ reported that she felt that the sessions had not gone well, and that C had not felt helped by her, so no further meetings took place (see e mail at page 1896)

19.82 On 13 April 2022 C attended a Stage 2 Grievance Appeal meeting (again accompanied by RK) conducted by MT with HR support provided by EC. The transcribed notes of that meeting were contained at pages 1445 – 1483. C agreed during cross examination that it was during this meeting that the first mention of her objections to masks being based on a belief structure was made and that it was after discussions with the WEU that she came to the understanding that what she believed in could qualify as a 'philosophical belief'. On 28 April 2022a reconvened Stage 2 Grievance Appeal meeting was held (notes at pages 1553 – 1576 and on 5 May 2022 the Stage 2 Grievance Outcome meeting (via Teams) was held (notes at pages 1772 – 1780. On 2 May 2022, the Stage 2 Grievance Outcome letter was sent to C (pages 1850 – 1858).

C's work from May 2022 onwards

19.83 C's temporary role in the nMABS team ended on 21 March 2022 and from May 2022 C commenced an Absence Line Call Handler Role and also continued undertaking interviews via Teams which were roles that did not require mask wearing (see e mails at pages 1400-1).

Changes to the Mask Mandate

19.84 On 10 June 2022 R made the decision that mask wearing was no longer required in non-clinical areas (but continued to be required in clinical areas) (see e mails confirming this decision at pages 1865 – 1871).This was announced to staff in an email of the same date from R's Director of Nursing (page 4349-50).

Discussion with PW and C raising pay issue.

19.85 During a fortnightly catch up conversation between C and PW on 20 June 2022, when the hours that C had worked the previous week were discussed (see note of the discussion by PW at page 1882-3 and note of discussion as reported by AC to ND at page 1879). C became upset when it was suggested that she take annual leave for 2 days on which no work had been carried out. PW suggested that C may be able to come to work on site as

mask wearing in non-clinical areas had been removed and C raised the issue that she would be unable to afford to travel 3 or 4 days a week as she felt financially disadvantaged and had not received all sums that had been due to her, including Covid payments. C said that she felt bullied and ended the call before stating that all future contact had to be via her union rep. C e mailed CY following this call complaining about what had taken place (see page 1873-4). She said she was feeling distressed and shaking after the call and complained about not receiving enhancements for working unsocial hours stating,

"As you know I cannot work unsocial hours so cannot calculate enhancements - these payments should be calculated from before I was sent home over the 12 months previous duty."

She further made a complaint about the calculation of her annual leave stating,

"Annual leave has always been calculated 7.5 hours per day, so why have I had days calculated 11.5 hours".

During cross examination C was clearly asked whether what she was alleging was that PW was motivated by her blowing the whistle and therefore ensured that she was not paid properly. C's response was that she felt she *"was being treated unfavourably because of disability"* and again stated she *"felt victimised"* because of disability. She further added that she did not in fact feel victimised by PW but that it was coming through *"other people"* or *"from higher up".* She was asked by the Tribunal whether she wished to withdraw the whistleblowing complaint, given this evidence but did not do so.

19.86 C's e mail was forwarded to MC who responded on 21 June 2022 stating that she would be contacting C shortly to agree a plan moving forward (page 1872). On 30 June 2022, AC flagged a concern to MC and HR (page 1894) that she had been unable to account for what work had been done by C to fulfil her 30 contracted hours per week to complete the roster. She noted that C's time spent working on the absence line had been added to the roster but that there appeared to be a shortfall of hours for the previous 4 weeks. AC mentioned that C had been doing some interviewing but as C was refusing to speak to PW anymore, he did not know what to add in respect of that to the roster.

<u>Discussions C and MC re next role</u>

19.87 On 26 July 2022 C (and RK) attended meeting with MC and MM to discuss a proposed return to office-based role to support with Datix work. MM's e mail to ND summarising what was discussed at the meeting was at page 1895. MM's note further records that C raised issues with her pay and annual leave which MM noted she would be looking into recorded as an action "*MM to look into pay issues and Annual leave".* We accepted MC's evidence that RK was confrontational during this meeting. C agreed that she

would take up this role but expressed anxiety about returning to the office environment and it was agreed that MC would contact the relevant line manager, a return-to-work plan would be put in place and an OH referral carried out. On 8 August 2022 did this and a meeting was arranged for 16 August. MC also confirmed she had sent OH referral (completed by SY). C did not attend the meeting arranged for 16 August 2022 and later apologised stating she forgot as was cleaning and sorting home to sell (page 1903). The meeting was rearranged to 19 August 2022 when C's proposed phased return-to-work was discussed and agreed to meet again on 31 August 2022. On 30 August 2022 C emailed MC self-certifying sickness absence stating she could not concentrate and was feeling anxious and asked if R would fund a Spectrum Course for counselling to which MC agreed (pages 1928 – 1929 and 1934 – 1935).

<u>Pay and annual leave issues.</u>

19.88 On 20 September 2022, MC sent an e mail to C (1955-6) attaching a schedule of payroll and it the covering e mail stated, "*The feedback is that you have been paid correctly*". The issue of C's annual leave was then looked at again in January 2023 when AC e mailed MC with her calculations on C's annual leave (page 2058). AC looked at this issue again following a query from HR and noted that one day of annual leave, for 2 May 2022, had been recorded for 11.5 hours. Ordinarily, had C been working clinically, she would have worked a long day and therefore one day's leave would equate to 11.5 hours. However, given she was not working clinically, a day's annual leave would equate to 7.5 hours therefore AC corrected this and inserted the figure of 7.5 hours into the table (see page 2074 and 2094)

19.89 The OH referral sent by SY was delayed due to administrative difficulties and had to be resent on 30 August 2022 and again on 20 September (page 1902 – 1903). The OH referral sent on 30 August 2022 contained the following statements (page 1940-41)

"There are no risks associated with returning to work for the organization except Helens ability to wear face masks / vaccination status." and,

"Member of staff currently unable to undertake a clinical role as she states she is unable to wear a face mask and has declined to accept the COVID vaccine. Her normal place of work is an oncology / haematology ward and therefore this poses a risk to patients on this area without the required PPE as per policy. This has been an ongoing issue since April 2020 however she has now been found a placement within the Governance team for surgery where she can be office based and masks are not required. A phased return of work is currently being planned and this should then integrate her within a team on site at Shrewsbury"

19.90 On 21 October 2022 C attended her OH appointment and there was a further delay in MC receiving the OH report (because SY had ticked the 'confidentiality box' which meant only she could review it) and it was only on

23 November 2022 that MC received a copy of the OH report (pages 2005 – 2012). On 29 November 2022 an informal long term sickness review meeting was held by MC supported by JR from HR (minutes 2030 – 2035 and 2055 – 2057). At this time C said she was not fit to return to work in any capacity and that she was struggling with anxiety about returning to work generally. C also stated that she did not find the counselling that had been arranged with HJ helpful and it had made her worse, nor did she find the Spectrum Course helpful. A further meeting was held on 14 December 2023 (notes at pages 2049-54). C became upset and was unable to discuss the OH report during the meeting and it was agreed that MC would contact RA to find out whether there was a possible opportunity for her in her team. During this meeting MC informed C that her sick pay was due to reduce from full pay to half pay in February 2023 in accordance with her contract of employment which provided for six months full sick pay reducing to six months half pay. C then e mailed on 22 December 2023 asking for "*the structure and plans*" for her return to work further noting that uncertainty was making her anxious and stating,

"I don't have any choice but to return. I can't exist on half pay."

MA suggested that the return-to-work plan would be discussed at the next meeting (scheduled for 4 January 2023). That meeting did not in fact take place as there was a mix up with dates.

Removal from Ward 23 Facebook group

19.91 It is not disputed that at some point C was removed from the Ward 23 Facebook group. This was used to communicate anything relevant to the ward, i.e. changes in policy, declaration of an outbreak of any infection, feedback from Infection Control reviews, staff leaving information and requests for contributions to collections, staff welcomes. C does not know when this occurred, and R's witnesses also do not know when this happened, but we accepted AC's evidence that PW told her he had taken C off the circulation list for the Facebook page. We also accepted her unchallenged evidence that it was "*standard practice*" for individuals who have not worked on the ward for some time, for whatever reason, to be removed and then re-added to the Group if and when they return to the ward. AC told us that PW and another employee were both removed from the group during secondments and would be re-added upon their return to the ward.

Informal sickness review meeting on 16 January 2023

19.92 On 16 January 2023 an informal Sickness Review meeting took place attended by C (accompanied by her union representative JB), MC and JR. The notes of that meeting were at pages 2108 – 2113. C was informed that there had been a change in mask wearing guidance again and that now all staff were required to wear surgical masks in non-clinical areas given the increase in Covid-19, flu and other respiratory infections (see page 2081 -

2082 - email from the Sath Comms Team entitled “Updated guidelines around PPE, hygiene and other IPC measures”). C went on to ask if mask wearing was mandatory and stated that surgical masks were not PPE. She further asked how patients were being tested for Flu and Covid 19 and that she was struggling to understand why staff were still having to wear masks. MC stated that R was following NHS guidance and IPC were developing policies based on this. A return-to-work plan with phased working was also agreed and recorded. Following this meeting C was sent a letter on 24 January 2023 summarising what was discussed (page 2146-8). This letter referred to the Telford position as a “*temporary redeployment post*” and also referred to the working hours “*for the next 5 weeks*”.

Telford PEF opportunity

19.93 On 11 October 2022, C had e mailed MC about a role she had seen advertised for a PEF and noted that this was a role that had been discussed with her previously. She asked MC whether she might be considered for deployment stating that she “*desperately*” wanted to be a clinical nurse again. MC responded on 14 October 2022 stating that this was a Band 3 post and also required work in clinical areas. She stated that this would be considered after the OH review (e mails at pages 1963-1966). On 4 January 2023 MC emailed RA to request a chat about whether there might be a possible return-to-work opportunity in her team for C (page 2059). On 17 January 2023 RA confirmed with MC that her team could support C with a phased return for five weeks without the need for C to wear a mask. On 19 January 2023 MC emailed RA (copying C) setting out details of C’s return-to-work plan. In this e mail she stated,

“*Firstly thank you for agreeing to support [C] to begin to Return to Work within the education team. I feel this is a really positive way to support [C] to return to her nursing role in the future”*

MC also emailed C on 19 January 2023 (page 2108) with some meeting notes and in this e mail stated,

“I have now discussed a temporary placement with [RA]’s team which I can discuss with you over a team's meeting tomorrow when completing your RTW documents”.

OH referral 19 January 2023

19.94 On 19 January 2023, MC completed a referral to OH which included the following information,

“*Member of staff currently unable to undertake a clinical role as she states she is unable to wear a face mask and has declined to accept the COVID vaccine. Her normal place of work is an oncology / haematology ward and therefore this poses a risk to patients on this area without the required PPE as per policy. This has been an ongoing Issue since April 2020.”*

It went on to state that C had "*now been found a placement within the Education team temporarily where she can be teaching room based and face masks are not required. A phased return to work is currently being planned and this should then integrate her within a team off site at Telford College".*

On 27 January 2023 C attended the appointment and MC was notified by OH that C had chosen to withdraw her consent to provide the OH report completed to R (page 2149).

E mails re C's vaccination status 20 January 2023

19.95 On 20 January 2023 RA emailed MC (page 19.85) confirming that she would speak to C to organise her days for the following week. She then asked,

"Can I please ask whether you are aware if [C] has received her Covid Vaccinations? I think I have had a conversation with C previously where she identified she was unvaccinated."

She went on to state that if she was correct that C would not be able to spend time with another member of RA's team (who was clinically extremely vulnerable). MC replied on the same date to confirm she was not (page 2127), stating,

"[C] has refused to have her vaccinations unfortunately and wont wear a mask – it's a really frustrating situation and one which we have to deal with as we cannot continue with her being at home (1 of only 2 cases in the Trust)."

MC went on to say she as sorry about the situation with that other team member and that she did not realise this was her situation.

19.96 Also on 20 January 2023, RA spoke to C re the proposed phased return to Education Team and emailed MC a summary of the call (page 2151). RA reported that C was concerned about driving to Telford but had agreed to do 2 days in the classroom with a review after the second day. C also told RA that she could not start until after she had her return-to-work meeting.

Employee wellness and attendance meeting 6 February 2023

19.97 On 6 February 2023 an informal return to work meeting attended by MC, JR, C and JB took place (typed minutes – p. 2190 – 2194 and RTW document – p.2185 – 2189). During this meeting the requirement to wear masks was discussed with MC confirming that nothing had changed regarding the wearing of masks in clinical areas and although the requirement to wear masks in non-clinical areas had been removed, it had been reintroduced due to heightened infections. C raised a number of issues about this, stating,

"Wrexham Trust don't wear masks and it's not used nationally as it's not evidence based and believes the Trust are gas lighting and being coercive."

"[C] states that she's being treated unfairly because she can't wear a mask and the Trust are coercing people to wear them and that mask wearing has caused her mental health issues."

C went on to complain that she had not had a risk assessment and following a previous mask fit test had become traumatised and resulted in a panic attack. During this meeting C apologised for losing her composure in the previous meeting. A return-to-work plan starting on 13 February 2023 with phased working hours for the first 4 weeks and then 30 hours in week 5 was agreed and recorded. This also recorded an action that a stress risk assessment should be completed at the commencement of the temporary placement and we accepted the evidence of MA that she had intended that RA would do this the week commencing 13 February but acknowledged that this was not done at the time (as RA completed the return to work risk assessment but not a specific stress risk assessment) and that it was an oversight. C did not raise this as an issue at the time.

19.98 RA carried out a return-to-work meeting with C on 13 February 2023 and emailed MC a summary of the meeting (page 2208). On 15 February 2023 C commenced a phased return-to-work in RA's team. On 17 February 2023 RA e mailed MC and KM to confirm that C had completed her first week and that C was "*very positive*" (page 2218).

<u>Risk assessment February 2023</u>

19.99 On 23 February 2023 RA completed a Return-to-Work risk assessment form with C which was sent to C on the same date (pages 2225-27). This document including the following statement,

"[C] is unable to wear a surgical mask which means she is unable to return to her role, at present, on Ward 23H at RSH." It further included the following wording,

"Health and safety concerns

Indicate what the risks are, and who is at risk.

Helen has been shielding for 2 years and is unvaccinated. This means she is potentially at risk from the infections other people may pass onto her within the teaching environment.
Helen is potentially at risk of not being able to continue in a teaching environment if masks are reintroduced as mandatory within this setting."

The document described C's completion of the phased return as a *"temporary measure".* It went on to raise concerns about travel and whether expenses would be sanctioned with RA noting that these could not be sanctioned as C was not a member of RA's team. It concluded by stating,

"• [C] will continue as part of the post reg non-medical education team for the duration of her 5-week phased return.
• I have requested a meeting with [MC] and [KM] for a meeting w/b 13th March to review the phased return and discuss next steps."

19.100 C responded to the e mail with the risk assessment on 24 February 2023 (page 22231) and asked RA where she got the information about C's vaccination status from as this had not been discussed in the meeting. RA responded by saying,

"I asked for the information from [MC] so I could ensure you were protected in the work environment. I apologise, I meant to speak to you about it when I did your risk assessment and completely forgot.

<u>MC appoints KM to act as health and wellbeing mentor.</u>

19.101 During her discussion with C on 17 February, RA also informed C that KM would be acting as a 'health and wellbeing mentor'. MC had decided to appoint KM to carry out this role as a support measure to C and to provide pastoral and holistic support, particularly during the five-week phased return to work as before that C had been off sick and//or away from the workplace for a significant period. KM met with C on Teams on 24 February and during this conversation, C said she had been enjoying the past few weeks but had been upset as her vaccination status had been shared in a risk assessment completed by RA and that this had been a breach of confidentiality. KM raised this with MC who explained that this had been shared as RA was managing a very clinically extremely vulnerable member of staff with a high risk of severe illness if they caught Covid 19 and that that employee's OH report had advised that all risks of this be minimised. Therefore, the vaccination status of those people this employee might come across was needed so that RA could consider how best to support this employee safely, as well as C.

19.102 KM, MC and RA also kept in touch during C's period of working. At page 2230 there was an e mail from RA updating both about progress as of 23 February 2023 stating that all was good. She also added,

"*I am conscious next week is week three and theoretically [C] is only with me for 5 weeks .I feel we need to have a discussion in week 5 of her phased return so we can plan what happens next. I think [C] is under the firm impression she is with me for the foreseeable future which may not be an issue as I have vacancies coming up, however I would not want to just give her a role without some sort of values- based conversation and discussion with you about probation etc."*

At pages 2238-9 there was an exchange of e mails about C's working hours during which RA stated the following,

"I am concerned that she is now introducing herself as a PEF and is under the impression she will be staying with me post the 5 weeks phased return. I

still do not know what my vacancies will look like as a result of the new business case so do not know if I can accommodate her. I have not promised her a role."

19.103 Between 15 February 2023 and 21 March 2023 whilst C was working in her team, RA prepared a log of her meetings with C and updated MC and KM by email throughout the phased return (see pages 2248 – 2251). On 15 February 2023, RA recorded that C was "*happy and settled*"; on 17 February that C was positive and upbeat and that the PEF she had spent the morning with made her feel at ease and welcomed. It recorded that C did not attend as planned 1 day as she was unwell and then again recorded on 23 February 2023 that she was happy and settled and "*feels her anxiety and nerves are improving within the education role*". On 10 March 2023 she recorded that C was enjoying the ward transition programme but was finding observing "*awkward*". RA further recorded that C was not involved in teaching at present as needed to observe all the skills required. It also recorded that, "*the team continue to be supportive*". .RA also recorded the following in the log the same day,

"I have reviewed her performance with the Team who have been accommodating [C] in teaching. The feedback has been she is introducing herself as a PEF, with the assumption she is now a permanent part of the team. They also feel she isolates herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions.

I have not organised any further off duty with [C] past 17th March as this will be the end of her phased return, however I will set up a final meeting with her dependent on the results of the meeting on Wednesday."

We accepted the evidence of RA that she simply recorded the feedback she had received from her team as it had been communicated to her and this would have been feedback she could have given to C in a discussion about the role and how it had gone if this had taken place.

<u>Meetings on 21 March 2023</u>

19.104 On 21 March 2023 RA had Teams meeting with C and RA's note of the meeting was recorded in the log she kept at page 2251. We accepted RA's evidence that the meeting started positively, and that C said she was grateful for the team's support. The possibility of a vacancy arising was discussed and again we accepted that the funding for this was still uncertain and at this time RA explained to C that the PEF role had a pastoral element to it which would require working in a clinical environment (where there was a requirement to wear a mask). We find that RA did at this time ask C whether she was able to wear a mask for short periods of time. At this time C became very upset and accused RA of humiliating and harassing her and then ended the call abruptly. RA relayed this to MC via telephone.

19.105 Later that day C (accompanied by JB) attended a scheduled teams call with MC and JR. In advance of that meeting JR contacted R's IPC and health and safety team by e mail to enquire whether there were any changes imminent regarding mask wearing. This was to inform the discussion later as to what roles C might be able to take up next. MC also queried that she had heard other NHS trusts had removed mask wearing and asked whether this was correct. KT responded that there would be a variation between different trusts but that the current guidance and risk assessment carried out by R (which was updated on 10 February 2023) still required mask wearing (pages 2319-21). The final version of the minutes of this meeting was shown at pages 2332-2337. JB asked MC whether C would be continuing in the temporary position and MC stated that it was only ever intended to support a phased return to work but that there may be an opportunity for C to apply for a permanent role in the future. It was explained that in the meantime a solution would need to be found as mask wearing was still a requirement in clinical roles. C then expressed her shock that the PEF position was temporary as she thought she could stay longer than 5 weeks and that it was a "*bombshell*" to find out that the PEF role required some elements of mask wearing as she did not understand this and that it was unreasonable to tell her she could not do the role. The notes then record the following,

"MC reiterates again that there are no options in a clinical role as it requires her to wear a mask and HG chooses to not to wear one. HG states 'it's not a choose, she can't wear one as she can't breathe whilst wearing one".

C then stated that she wanted to speak to R's CEO to discuss her continued concerns and was informed that she could e mail direct to raise these. There was a brief discussion about what would happen next week with the possibility of staying on with the PEF team mentioned. Starting the permanent redeployment process was also discussed with C saying she would consider it but would not agree to this there and then.

19.106 On 22 March 2023 C commenced sick leave and e mailed KM (page 2322) stating that she was distressed, feeling low and unable to function and further added,

"I don't wish to speak with [MC] again please, I have lost trust and confidence."

C asked to speak with KM who replied stating she would be in touch on her return from annual leave and signposted her to employee support services. KM e mailed C on her return on 27 March 2023 suggesting a catch up, but C stated she did not feel like talking (page 2339).

<u>Grievance 2</u>

19.107 On 27 March 2023 C emailed KM attaching a grievance to KM (shown at pages 2340 – 2353). This was a lengthy document which again stated that it was being submitted under R's Freedom to Speak Up: Raising

Concerns (Whistleblowing) policy and that C stated that it "*qualifies as a protected disclosure for the purposes of section 43B ERA".* It stated that the grounds for her grievance were that she had expressed legitimate health and safety concerns that through,

"research it has become known to me that mandatory masks and mRNA Covid-19 vaccines are not safe or effective and that informed consent has not been upheld in accordance with legislation and ethics. Please refer to previous letters dated 19.01.21, 25.01.21, 18.03.21."

19.108 She went on to complain that because of raising such concerns she had been victimised and discriminated against which had caused her to become ill. She then went on to give accounts of employee wellbeing meetings held on 14 December 2022, 16 January 2023, 6 February 2023, 21 March 2023 and complained about what was discussed in such meetings. When setting out her accounts of the meeting, she made a number of comments about the wearing of masks and the Vaccine, as follows:

"I was asking why masks are compulsory because there is no evidence to support surgical masks significantly reduce transmission and infection of respiratory viruses. Masks are not a benign intervention."

"Asymptomatic PCR testing will show false positives exaggerating covid infections and outbreaks".

"I explained surgical masks are not PPE, and if you're mandating surgical masks as PPE then the trust has a duty of care to abide by Health and Safety legislation, risk assessments including exposure limits for C02 (COSHH)."

"The stress and anxiety of knowing the NHS and SATH is complicit in promoting and facilitating coercive coronavirus policies that are not safe or effective. To be specific mRNA vaccines and mandatory face masks without informed consent and individual risk assessments which is in breach of legislation and ethics."

"I have observed the coercive videos, emails and notices from SATH promoting safety and efficacy of mRNA vaccines including the recommendations of covid vaccination to pregnant women.

ONS data- mRNA vaccines have negative efficacy.

Cochrane Review on face masks - they don't work."

19.109 The grievance letter concluded by C listing a number of statutory provisions that she said applied and then asking for explanations of a number of matters including why her vaccination status was disclosed and why she received no feedback from RA. She also added a statement that a CEO of a hospital in Wrexham had stated that surgical masks were ineffective and that other English hospitals were allowing mask exemptions.

Request for extension of sick pay

19.110 KM acknowledged receipt of this grievance and forwarded this to HR to consider, also letting C know this had been done (page 2354). She asked if there was anything she could assist C with, and C e mailed complaining that she had been under financial detriment for some time including enhancements not being paid and there was now the "*threat of being down to half pay*". KM escalated this to LC and an application for extension of sick pay under section 9 of R's Attendance Policy was made on 30 March 2023. This would normally have been considered by a panel of senior managers including MC, LC and SMcK. MC decided not to take part in the decision making process, given the grievance that had at this time been raised, although we note she did express her view that she would not support an extension of sick pay as there was not a return to work date in place (see page 2364). LC accorded with this view and stated that, "*without a return to work in place, I don't think we can support an extension*" (page 2364).

Letter to LB

19.111 On 28 March 2023 C emailed LB stating she had been subject to victimisation and discrimination and requested a meeting to discuss further (page 4868 – 4869). This was a brief e mail making allegations that she had been subject to victimisation and discrimination because of her "*stance on face coverings*". She contended that this had led to her health having suffered. She further stated,

"I am aware that there are the "proper channels" that I should follow but my concern is that unless someone informs you directly what is happening, you will never know until an individual decides to become a whistle-blower."

19.112 During C's sick leave, she corresponded with KM, sending sick notes to her and raising various queries with KM providing updates as to her ongoing grievance (which had been delayed due to the Easter break). On 17 April 2023 KM notified C that her contractual sick pay was reduced to half pay (in accordance with clause 11.3 of employment contract) with effect from 7 April 2023 (page 2373). There were further e mails and on 26 April 2023, KM informed C that a grievance meeting had been scheduled for 19 May 2023 and apologised to C for the delay. (page 2415). C was unable to make that date due to a dental appointment and also asked that the meeting be held by Teams to allow the attendance of her union representative (who did not live locally).

Meeting with LB

19.113 On 24 April 2023 C attended a meeting by teams with LB and R's, Director of Nursing. C was accompanied by JB from the WEU. C did not give an account of what took place in this meeting in her witness statement, and it is unclear what information is said to be disclosed during this meeting.

Handwritten notes taken by LB of this meeting were shown at pages 2402 to 2410. After the meeting C emailed LB a list of questions to which she required an answer (shown at pages 2398 – 2401). These questions related firstly to the use and effectiveness or surgical masks asking questions such as the size of particles that a surgical mask could filter and whether viruses were "Biological Hazards". It also asked questions about the content of masks and risks of excessive CO2. It contained one statement which was not a question, namely,

"*According to one review, masks provide breathing resistance and create a dead space that traps CO2, leading to more inhaled and re-breathed CO2".*

The document also contained a number of similar questions related to Covid 19, the symptoms of the virus, and the effectiveness of the vaccine asking for evidence that the Vaccine protects against infection, variants and becoming seriously ill or dying from Covid 19.

19.114 On 26 April 2023 a letter was prepared by ND to be sent from LB to C (shown at pages 2411 – 2412). This letter gave a brief account of what was discussed and went on to state that a number of C's concerns raised during the meeting would be *"considered within the ongoing processes".* The letter referenced that the claimant had explained that the Vaccine Mandate had a detrimental impact on her wellbeing and that she felt bullied and victimised by how R approached it. It included the following statement,

"As you are aware, the introduction of mandatory COVID-19 vaccines was a Government decision and was later withdrawn, however I know this process was difficult for some staff and I'm sorry that this upset you."

We accepted the evidence of C that she never received the letter, although we also accept that this letter was posted by R. For some reason, this letter did not reach C, and we note that at page 2411, no address was included in the header, so perhaps speculate although make no finding, that the address was mistakenly omitted. We accepted the evidence of ND that in or around July 2023 he was made aware that C said she had not received a response to her questions. He explained that he was surprised and emailed LB's PA on 17 July to say "*we have not replied to this letter. I thought it had been merged into her grievance but apparently [C] is still expecting a reply from [LB]*" (page 2742) NB then drafted a response on behalf of LB (page 2788 which was sent to C on 7 September 2023.

19.115 On 2 May 2023, MC wrote to C (page 2423 - 2425) to inform her that plans for her to meet with C to discuss sickness absence would be paused until the matters C had raised had been addressed. She stated that KM would be her wellbeing contact in the meantime and that sick notes and updates should be provided to KM. On 12 May 2023 MC completed an OH referral for C (as KM did not have the required system access to do this) asking OH to consider the possibility of redeployment (pages 2441 – 2446) Similar wording was included from earlier referrals regarding C's inability to

wear a mask. The referral then explained what had happened in recent months and said, "*she would need to wear a mask on clinical areas which [C] believes is not required and against her religious belief".* MC gave unchallenged evidence that at this time, this was what she understood part of C's objection to wearing a mask was based on because of what was said by C in their recent meetings

C additional e mail adding to grievance

19.116 On 16 May 2023 C emailed KM attaching a letter (dated 12 May 2023) stating she wanted to add more points to her original grievance (shown at pages 2451 – 2463). This e mail complained about OH referrals made by AC, MC and SY in 2021 and 2022 that she had just received copies of as a result of a subject access request (attaching such documents). In particular that a box had been ticked on such referrals indicating that the contents of the referral had been shared with C before submission (when she contended they had not). She also complained about uncertainty around her current job situation and that R was not taking care to ensure her safety and wellbeing was protected. C also accused MC's letter of 2 May 2023 of trivialising her grievance and "*her offences*".

Stage 2 Grievance meeting

19.117 On 25 May 2023 C attended a Stage 2 Grievance Meeting (with JB) conducted by AW with HR support provided by JE (notes at 2504 – 2536). During this meeting she raised with AW and JE that she had "*heard on the grapevine*" that mask wearing was being removed. JE responded that she was aware that it was being reviewed but no official confirmation had been received and that she and AW were still awaiting that to be confirmed. As part of the investigation of C's grievances, we were referred to various communications between AW and JE and in particular AC and RA, asking them to comment and provide their views on various of the allegations. On 25 May 2023, MC sent a document by e mail to JE and AW responding to various points and addressing a complaint made by C that MC was denying her hidden disabilities to which MC stated,

"I have not denied any possibility of disability which HG considers she may have".

We accepted the explanation of MC that she had written this on the basis of her views at that time, given that the last OH report she had seen in October 2022 had suggested that C did not have any underlying mental health condition but irrespective of this had always been supportive of C in relation to her mental health.

19.118 The requirement of mask wearing was removed in clinical areas, save for high-risk areas (including Ward 23) with effect from 5 June 2023. This was communicated via an all-staff e mail from the Sathcomms e mail address on 26 May 2023 (page 4354). On 2 June 2023 C emailed AW and

JE (page 2544) and within this e mail stated that she was particularly upset that she had had no official contact from R regarding the change in policy for masks, stating "*You both said to my face that you had nothing official to tell me. I received a memo from trust policy the next day, which was a generic staff update I should not be finding out through a friend and a generic email*". We accepted the evidence of AW that at the meeting that had taken place the day before with C, she had not known of the impending official decision to remove mask wearing in most clinical areas. She explained that she had been extremely busy that week with diary commitments and planning for the upcoming Junior Doctor strikes and cannot recall when she became aware and read the e mail. JE had been on annual leave and on her return responded to C (page 2547-49) apologising and stating that she had only just seen the communication regarding changes in mask wearing and offered to hold a meeting with C to discuss this with her in more detail if she wished. C responded stating that she was happy to discuss after her leave (page 2590).

19.119 An OH report produced on 17 May 2023 (pages 2481-5) had indicated that C was ready to return to work and recommended a phased return with regular breaks. It also recommended regular 1:1 informal meetings with management. On 2 June 2023, C confirmed that she was fit to return to work and KM was at this time responsible for managing C's return to work and on 13 June 2023 C met with KM (accompanied by T Davis (TD), HR, to agree her phased return to work in the Endoscopy dept which commenced that week. On 3 July 2023 KM and TD met C again to discuss her return (notes at pages 2624 – 2625) and during this meeting KM asked C about her thoughts about a possible return to work in Ward 23 if mask wearing ceased (which she understood it was about to). C expressed some anxiety about this and was reassured she would be supported should she decide to return. As an alternative, the possibility of C being placed on R's redeployment register was then discussed.

19.120 On 5 July 2023 the mask wearing requirement was withdrawn in Oncology / Haematology and KM e mailed C to inform her (page 2626). On 21 July 2023 KM and TD met C (notes at page 2649) and the possibility of her returning to Ward 23 was discussed as well as and what her other options were should she decide not to return including being placed on the redeployment register for a period of 12 weeks during which time she would remain on the endoscopy ward. KM asked C whether she might consider working in the Chemotherapy Day unit as there were vacancies there, but C was hesitant as she did not know who her manager would be. C reported that she had generally been feeling unwell KM informed her that she did not have to make a decision that day and gave her a further week to think about it. C also agreed that she did not have the skills at the moment for a substantive role at her level in Endoscopy.

<u>Meeting with C, KM and TD and alleged laughing</u>

19.121 On 28 July 2023 a further meeting took place between C, KM and TD. C alleged that she felt unwell during this meeting and mentioned that her stomach had swelled and made her distressed. She said that she left the meeting to speak to her line manager, K Butterworth who was not in her office and that she *"turned back and witnessed [KM] and [TD] laughing in amusement. I was distressed and they were laughing*". C said she felt uncomfortable and went to the bathroom because she felt sick and lightheaded. KM denies that either she or TD were laughing. She recalled that at the outset of the meeting, it had been quite settled but that C became quite angry towards TD and so she asked C if she would like to take a break and at this time C left the room for about 10 minutes whilst she and TD remained in the room. KM said that after C returned, the meeting continued after about an hour, and she did not notice that C had become distressed at any time during the meeting. She said that C was not in a position to confirm her decision about next steps and asked KM to confirm her options in writing. We find that KM and TD were not laughing in amusement during this meeting, certainly not in the context of any discussions with C. Our view is that this most likely explanation for what C perceived could have been that during the break in the meeting of 10 minutes, that KM and TD were talking about other matters which may have had no connection with C and may have been of a less serious nature. It is not beyond the realms of possibility that they may have smiled or laughed during an entirely unrelated conversation. KM is unlikely to recall such an interaction, but we entirely accept her evidence that she was not laughing at C and would never have behaved in such a manner. C was feeling unwell on this day and was clearly anxious about what was being discussed in the meeting. We find that she may have misinterpreted entirely normal social interactions between KM and TD during a break in a meeting as somehow being directed at her, perhaps contributed to by her own distressed state and poor health on that particular day.

19.122 Following this meeting KM sent C a letter on 4 August 2023 summarising the discussions to date (page 2681-4) On 9 August 2023 C commenced sick leave for stress related problem and auto immune issues. In an e mail later sent by C to KM on 8 September 2023 she stated that she felt under pressure to make an employment decision and that she saw KM and TD laughing in amusement after at their last meeting on 28 July (pages 2800-3). This allegation was repeated in an e mail of 19 September 2023 when C emailed KM to say she was anxious about meeting her and TD as last time she left the meeting they were laughing (page 4709 – 4715).

19.123 On 7 February 2024 C was provided with her Stage 2 Grievance Outcome letter (page 3005 – 3020) and on 29 February 2024 she submitted her Stage 3 Grievance Appeal Letter (pages 3056 – 3079).

The Relevant Law

20 The relevant sections of the ERA we considered were as follows:

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer,

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

48 Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section …44 (1).

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1)…. (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

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

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

21 The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: …

…disability;…religion or belief"

10. Religion or belief

(1) Religion means any religion and reference to a religion includes a reference to a lack of religion

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief…..

13 Direct discrimination
(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".

15 Discrimination arising from disability

(1) a person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

26 Harassment

(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 other circumstances of the case;

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

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

123 Time limits

(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(3) For the purposes of this section—

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

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

136 Burden of proof

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

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

Section 212 General Interpretation

In this Act-

"substantial" means more than minor or trivial;

Paragraph 20 (1) (b) of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

The relevant provisions of **The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 ('2020 Regulations')** are as follows:

2.—(1) In these Regulations—
…

"relevant place" means—
(a) a place listed in Part 1 of the Schedule; or

(b) a transport hub;
…..

Requirement to wear a face covering whilst entering or remaining within a relevant place
3.—(1) No person may, without reasonable excuse, enter or remain within a relevant place without wearing a face covering.
…….

Reasonable excuse

4.—(1) For the purposes of regulation 3(1), the circumstances in which a person ("P") has a reasonable excuse includes those where—

(a)P cannot put on, wear or remove a face covering—
(i) because of any physical or mental illness or impairment, or disability (within the meaning of section 6 of the Equality Act 2010(1)), or

(ii)without severe distress;

(b)P is accompanying, or providing assistance to, another person ("B") and B relies on lip reading to communicate with P;

(c) P removes their face covering to avoid harm or injury, or the risk of harm or injury, to themselves or others;

(d) P is entering or within a relevant place to avoid injury, or to escape a risk of harm, and does not have a face covering with them;

(e) it is reasonably necessary for P to eat or drink, P removes their face covering to eat or drink;

(f) P has to remove their face covering to take medication;

(g)a person responsible for a relevant place or an employee of that person acting in the course of their employment, requires that P remove their face covering in order to verify P's identity;

(h) in a registered pharmacy, an employee of that registered pharmacy acting in the course of their employment, requires that P remove their face covering in order to assist in the provision of healthcare or healthcare advice to P;

(i) a relevant person requests that P remove their face covering.

(…

Offence and penalties
6.—(1) A person who contravenes the requirement in regulation 3 commits an offence.

(2) A person who obstructs, without reasonable cause, any person carrying out a function under these Regulations commits an offence.

(3) A person who, without reasonable excuse, contravenes a direction given under regulation 5(2) or regulation 5(5) commits an offence.

(4) An offence under this regulation is punishable on summary conviction by a fine.

(5) Section 24 of the Police and Criminal Evidence Act 1984(1) applies in relation to an offence under this regulation as if the reasons in subsection (5) of that section included—

(a)to maintain public health;

(b)to maintain public order.

….

SCHEDULE
PART 1
Relevant places where face coverings must be worn
1.—(1) A shop, but does not include—

(a)restaurants with table service, including restaurants and dining rooms in hotels or members' clubs,

(b)bars, including bars in hotels or members' clubs,

(c)public houses.

(2) For the purposes of (1), an area within or adjacent to a shop where seating or tables are made available by that business for the consumption of food and drink on the premises by customers of that business is not a relevant place for the purposes of these Regulations.

2. Enclosed shopping centres, excluding any area in that building which is open to the public and where seating or tables are made available for the consumption of food and drink.

3. Banks, building societies, credit unions, short-term loan providers, savings clubs and undertakings which by way of business operate a currency exchange office, transmit money (or any representation of money) by any means or cash cheques which are made payable to customers.

4. Post Offices.

PART 2
Exemptions from definition of shop - regulation 2(2)

…..

7. Premises (other than registered pharmacies) providing wholly or mainly medical or dental services, audiology services, chiropody, chiropractic, osteopathic, optometry or other medical services including services relating to mental health.

……
EXPLANATORY NOTE
(This note is not part of the Regulations)

These Regulations require members of the public to wear face coverings whilst inside a relevant place specified in the Regulations in England to protect against the risks to public health arising from coronavirus, except in certain limited cases.

22 The Equality and Human Rights Commission Code of Practice on Employment ("the Code") paragraph 6.10 says the phrase "provision, criterion or practice" ("PCP") is not defined by EQA but

"should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

Paragraph 2.54 of the Code states that: "*a religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system"*. Paragraph 2.56 states that religious belief "*goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion"*

23 The relevant authorities which we have considered in relation to the claims for PID detriment were as follows:

Williams v Michelle Brown AM/UKEAT/0044/19/00 where HHJ Auerbach considered the questions that arose in deciding whether a qualifying disclosure had been made

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT [2010] ICR 325, [2010] IRLR 38 made it clear that to be a disclosure there must be a disclosure of information, not an allegation. Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 - paragraphs 31 and 32 on the irrelevance of the distinction between 'allegation' and 'information' in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

Fincham v HM Prison Service EAT/0925/01 confirmed that the disclosure of information must identify, albeit not in strict legal language, the breach of the legal obligation that the claimant is relying on.

Chesterton Global Ltd v Nurmohamed [2017] ICR 731 CA The following guidelines were suggested as to determining whether the worker genuinely believed the disclosure was in the public interest and whether it was reasonable for him to have done so:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e., staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, though this should not be taken too far.

Korashi v Abertawe Local Health Board [2012] IRLR 4 EAT, para.62 & 64 the reasonable belief of the person making the disclosure takes into account the characteristics of the claimant, i.e., what a person in C's position would reasonably believe to be wrong doing. In the case of multiple disclosures, it is not enough that C believes that the gist of the multiple disclosures is true, there must be a reasonable belief in respect of the particular disclosure relied upon.

Babula v Waltham Forest College 2007 ICR 1026, CA, at paragraph 75 on reasonable belief:

"Provided (her) belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong- nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to [one of the failures listed in s.43(1)(a)-(f)] is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute"

Twist DX Ltd v Armes (UKEAT/0030/20/JOJ (V)), (paragraph 72):

"The perspective of the worker and their evidence as to why they thought that it was in the public interest to make the disclosure are therefore relevant, but primarily to deciding whether they actually held that belief. If they did, the reasonableness of that belief is for the ET to determine by reference to its views as to what is in the public interest, albeit on the basis that the question is whether the belief is reasonable rather than whether it is right".

Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT) - When considering a claim of detriment for multiple disclosures the ET should be precise as to the detriments and disclosures in question and should not just roll them all up together.

Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64 [2012] ICR **372** – *"section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower".*

International Petroleum Ltd & Ors v Osipov & Ors [2017] the EAT determined that "*the words "on the ground that" were expressly equated with the phrase "by reason that in Nagarajan v. London Regional Transport 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference*."

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL - for a disadvantage is to qualify as a "detriment", Tribunals should take the broad and ordinary meaning of detriment from its context and from the other words with which it is associated. It confirmed De Souza v Automobile Association [1986] ICR 514, 522G, that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Jesudason v Alder Hey Childrens NHS Trust [2020] IRLR - Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. The causal connection of "on the ground that" is

satisfied if the protected disclosure materially influences (in the sense of being something more than trivial) the employer's treatment of the whistleblower. It is more aptly described as a "reason why" test, it is not a "but for test.

24 Grainger plc and ors v Nicholson 2010 ICR 360, in order for a belief to be protected as a 'philosophical belief', it must be:

(a) genuinely held;

(b) not simply an opinion or viewpoint based on the present state of information available;

(c) concerns a weighty and substantial aspect of human life and behaviour;

(d) attains a certain level of cogency, seriousness, cohesion and importance, and is worthy of respect in a democratic society;

(e) is not incompatible with human dignity and is not in conflict with the fundamental rights of others.

The criteria are now replicated at paragraph 2.59 of the Code.

25 In relation to a claim for failure to make reasonable adjustments under sections 20 and 21 EQA the following authorities were considered:

Environment Agency –v- Rowan [2008] IRLR 20 and also Secretary of State for Work and Pensions (Job Centre Plus) versus Higgins [2014] ICR 341 emphasised the importance of a Tribunal going through each of the parts of the statutory provision. The ET has an obligation to make explicit factual findings identifying the relevant PCP, the persons who were not disabled with whom comparison should be made, the nature and extent of any substantial disadvantage suffered by the claimant and any step or steps it would have been reasonable for the employer to take.

Ishola v Transport for London [2020] IRLR 368 CA said that all three words (provision, criterion or practice) carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, -the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA **-** The nature of the comparison exercise under s.20 was to ask whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the PCP had a more substantial effect on disabled employees

than on their non-disabled colleagues. In addition, in relation to whether an adjustment is effective the Court of Appeal said '*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'*

Secretary of State for Work and Pensions v Alam 2010 ICR 665, a tribunal should approach the issue of knowledge in reasonable adjustments claim by asking whether the employer knew that both that the employee was disabled and then that his disability was likely to disadvantage him substantially in relation to the PCP's application.

Romec Ltd v Rudham EAT 0069/07. Tribunals must consider the essential question whether a particular adjustment would or could have removed the disadvantage experienced by the claimant, but this must be read with care as in Noor -v- Foreign & Commonwealth Office [2011] ICR 695

26 In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding. whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *''In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

27 The relevant authorities which we have considered on the direct discrimination and victimisation claims are as follows:

Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT is an example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the claimant's perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.
The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy vNomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment are not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL, -The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Conclusion

28 The issues between the parties which fell to be determined by the Tribunal were set out in the List of Issues. We set out our analysis and conclusion on each identified issue as follows:

Complaint of detriments on ground of protected disclosures

Disclosures

29 In relation to the disclosures identified at paragraphs 2.1.1.1 to 2.1.1.7 of the List of Issues and as set out below these were all made to R, being C's employer for the purpose of s. 43(C)(1)(a) ERA. Therefore, in each case, if the disclosure was a qualifying disclosure, it was a protected disclosure.

30 To determine whether each disclosure was a qualifying disclosure, the Tribunal was required to determine in the case of each disclosure relied upon:

30.1 What was said or written to whom and when (issue 2.1.1)?

30.2 Did this amount to a disclosure of information (issue 2.1.2)?

30.3 Did C believe the disclosure of information was made in the public interest (issue 2.1.3)?

30.4 Was that belief reasonable (issue 2.1.4)?

30.5 Did she believe it tended to show (as applicable) (issue 2.1.5) that:

30.6 a criminal offence had been, was being or was likely to be committed;

30.7 a person had failed, was failing or was likely to fail to comply with any legal obligation; or

30.8 the health or safety of any individual had been, was being or was likely to be endangered;

30.9 Was that belief reasonable (issue 2.1.6)?

30.10 R denied that any of the alleged PIDs listed above were qualifying disclosures at all. Therefore, it was necessary to make findings and conclusions about all of them. In relation to each alleged disclosure relied upon we set out our conclusions as follows:

<u>Issue 2.1.1.1: 15 November 2021, a telephone call with AC.</u>

31 C contends that the same disclosure was made to AC during two separate conversations with AC on 15 November and 3 December 2021. Dealing with the conversation on 15 November, we refer to our findings of fact at paragraph 19.34-7 above that during this conversation C raised her concerns about the effect that having the Vaccine would have on her own health and mentioned that she had read online about possible side effects. We were not satisfied that C has shown that what was said during this conversation

amounted to a disclosure of information which C reasonably believed tended to show a matter within s. 43B(1)(a), (b) or (d) (namely that a criminal offence had been, was being or was likely to be committed; that a person had failed, was failing or was likely to fail to comply with any legal obligation or that the health or safety of any individual has been, is being or is likely to be endangered). We similarly conclude that C has not shown that she had a reasonable belief that what was said was in the public interest. We accepted R's submissions that this was a general conversation about the Vaccine and how it might affect C given her own health during which C also mentioned she had read about side effects on internet sites. This was not a qualifying disclosure.

Issue 2.1.1.2: 3 December 2021, a telephone call with AC

32 Our findings of fact about the telephone conversation on 3 December 2021 were at paragraphs 19.42-45. We accept that C communicating to AC more detailed information as to what she had become aware of about the safety of the Vaccine and its possible side effects amounted to a disclosure of information which C reasonably believed to be made in the public interest and which she reasonably believed tended to show that the health or safety of any individual had been, was being or was likely to be endangered. There was a significant public interest in both Covid 19 and the Vaccine. In addition there were well publicised examples of individuals who did appear to have signs of side effects following the administration of the Vaccine. We make no comment on whether such side effects were caused by the Vaccine and could not possibly do so, but it is clear that given the unprecedented and widespread global vaccination programme that was at the time taking place, there is a possibility that as with any medication, there may have been side effects. It was not unreasonable for individuals to have and express concerns about the effects of the Vaccine on themselves and others. The Vaccine Mandate was a controversial policy at the time and there were many individuals opposed to it and questioned its safety. Whatever the rights or wrongs of this policy which we entirely accept R was required by law to implement, it was reasonable for C to raise concerns as to the safety of what was taking place which did involve R's actions and was not just a matter of Government policy.

33 In relation to C questioning the legality of the Vaccine Mandate during this telephone conversation we were satisfied that she was disclosing information expressing her genuine belief that a person had failed, was failing or was likely to fail to comply with any legal obligation and that this was in the public interest. This was specifically discussed during the call with AC and indeed AC looked up the legal provisions that she understood were applicable and discussed these with C on the telephone call. However given the lack of any actual information from C informing this belief as to the legality of the Vaccine Mandate, we conclude that C has not shown that the belief was reasonably held. C rather than providing information suggesting that the

Vaccine Mandate was unlawful, questions its legality and discusses the basis for governmental action with AC.

34 For these reasons, we conclude that during this conversation on 3 December 2021 C made a qualifying disclosure and therefore a protected disclosure in relation solely to a reasonable belief that the disclosure showed a potential health and safety risk.

Issue 2.1.1.3: 19 January 2022, the claimant's written grievance.

35 See our findings of fact at paragraph 19.65-68. We were not satisfied that C disclosed information that tended to show a genuine and reasonable belief that a criminal offence had been, was being or was likely to be committed. C cites section 241 TULRCA (a criminal offence primarily dealing with violent and disruptive pickets in trade union disputes) and suggests it is relevant to her situation when it plainly is not. It is clear that C disclosed a significant amount of information in her written grievance and we accept that she genuinely believed that this information tended to show that R had failed, was failing or was likely to fail to comply with any legal obligation or that the health or safety of any individual has been, is being or is likely to be endangered. We were also satisfied as to the genuineness of her belief that this was done in the public interest and given the huge amount of public interest in Covid 19, the Vaccine and how this was being addressed, it was reasonable to believe that what she was doing was in the public interest. The key issue is therefore whether the belief held by C that the information she was disclosing tended to show that there was a breach of a legal obligation, or a health and safety risk was reasonable. R submits citing Babula and Armes referred to above that C has failed to establish that her beliefs were reasonably held. It contends that C's beliefs were based on internet searches and what Mr Williams says is "*unfortunate reliance on her union whose agenda was clear for all to see*". We have considered this carefully and do have concerns about the reasonableness of what C believes the information set out in this written grievance tends to show. Dealing first with the reasonableness of the belief in relation to a breach of a legal obligation by R which C repeats throughout the letter. Here we were not content that the contents of this grievance show that C's belief that she was disclosing a breach of a legal obligation was reasonable, in particular where she cites section 241 TULRCA and where she repeats her contention of being "*clinically exempt*" from the Mask Mandate (which we have addressed elsewhere in this judgment). Moreover by the time of the grievance C's allegations about the legality of the Vaccine Mandate have become more related to issues of her alleged philosophical beliefs rather than the narrower issue of the specific legal powers that the Vaccine Mandate was enacted under. C acknowledged in cross examination that whilst she had written her grievance herself, she had some assistance from WEU who provided her with details of legislation. The inclusion of all this information in fact leads us to doubt the reasonableness of C's belief that what was disclosed tended to

show breaches of legal obligations as her letter cites extensively from legislation that does not appear to be of direct relevance or accurate.

36 In relation to the reasonableness of C's belief that what was being disclosed tended to show that the health or safety of any individual had been, was being or was likely to be endangered by the Vaccine Mandate, then again C's beliefs have hardened further from those expressed in the conversation of 3 December about vaccine safety and side effects. She now expresses her beliefs in terms of her view that natural immunity is superior to that provided by the Vaccine and that harm can be caused if someone with that immunity is vaccinated. She goes on to state here beliefs that information was being suppressed and that the use of the Vaccine was a medical trial. Whatever the truth or validity of such contentions, objectively speaking and given the way such beliefs were now being expressed by C, we cannot conclude that C's belief that what was disclosed tended to show a health and safety concern was reasonably held. C is now expressing more extreme views about the Vaccine based on information available on the internet, rather than providing information of a substantive nature. We make it clear that we do not and indeed should not express any view as to whether C is or was correct in her views, but at the time these were expressed we conclude that C's belief that the information being communicated tended to show a risk to health and safety was not reasonably held. Therefore we conclude that this was not a qualifying disclosure and therefore not a protected disclosure.

Issue 2.1.1.4: 18 March 2022, the claimant's written appeal to her grievance outcome.

37 We refer to our findings of fact at paragraphs 19.77-80 above. We conclude that C did not disclose any information that tended to show a genuine and reasonable belief that a criminal offence had been, was being or was likely to be committed. She makes a number of assertions about criminal conduct in her letter, but these are nothing but mere assertion. We do accept that C held a genuine belief that what she had disclosed tended to show there had been a breach of a legal obligation (in relation to the Mask Mandate and the Vaccine Mandate) as she cites various pieces of statute she alleges have been contravened. We also accept that C held a genuine belief that what she had set out tended to show that the health or safety of any individual has been, is being or is likely to be endangered. However for similar reasons as we set out in paragraphs 35 and 36 above, we do not conclude that these beliefs were held reasonably. C now lists an extensive number of pieces of law, domestic and international (including legislation no longer in force) and asserts wide ranging breaches of legal obligations up to and including war crimes in the way that R had implemented the Vaccine Mandate. We cannot conclude that the information disclosed tended to show any sort of reasonable belief in the breach of a legal obligation. Similarly, the health and safety risks referred to now are wide ranging and C makes sweeping statements that wearing of masks causes harms and infection risk and

causes fibrosis of the lung. We can see no basis upon which we could conclude that C's beliefs however genuinely held were objectively reasonably held. For these reasons we conclude that what was disclosed on this occasion was not a qualifying disclosure and therefore not a protected disclosure.

Issue 2.1.1.5: On 28 March 2023 C wrote to the Chief Executive LB.

38 We rely on our findings of act at paragraph 19.111 above. We conclude that there was no disclosure of information in this e mail which tended to show a matter within s. 43B(1)(a), (b) or (d) ERA. This e mail simply makes assertions and allegations of discrimination and victimisation related to C's position on face coverings but nothing in here satisfies us C reasonably believed she was disclosing any information at all. The reference to a whistle blower does not make this a disclosure of information of itself and what is asserted here is a general allegation of wrongdoing rather than the provision of information. Accordingly, this was not qualifying disclosure and therefore a not protected disclosure.

Issue 2.1.1.6: On 24 April 2023 C had a Teams meeting with LB and after the meeting sent her a list of questions.

39 We refer to our findings of fact at paragraphs 19.113 and conclude that C did not during this meeting make a disclosure of information that tended to show in her reasonable belief a matter within s. 43B(1)(a), (b) or (d). C does not give an account of what was said or done in this meeting, so we are unable to conclude that a qualifying disclosure and thus a protected disclosure was ever made. In addition, the list of questions sent to LB after this meeting was precisely that, a list of questions to which C wanted R to provide its answer. The only provision of information was an assertion by C that one review had concluded that masks caused a build-up of CO2 for the wearer. We were satisfied that C genuinely believed that this tended to show that the health or safety of any individual had been, was being or was likely to be endangered by mask wearing, but we cannot conclude that this was a belief held reasonably as there is nothing to support or otherwise explain C's bare assertion. Accordingly this was not a qualifying disclosure and thus not a protected disclosure.

Issue 2.1.1.7: Grievance dated 27 March 2023 and 12 May 2023.

40 We refer to our findings of fact at paragraphs 19.107-109 and 19.116. We were satisfied that C genuinely believed that what she set out in her written grievance tended to show that the health or safety of any individual had been, was being or was likely to be endangered by mask wearing, but we cannot conclude that this was a belief held reasonably for the same reasons as are set out at paragraph 36 above. The assertions made by C about vaccine safety are not referenced in any way and she makes sweeping comments without really referring to why she says this is correct. She sets out her own view about vaccine and mask safety and that what is being done

is unlawful and unethical, but we are unable to conclude that objectively what she says is information tending to show that this is actually correct. The information contained in the follow up e mail of 12 May 2023 addresses more her own personal concerns raised as part of the grievance, and we do not conclude that the test in respect of a reasonable belief that what was being disclosed was in the public interests was met. Accordingly this was not a qualifying disclosure and thus not a protected disclosure.

Detriments

41 Having concluded that the C made protected disclosures on one of the above occasions (on 3 December 2021), we next needed to determine whether she was in fact subject to the detriments alleged (issues 3.1 and 3.2 above) and secondly whether this was done on the grounds of having made this protected disclosure (issue 3.4). We conclude in relation to each alleged detriment as follows:

Issue 3.1.1: 7 January 2022: AC denied the claimant the opportunity to work in Telford with the Overseas Nurse Team.

42 We refer to our findings of fact at paragraphs 19.39-41, 19.55 and 19.57-58 above. This complaint is not made out on the facts as AC did not deny C the opportunity to work in Telford with the Overseas Nurse Team on 7 January 2022. AC supported C in taking up this role and asked her to make the arrangements with RA directly. This did not take place and when RA did not hear from C, she assumed C was no longer interested. When C was signed off sick on 22 December 2021, AC was still under the impression that C would be going to work with RA in the New Year and so contacted RA to let her know that C was off work sick until 16 January. It was at this time that AC became aware that no arrangements had been made between RA and C for the Telford role. In any event, C then subsequently arranged to carry out the nMABS role from early January 2022 (see paragraphs 19.57-58). Even if the facts had been made out, we were entirely satisfied that the fact that C had made a protected disclosure on 3 December 2021 was entirely unconnected to C not taking up the Telford role. It is clear on the face of the correspondence and our findings of fact why the role was not taken up. C and RA did not make the arrangements for the role, C was then signed off sick and ultimately agreed to take up another role in any event. This complaint of protected disclosure detriment is dismissed.

Issue 3.1.2 January 2022: AC dismissed a phased return to work for C.

43 We refer to our findings of fact at paragraph 19.61 above and conclude that this complaint is not made out on the facts. AC informed LiB that her reading of the OH recommendations was that a phased return to work related to a return to clinical duties, so did not believe it was necessary if C was working at home. However she then went on to say that if C needed phased return into the nMABS role then "*of course*" she would support it. There was no

dismissal of a phased return at all. Whilst no phased return ultimately took place, this was something that AC had indicated she would support so it was not due to any intervention from AC that this did not happen. In any event, we were again content that any statement or comment made by AC in relation to the need for a phased return was not done because of any protected disclosure made by C. This comment about the need for a phased return related to AC's understanding of what OH were recommending in their report of 6 January 2022, namely that she believed that it was required for a return for clinical duties. The report was unclear as to what the recommendation actually was so this interpretation was possible. In any event, she later made absolutely clear to LiB that she would support a phased return if C needed it. This complaint of protected disclosure detriment is dismissed.

Issue 3.1.3 19: January 2022: ignored the following Occupational Health recommendations:

Issue 3.1.3.1: Phased return,

44 For the same reasons as set out in paragraph 43 above this complaint is dismissed.

Issue 3.1.3.2: Targeted psychological support,

45 This complaint is not made out on the facts, and we refer to paragraphs 19.63 and 19.60, 19.81, 19.87 above. R did not ignore the OH recommendation of targeted psychological support contained in the 6 January 2022 report as AC be mailed OH on 10 January to follow this up. A further e mail was sent by SK on 25 March 2022 to HJ and counselling sessions were arranged and attended by C (albeit that in the end, C did not find these to be useful). R also paid for C to attend an external CBT counselling course (the Spectrum Course) although again C did not find this useful. In any event whatever steps taken or not taken related to this recommendation had no connection at all to the fact that C had made a protected disclosure on 3 December 2021. This complaint of protected disclosure detriment is dismissed.

Issue 3.1.3.3: Stress risk assessment.

46 The recommendation that a stress risk assessment was not actioned by AC at the time of receiving the OH report (see paragraph 19.64 above) and we accepted the explanation of AC that she did do so because C was reluctant to discuss OH recommendations in the health and wellbeing meeting on 19 January 2022 and that it was inappropriate for her to be involved in dealing with this as C had alleged that AC had bullied and harassed her and C submitted a grievance complaining about the actions of AC later that day. There was no connection at all to the protected disclosure made some months earlier on 3 December 2021. In any event, we also refer to our findings at paragraphs 19.74 and 19.81 above. As an outcome of C's

grievance, MC instructed SY to conduct a stress risk assessment and this was then conducted by SY. This allegation is not made out on the facts as R did not ignore the recommendation that a stress risk assessment was carried out but in fact fully implemented this on or shortly after 22 March 2022. This complaint of protected disclosure detriment is not well founded and is dismissed.

Issue 3.1.4: On 10 March 2022: DH labelled C's nose surgery as "cosmetic".

47 We refer to our findings of fact at paragraphs 19.72 and 19.74. The facts behind the allegation are established in that when reading out the grievance outcome to C and RK on 10 March 2022, DH made reference to C having had "cosmetic surgery". We then considered whether the reason DH making this comment (which we accepted given the relatively low threshold for determining this issue was detrimental treatment) was because C had made protected disclosures, considering whether the one protected disclosure made to AC on 3 December 2021 was consciously or unconsciously more than trivial reason or ground for what was said by DH. We concluded that it was not. There was no evidence at all that DH even knew about the disclosures made by C to AC in December 2021 or even that the fact that C had raised concerns on any occasion about the safety of the Vaccine had any effect on her using this choice of words. This was in our view merely a description of what DH understood the surgery that C had undertaken in 2019 to have been. In the grievance meeting itself, the discussion as to whether the surgery was cosmetic surgery or not only really came up as part of a side issue as to whether the correct process for taking leave had applied at the time. C had herself then stated that it was cosmetic surgery. This was picked up and then used in the outcome letter and read out during the outcome meeting. There was simply no evidence adduced that anything either MM or DH said was related to or because of that protected disclosure or indeed was in any way intended to make a criticism of C or demean her in any way. This appears to be an entirely fanciful and misconceived allegation of protected disclosure detriment. This allegation is dismissed.

Issue 3.1.7: Loss of pay and pension contributions:

Issue 3.1.7.1: Lost enhancements: 14.10.20 and Issue 3.1.7.2: Lost weekend and night payments: 14.10.20 [Claimant has confirmed lost enhancements and lost weekend and night payments are the same thing. She states that "the payments stopped when I was taken from duty and forced to work from home. 14.10.20"].

48 This claim is about the cessation of weekend and night payments once C was removed from clinical duties in October 2020. There is no dispute it appears that C did not receive such payments once she stopped working on Ward 23 and carrying out these night and weekend duties. C acknowledged in her own witness statement she conceded that this particular detriment was before any protected disclosure as it started in October 2020. It is abundantly

clear that the reason such payments stopped was because C was no longer carrying out a clinical role and was no longer carrying her duties on weekends and nights. This was nothing whatsoever to do with the fact that C made a protected disclosure on 3 December 2021, and it is illogical to suggest this given that such payments ceased with effect from October 2020 over a year before any protected disclosure was made. This complaint of protected disclosure detriment is dismissed.

Issue 3.1.7.3: Sick pay and Issue 3.1.7.4: Half pay.

49 It is not entirely clear what is being complained about here with R suggesting that this is more a matter of remedy. In C's witness statement she complains about being on long term sickness and this impacting annual leave and also that her sick pay was reduced to half pay and an extension of full pay was declined. We refer to our findings of fact at paragraph 19.110 and 19.112 above. C had exhausted her contractual entitlement to full sick pay on 7 April 2023. An application for extension of full sick pay was made on her behalf and considered but was declined and we accepted the explanation of MC that the reason for this was that there was no return-to-work date anticipated which meant that R could not extend the full pay entitlement. Accordingly, C's sick pay entitlement reduced to half pay in accordance with section 11.3 of her contract of employment (see paragraph 19.2 above). C does not really appear to contend that the reason her sick pay was not extended was connected to having made protected disclosures and we conclude that there clearly was no connection to C having made a protected disclosure to AC on 3 December 2021. C no longer had a contractual entitlement to be paid at full pay, her request was considered in accordance with policy and we entirely accept the explanation that the reason it was not considered appropriate to extend full pay was because no return to work had been planned or was anticipated. These complaints of protected disclosure detriment are dismissed.

Issue 3.1.8 - 2, 16 and 20 May 2022: PW reduced the claimant's annual leave hours from 11.5 to 7.5 and missed COVID payments.

50 It was unclear at the conclusion of the evidence precisely what this complaint related to, and the Tribunal was required to examine the evidence and referenced emails in detail during deliberations. Firstly in relation to reducing annual leave hours, in her witness statement C stated that the complaint related to PW telling her she needed to use annual leave for bank holidays and then deducting 11.5 hours annual leave from her allowance rather than a daily rate of 7.5 hours for each bank holiday. The complaint appears to be that as C was not working her long shifts on the ward but working from home that only 7.5 hours should have been deducted and not 11.5 hours. C contended that it was unnecessary and made her "*feel anxious and punished*". We refer to our findings of fact at paragraph 19.85 when the issue of annual leave calculation was raised with PW by C during a conversation which took place on 20 June 2022. We further refer to our findings at paragraph 19.87 when the issue was discussed again during the meeting

between C (and RK), MC and MM on 26 July 2022, at paragraph 19.88 where MC e mails C with her findings on the pay issue and where it was picked up that annual leave had initially been recorded incorrectly at 11.5 and then corrected to 7.5 hours. Therefore there was an initial error in the way that C's annual leave hours were recorded but this was for 2 May 2022 (not 16 and 20 May 2022). This was then corrected by AC so that annual leave was recorded correctly. It is hard to see how this in reality can be seen as detrimental treatment as C did not ultimately lose out. Secondly, the claim also appears to be about Covid payments. During preparation for the Tribunal hearing, C was asked by R's representatives and provided details of the precise dates of missed covid payments (page 245) and responded by referencing a spreadsheet (pages 364 to 368). It is still completely unclear what sums she says she was underpaid by PW in respect of Covid payments. In any event, we entirely accept the submissions of R that this complaint also fails on the basis of C's own evidence when asked about in cross examination (see paragraph 19.85). C did not even contend that PW had miscalculated or underpaid her pay and annual leave entitlement because she had made a protected disclosure. C's views in evidence were that this was connected to disability and that it was not PW in any event but "*other people*". This claim entirely fails as there was no connection at all between any purported underpayments or mis recording of annual leave and the protected disclosure on 3 December 2021 (nor does C even really suggest that there is one). The complaint is dismissed.

Issue 3.1.9: Removed from the ward Facebook group.

51 We refer to our findings of fact at paragraph 19.91 above, the facts behind this allegation are made out as PW did remove C from the Facebook group for ward 23. We then considered whether the reason for C's removal (which we accepted given the relatively low threshold for determining this issue was detrimental treatment) because C had made protected disclosures, considering whether the one protected disclosure made to AC on 3 December 2021 was consciously or unconsciously more than trivial reason or ground for what was done by PW. We concluded that it was not. We accepted AC's explanation that the most likely reason for C's removal from the Facebook Group was simply due to the fact that she had been away from the ward for a long period of time. There was no evidence at all that PW knew the detail of the disclosures made by C to AC. There was simply no evidence adduced that anything that PW did or did not do was related to or because of that protected disclosure. This allegation is dismissed.

Issue 3.1.10: LB has not acknowledged or replied to the claimant's questions or replied to her following the meeting on 24 April 2023.

52 We refer to our findings at paragraph 19.114 above. The complaint is not made out on the facts as LB did in fact reply to C and prepare a letter following the meeting that took place on 24 April 2023. However we also acknowledge that C does not appear to have ever received this letter at the time. When this became apparent a further letter was sent to C on 7

September 2023. In any event there is no evidence at all to suggest that any issues with regard to the sending of this letter and response had any connection whatsoever to the protected disclosure C made to AC on 3 December 2021. We are content that there was no connection at all. This complaint of protected disclosure detriment is dismissed.

Issue 3.1.11: On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

53 We refer to our findings at paragraph 19.103 above. This entry was recorded by RA in her log of meetings and relevant notes related to C's placement with her. It appears that C became aware of this comment when the documents was disclosed to her as part of her freedom of information request. The facts behind this complaint are established so the question is whether RA made this entry onto this log because of C having made a protected disclosure to AC on 3 December 2021. We conclude that C has adduced no evidence to suggest that this was the case. The fact of the protected disclosure having made was not connected at all to the recording of this comment. It is not clear whether RA had any knowledge of this particular conversation having taken place between AC and C back in December 2021. We also accepted RA's evidence that she was recording this comment exactly as it had been passed to her by her team members. The purpose of the log was to ensure that all matters related to C's work in the PEF team were recorded and acted upon. C clearly disagrees with the content of this comment but there is simply nothing to suggest that it was made because of any protected disclosure. This complaint of protected disclosure detriment does not succeed and is dismissed.

Issue 3.1.12: When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

54 We refer to our findings of fact at paragraph 19.93-94, 19.99, 19.102 -103. We conclude that in the first instance it was always intended that C would not be "doing the PEF role" but be observing those performing the role and assisting as a way of easing back into the workplace as a phased return. It does appear that C was not entirely clear that this was the case at the start and anticipated a more long-term opportunity. Nonetheless the nature of the position was set out in the risk assessment prepared by RA and sent to C on 23 February 2023, stating that the position was "temporary" and that she would continue in the team for the duration of her "5 week phased return" (see paragraph 19.99). C now alleges that she was not invited to share in

sessions or given training and was not adequately supported in this role, but we cannot conclude that this has been shown to be the case by C. There were meetings between C and RA regularly which were recorded and logged. These records include C feeding back that she was "happy and settled" and was being made to feel at ease and welcomed by the team. It is recorded that on 10 March 2023 C felt that the team continued to be supportive. This contemporaneous record is entirely at odds to what C now says about the experience. It is also clear that no complaint was made to any of the managers involved in C's phased return at the time of such lack of support. C is clearly of the view that the criticisms of what she was doing was incorrect and unwarranted. We are unable to conclude whether this is the case, although accepted the evidence of RA that she was simply recording in the log what members of her team had told her. In any event, whatever was said or not said, we have already concluded that the reason for this was not that C had made a protected disclosure to AC on 3 December 2021. No connection or causation has been shown or even suggested. This complaint of protected disclosure detriment is dismissed.

Complaint of Health and Safety detriments

55 We have also gone on to consider whether C raised health and safety concerns within the circumstances set out in section 44 (1) (c) ERA. C relies on the same 7 matters that are said to be protected disclosures and in addition relies on three further incidents which she says amount to raising health and safety concerns. For broadly the same reasons we set out at paragraphs 20 and 21 above we conclude that the alleged health and safety concerns relied upon as set out at paragraphs 4.1.1; 4.1.3; 4.1.5; 4.1.8; 4.1.9 and 4.1.10 were not circumstances connected to C's work (issue 4.2) that C reasonably believed were harmful or potentially harmful to health and safety (issue 4.3). This is largely because the concerns raised were not based on C's reasonable belief considered objectively, however genuinely she believed them.

56 In relation to the additional alleged health and safety concerns relied upon as set out at paragraphs 4.4.1.4, 4.1.6 and 4.1.7 we conclude the following:

<u>Issue 4.1.4: 25 January 2022, further grievance letter</u>

57 We refer to our findings of fact at paragraph 19.69 above. Whilst we accept that C raised circumstances connected to her work that she believed were harmful or potentially harmful to her health and safety, we do not conclude given the conclusions that we reach elsewhere in this judgment that such a belief which was one which was objectively reasonable for C to have held and communicated. Many of the factual allegations complained about this letter we found to have not been made out on the facts. The complaints made are in some cases about steps taken by AC that were required in her role as manager. We accept that C was at this stage aggrieved by some of these actions and became distressed (even if this was not communicated at the time). However objectively speaking we do not conclude that any of the

matters complained about in this letter objectively speaking were based on a reasonable belief that health and safety was being harmed.

Issue 4.1.6: 16 January 2023, the claimant attended an employee wellness and attendance meeting with MC and JR and raised health and safety concerns,

58 We refer to our findings of fact at paragraph 19.92 above and conclude that C did not in fact raise health and safety concerns during this meeting. There was a discussion about the reintroduction of mask wearing in non-clinical areas and C stated that she could not understand it and that she felt surgical masks were not PPE, but we conclude that this in no way amounted to C raising circumstances connected to C's work that C reasonably believed were harmful or potentially harmful to health and safety.

Issue 4.1.7: 6 February 2023, the claimant attended an employee wellness and attendance meeting with MC and JR and raised health and safety concerns.

59 We refer to our findings of fact at paragraph 19.97 above. During this meeting C made a number of allegations about R being coercive about mask wearing and also stated that mask wearing and a mask fit test had caused mental health issues. However we were not satisfied that these general allegations amounted to C raising circumstances connected to her work that C reasonably believed were harmful or potentially harmful to health and safety. Her opinions about R's policy on mask wearing were made clear and she complains about the mask wearing requirement not being evidence based. She also makes an allegation about the impact that masks have had on her mental health. However this we do not consider to be the raising of circumstances connected to work that C reasonably believed constituted a health and safety risk. There was no suggestion that R was requiring C to actually wear a mask at this time at all as it acknowledged that she was unable to do this. C's comments were more general complaints about the policy as it applied more generally. Therefore we were not satisfied that the requirements of section 44 (1) (c) ERA.

60 In relation to the alleged health and safety concern relied upon as set out at paragraph 4.1.2 above, for similar reasons as are set out at paragraphs 17-19 above, we conclude that this did amount to C raising circumstances connected to her work (given that they related to the Vaccine Mandate that was due to be implemented by R) that C reasonably believed were circumstances that were harmful or potentially harmful to health and safety. This was brought to R's attention by phone (which must be regarded as reasonable means).

61 However we have gone on to consider the issue identified at para 4.5 of the List of Issues above. C accepts that she was employed at a place where there was a representative of workers on matters of health and safety at work or safety committee. The only remaining issue was whether it was not reasonably practicable for C to raise the matter she did on 3 December 2021 by means of this health and safety committee. C has not addressed this

point at all in her evidence and on this point, we conclude that it clearly was reasonably practicable for C to have raised her concerns via a health and safety at work representative or committee. C had access to support from the RCN and latterly the WEU and indeed her RCN representative had raised a matter related to mask wearing on her behalf before (see paragraph 19.30 above). C was able to and did contact R's VCOD team about the Mandatory Vaccine on 20 December 2021 (see paragraph 19.53 above. There is nothing to suggest that there was anything which would have prevented C from seeking out information on how to contact R's health and safety committee and raising concerns directly to them. Therefore the matters raised do not fall within the circumstances set out in section 44 (1) (c) as alleged and we do not need to go on to consider whether the 8 separate detriments complained about (in fact encompassing 18 different complaints) occurred and whether they were because of raising that one health and safety concern. However for completeness it is our view that for very similar reasons as are set out at paragraph 27 to 39 above, we would have concluded that none of the alleged detriments had any connection to the fact that C had raised a health and safety concern with AC on 3 December 2021. Detriment 4.6.1 occurred before the purported disclosure was made. Many of the detriments were alleged to have been carried out by individuals who are unlikely to have even been aware of what C did or did not say to AC in December 2021, in particular as many acts related to e mails that were sent not only to C but in fact to all employees of the Trust (over 8000 people). Many or the alleged detriments took place well over a year after the purported health and safety disclosure and in reality, are highly unlikely to have been influenced by it. For all of these reasons C's complaint that she was subjected to a detriment in contravention of section 44 (1) (c) ERA as set out at paragraph 4.6 of the List of Issues does not succeed and is dismissed.

Issue 6. Disability

62 There has already been a determination that C was a disabled person by reason of Hypothyroidism before March 2020 until April 2021 and Chronic Rhinosinusitis from November 2020 until May 2022. The Tribunal determined that C was not disabled as a result of Anxiety/Depression from between March 2020 and May 2022. In relation to matters after May 2022, R concedes that C remained disabled as a result of Chronic Rhinosinusitis from May 2022 until the last act complained of, namely 4 August 2023. It also conceded that C was disabled as a result of Anxiety/Depression from June 2023 onwards. Therefore it remains in dispute whether C had a disability as defined in section 6 EQA as a result of Anxiety/Depression between May 2022 and June 2023. C does not really address this issue in her evidence in that we do not hear any specific evidence about the effects of Anxiety/Depression on C's ability to carry out day to day activities. We know that C was carrying out various different remote roles for R between May and August 2022. C was signed off from work on 30 August 2022 and remained on sick leave until February 2023. Sick notes at this time recorded

that the absence was due to a "stress related problem" and it is clear that C was receiving treatment in relation to her mental health (see paragraph 19.81). However there is insufficient evidence for us to conclude that C meets the test for being a disabled person as a result of Anxiety/Depression between these two dates. It is our view that nothing in particular turns on this, given that there is no dispute that C was a disabled person at all relevant times as a result of Chronic Rhinosinusitis and the issues we have to determine in relation to disability all largely relate to this physical disability.

Complaints of direct disability or religion and belief discrimination (Equality Act 2010 section 13)

63 It is already established that C was disabled at all relevant times, but she also makes complaints in relation to religion of belief. C describes her religion and beliefs as recorded in the List of Issues is as follows:

"7.1.1 She is a practising Christian and a Jehovah's witness. Her faith guides her in every decision she makes.

7.1.2 She believes in doing good by others/in doing no harm.

7.1.3 She believes God has created her with a safe and effective natural immune system and that breathing fresh air is essential to that immune system;

7.1.4 She believes body autonomy should be respected;

7.1.5 She believes in homeopathy and natural medicines and believes that nature has everything we need to heal ourselves;

7.1.6 She believes that where there is risk there should be choice."

64 R submits that C's claims based on religion and belief are entirely flawed because the above set of beliefs do not reflect a clear structure and belief system. It accepts C is a practising Christian and Jehovah's witness and also accepts that this faith guides her in every decision she makes. However it submits that the other matters set out are in some cases general beliefs not specific to any particular religion or expressions of different beliefs that are capable of being philosophical beliefs that have no clear connection to her religious belief. In relation to religion it contends that C has failed to articulate why it is part of her religion to refuse to wear a mask or accept the Vaccine. Although it was unclear and C's evidence was confused, it appears to us that C contended that her claim for religious discrimination was based on her religion of Christianity and being a Jehovah's witness (and that the beliefs set out at paragraphs 7.1.2 to 7.1.6 are an expression of that religion for her). She described her faith as being a central part of her life and guiding every decision she made where she asked herself whether what she did was going to offend God. She described her belief in homeopathy as spiritual and connects this to her faith, alleging that "God provides everything essential to

her life". To that extent, we have approached the questions of deciding the complaints C makes about religion on this basis.

65 C makes 5 allegations of direct discrimination on the grounds of disability and/or religion/belief and relies on the same acts of less favourable treatment in relation to both protected characteristics. In order to decide these complaints, we had to determine whether R subjected C to the treatment complained of (which is set out at paragraphs 7.2.4 to 7.2.8 of the List Of Issues and then go on to decide as set out in issue 7.3 whether any of this was 'less favourable treatment', (i.e. did R treat C as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances). We had to decide whether any such less favourable treatment was a detriment (issues 7.5) and crucially whether it was because of either C's religion/belief or because of disability (issue 7.4).

66 It is clear to us from her evidence at the Tribunal hearing that C holds a genuine and strong belief that she has been discriminated against in particular because of disability. C was less clear on her contentions that religion played a part where it is said to, and we are not at all satisfied that C in fact believed that the reason for the treatment complained of was her religion/beliefs. This is an argument that appears to have arisen and was subsequently developed once C became represented by WEU. There is no doubt of C's faith and religious belief, but we conclude that there was a conflation between this and the more widely drawn and disparate elements of what is now said to be C's religious belief. In any event, in all instances for us to reach the conclusion that C has been subjected to such discrimination, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

67 We applied the two-stage burden of proof. We first considered whether C had proved facts from which, if unexplained, we could conclude that the treatment was because of disability or religion/belief. The next stage was to consider whether R had proved that the treatment was in no sense whatsoever because of disability or religion/belief. We set out below our conclusions on these matters for each allegation listed in the List of Issues with reference to each paragraph number where the allegation is listed:

<u>Issue 7.2.4 On 23.2.23 MC gave RA the claimant's vaccination status without her consent. As a result RA's behaviour towards the claimant changed and in particular, she described the claimant as a risk in a covid risk assessment. The claimant will also rely on RA's behaviour in the meeting on 21 March 2023 where she alleges RA was negative and judgmental.</u>

68 We refer to our findings of fact at paragraphs 19.40, 19.93, 19.95, 19.99-100 and 19.104. RA knew that C was unvaccinated when C told her this in November 2021 and then asked MC whether C was still unvaccinated on 20 January 2023 and MC confirmed that she was on the same date. MC had not asked C about this before sharing this information, so we conclude that

MC did share C's vaccination status to RA without C's consent (albeit that this was done on 20 January, not 23 February 2023). However it is not clear how C contends that RA's behaviour towards her changed after this was disclosed. In fact there had been no contact between C and RA about the Telford role until after her vaccination status was shared by MC. RA first contacts C the same day of this conversation to discuss C starting the role with her. In relation to describing C as a risk in a covid risk assessment, RA did not describe C as a risk, but rather stated that C was "at risk" from infections others may pass to her and also "at risk" of not being able to carry out the role if masks were introduced. This part of the allegation is not established on the facts. C makes an allegation of RA being negative and judgmental during the meeting on 21 March 2023, but we conclude that C has not shown that this was the case. Our findings of fact of this call are at paragraphs 19.104 above and we conclude that it started positively and it was only when RA mentioned that the pastoral element of the PEF role in a clinical setting required mask wearing that C became upset, accused RA of harassing her and shortly after ended the call. This part of the complaint is not established on the facts.

69 In relation to the sharing of C's vaccination status by MC to RA without her consent, we have then gone on to consider whether this was less favourable treatment and whether it was because of either C's religion or her disability. C was clearly concerned about the sharing of this information, so we are satisfied that it was a detriment. However C has failed to establish any connection at all between this and either her disability or her religion/belief. In relation to disability, then it does not appear that whether or not C was vaccinated had any connection at all to her Chronic Rhinosinusitis which is the disability in play at the time. That disability had a connection to C's inability to wear a mask, but we simply cannot see how vaccination status has any bearing on this at all. In relation to religion/belief, then we accept R's submission that C has wholly failed to explain why it is part of her religion to not have a Covid vaccination. The tenets of C's religious beliefs relied upon that may have some bearing on the issue of vaccination (e.g. her beliefs in a safe and natural immune system and homeopathy as set out in paragraph 7.1.3 and 7.1.6) are as R submits, more in the nature of matters that could form the basis of a philosophical belief but we simply have no evidence from C about this purported belief that would get close to satisfying the Grainger criteria.

70 We conclude that C has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that there was any less favourable treatment because:

70.1 We accepted the explanation of RA that she had asked MC to confirm C's vaccination status because she was managing another employee who was clinically extremely vulnerable and thus whether or not team members that employee came into contact with were vaccinated was relevant to assessing

risks to that person. That is an entirely logical and sensible reason for asking the question and indeed for MC providing the information.

70.2 There is no evidence to suggest that any other employee in the same situation as the C who was not disabled or did not adhere to C's religious beliefs would have been treated differently.

70.3 C has not proved primary facts from which the Tribunal could conclude that the complaint was because of disability or religion/belief, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, R would have discharged that burden as the reason why RA asked this question and the reason why MC provided it was because they wanted to assess the risks of catching Covid-19 in relation to another employee. This treatment was not because of the claimant's disability or religion/belief more generally. This allegation of direct disability and religion/belief discrimination is dismissed.

Issue 7.2.5 The claimant's unvaccinated status was used to prohibit her from returning to work.

71 C's makes this complaint apparently based on comments made in OH referrals on 30 August 2022 (see our findings of fact at paragraph 19.89) and 19 January 2023 (see paragraph 19.94). She suggests that the reference to vaccination status and risk in connection with her inability to carry out a clinical role supports her view that it was vaccination status and not inability to wear a mask that was preventing a return to a clinical role or otherwise returning to work. Firstly we conclude that this complaint is not made out on the facts. C was not in fact prohibited from returning to work and indeed carried out various roles over the period both working at home and on various sites. It was working in a clinical setting (in particular in her home ward 23) that was the issue. We were satisfied that it was C's inability (and later inability and refusal) to wear a surgical mask that prevented her from carrying out a clinical role. This was the case from October 2020 when C was first removed from clinical duties (see paragraph 19.23) and during various discussions after that point including OH referrals it specifically references C's inability to wear a mask and R's requirement for a mask to be worn in clinical areas that was causing the issues (see paragraph 19.24 for example). This was many months before the issue of vaccination was even raised. Even when vaccination is referred to in the OH referral's C relies upon, it specifically references "required PPE" and masks as being the barrier for returning to work, not vaccination status.

72 In any event even if the facts had been established, for the same reasons as set out at paragraph 69 above, C has failed to establish any connection at all between vaccination status and either her disability or her religion/belief. This complaint is dismissed.

Issue 7.2.6 On 21.3.23 RA and MC asked if the claimant could wear a mask for short periods – they did not understand it was not an option for the claimant and

did not take her seriously. They were judging and shaming the claimant. The claimant was not given any feedback on her 5-week phased return. They revoked the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there. MC blamed the claimant for the loss of the opportunity saying it was "your choice" and "your beliefs".

73 There are a number of separate elements to this complaint. Our findings of fact about the meetings that took place on 21 March 2023 are at paragraphs 19.104-105. Firstly we conclude that RA (but not MC) asked C if she could wear a mask for short periods during their Teams meeting on 21 March 2023. This was in the context of a discussion about whether C may be able to continue to perform the PEF role carrying out the pastoral element of this role which required her to be in a clinical setting. For the same reasons as above we conclude that there is simply nothing which connects questions about mask wearing to C's religion or belief. There is at least some connection with disability as the reason why C could not wear a mask was due to her Chronic Rhinosinusitis. However we conclude that C's disability was not the reason why RA asked her whether she could wear a mask for short periods. It was merely to enquire whether any form of mask wearing could be tolerated which would enable C to carry out the pastoral elements of the role. This was an entirely reasonable enquiry in the context of discussions about finding a suitable role for C to carry out. It is hard to see how this could be detrimental treatment at all and in any event, it was the difficulties with wearing a mask and not the disability itself that prompted the question. It is highly likely that a similar question would have been asked of another employee who was having difficulties wearing a mask for reasons unconnected with Chronic Rhinosinusitis or indeed any other health condition. There was no less favourable treatment and no connection with either religion/belief or disability, so this element of the complaint fails.

74 The next part of this complaint appears to relate to judging and shaming C. This has simply not been established by C. We accept that C may have felt that she was being judged and shamed but this is not what we have to determine for a direct discrimination complaint which asks us to focus on the acts of the alleged discriminators and the motivation as to why they did what is now complained of. Whatever was discussed in those meetings, we were satisfied that the actions of MC and RA were not to judge or shame C. They were trying to have an open discussion about what role C could now carry out when her phased return to work had come to an end. Next C complains about not being given feedback about her 5-week stint in Telford and we accept that this did not take place during this meeting. However it is our view that the reason for this not taking place was because of C's decision to prematurely end the call she had with RA after the issue of mask wearing was mentioned (see paragraph 19.94). RA had been in communication with C on a regular basis during the placement (see paragraphs 19.99-103) and had recorded feedback which she intended to provide to C. However this did not ultimately take place as C ended the call and the conversation went no further. We can find no connection at all, and C has failed to even show any

connection with either disability or religion/belief to this action. This part of the complaint is also dismissed.

75 The next part of this complaint appears to relate to what C says was R "*revoking the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there*". The essence of this complaint is threefold and appears to be based on C's view that the role she had been assigned to in Telford was a more permanent opportunity intended to last for more than 5 weeks, that no-one had told her that it was coming to an end after this period and that she was unaware of the requirement of the PEF role of providing support in a clinical setting where mask wearing was required. We accept that for whatever reason C seemed to be operating under the impression that she was fully carrying out the role and would be there for the duration. However this is not what was communicated to her. Firstly when C first raised the suggestion of a PEF role in October 2022, MC told her that it was a band 3 post being advertised and that work in clinical areas was required (see paragraph 19.93). The e mail sent (including C) on 19 January 2023 makes explicit reference to the role being temporary and that it was about supporting C to begin to return to work. The risk assessment sent to C on 23 February 2023 also states that the role would continue "for the duration of her 5-week phased return" and that it was a" temporary measure". Whatever C might have assumed about this role, this is not what was communicated to her. Therefore C has not established this particular part of the complaint on the facts. This role was not revoked, it came to an end as originally planned after 5 weeks. There had clearly been some discussion about whether C could continue after this, but this was far from certain, depending on budget and of course with the issue of clinical work arising, but we find that there was no such revocation of the role, and this complaint is dismissed on the facts.

76 Lastly C complains of MC blaming her for the loss of the opportunity saying it was "your choice" and "your beliefs". We refer to our findings at paragraph 19.105 above. We do not find that there was any 'blame' apportioned by MC to C for any 'loss of an opportunity' as the Telford role had come to an end after the 5-week phased return as had been planned. During the conversation on 21 March 2023 when the discussion moved to finding an alternative role for C, MC did state that it was C's "choice" not to wear a mask and C objected to this stating that it was not a matter of choice but her inability to wear a mask. It was clear that C was upset by the suggestion that she was choosing not to wear a mask rather than being unable to do so due to her health reasons and it was perhaps not put as sensitively as it could have been by MC. However we also conclude that as well as C's inability to wear a mask due to her health, C had also by this stage determined that she would not wear a mask as it was not necessary and that she strongly believed she was exempt from wearing one. She stated in January 2022,

"*that she had no intention therefore of wearing a mask for clinical reasons, because it was distressing and uncomfortable for her, but also because she*

felt she should be exempt from this'. She did not therefore see the point of CBT or counselling to enable her to wear a mask as she did not feel she should have to wear a mask."

77 This point was developed further in C's stage 1 grievance in January 2022 (see paragraphs 19.65-67) and her appeal on 18 March 2022 (see paragraphs 19.77-80). Therefore as well as the inability to wear a mask, C was also refusing to do so on principled grounds, largely due to the fact that she felt she had a legal exemption; that masks were ineffective as PPE and did not halt the spread of Covid 19 and also they caused harms. It was therefore not an entirely inaccurate statement for MC to have included. However for similar reasons we set out in paragraph 54 above C has failed to establish sufficient evidence to show that the reason why MC said it was C's choice not to wear a mask was because of C's disability or religion/belief. It was a statement of MC's understanding of the reason for C being unable to wear a mask which was not in fact inaccurate as although the primary reason may have been health related, C by this time also has developed a principled objection to mask wearing. This complaint is dismissed.

7.2.7 On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

78 We refer to our findings at paragraph 19.102 above. RA did record this comment in the log of interactions relating to C's placement in Telford. It is clear that C became upset about this statement when she later read it when she saw this document. However C has failed to show any evidence at all to support her view that this comment was recorded in RA's log by her because of C's disability or because of her religion/belief. The burden of proof does not pass to R to explain why it was included. In any event, we accepted RA's explanation that she was recording this comment as it had been communicated to her by members of her team. There was no connection to disability or religion/belief. This complaint is dismissed.

7.2.8 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

79 For very similar reasons as are set out in paragraph 54 above where this same allegation is made as one of protected disclosure detriment, this complaint is dismissed. The facts behind this complaint are not established and, in any event, there is no evidence at all of discrimination to shift the burden of proof to R to explain the reason for any treatment. We conclude

that there was no connection with either disability or religion/belief to the matters now complained of. This complaint is dismissed.

Complaint of discrimination because of something arising in consequence of a disability (section 15 EQA)

80 C relies on a large number of acts that she says amount to unfavourable treatment because of something arising in consequence of her disability. In determining this complaint, we firstly looked at the matter said to be arising in consequence of disability set out at paragraph 8.2. C alleges that the something arising in consequence of disability is that she "*had breathing difficulties associated with her medical conditions and was unable to wear a mask continuously for long periods*". R accepts that C was unable to wear a mask but points out that this was positioned by C as being related to pain and discomfort in her nose and later a 'phobia' about wearing a mask, rather than breathing difficulties. We refer to our findings of fact at paragraphs 19.24 where difficulties with breathing stemming from sinus issues is identified in the October 2020 OH report and paragraph 19.59 where again breathing difficulties are reporting in January 2022. We are satisfied that due to breathing difficulties and or pain experienced by C, that her inability to wear a mask continuously for long periods was something arising in consequence of disability. That being established, we next had to consider in respect of each of the alleged acts of unfavourable treatment whether this was because of this something arising. Put simply did the unfavourable treatment occur and was it because C was unable to wear a mask. Dealing with the alleged acts relied upon in turn, we conclude as follows:

<u>Issue 8.1.4: LB has not acknowledged or answered the claimant's questions or communicated with her following the meeting on 24 April 2023.</u>

81 We again refer to our findings at paragraph 19.114 above. The complaint is not made out on the facts as LB did in fact reply to C and prepared a letter following the meeting that took place on 24 April 2023. C did not receive this letter, and a further letter was sent to C on 7 September 2023. We also conclude that any issues with regard to the sending of this letter and response was not because C was unable to wear a mask. This is not why C's questions were addressed as they were and therefore this complaint fails both on the facts and also on the matter of causation. This complaint is dismissed.

<u>Issues 8.1.5: Putting pressure on the Claimant to have a Covid 19 vaccination.</u>

82 Within this complaint of being put under pressure to have the Vaccination C relies on 21 separate acts consisting of e mails and telephone calls with and from R. The contact complained about broadly falls into three categories and we have grouped the allegations accordingly. Firstly telephone calls from PW between January and June 2021 (issues 8.1.5.1 to 8.1.5.3); secondly telephone calls and e mails sent directly to C from AC between November 2021 and January 2022 (issues 8.1.5.4 to 8.1.5.9 and 8.1.5.17-8.1.5.18) and

lastly general multi recipient e mails and letters send C and others by R's Mandatory Vaccines team or via its sathcommstream e mail address (issues 8.1.5.10 to 8.1.5.16; 8.1.5.19-8.1.5.21). Dealing with each in turn:

Issues 8.1.5.1 to 8.1.5.3 - Telephone calls from PW on 14 January, 18 April and 14 June 2021

83 We refer to our findings of fact at paragraph 19.27 and find that in all these calls, C was asked about whether she would have or has had a Covid vaccination. The first of these occasions PW enquired as to whether C would be vaccinated and on the second and third occasion PW recorded that C did not want to discuss it. C has adduced no evidence at all as to the content and tenor of any of these conversations just making the generalised allegation that she was pressured. We conclude that this allegation is firstly not made out on the facts as simply asking C whether or not she was vaccinated or intended to be vaccinated cannot of itself be regarded as an act of coercion or putting pressure on her. The issue of vaccination was a live and relevant matter at the time of the Covid 19 pandemic and became of particular interest and concern to R once the Vaccine Mandate became a possibility and was introduced. In any event, C has failed to show any connection whatsoever to these questions having been asked by PW because of C's inability to wear a mask (which is the something arising relied upon). There is no connection at all, and this complaint appears to be misconceived. None of these conversations amounted to unfavourable treatment because of something arising in consequence of a disability and therefore these three complaints are dismissed.

Issues 8.1.5.4 to 8.1.5.9 and 8.1.5.17-8.1.5.18 – telephone calls between C and AC and e mails directly from AC to C

Issue 8.1.5.4 – telephone call on 15 November 2021

84 We refer to our findings of fact at paragraphs 19.34-37. A discussion on the Vaccine did take place during this conversation. This was initially raised by C and AC did during the conversation ask C whether she had been vaccinated, specifically recording concerns raised by C about its safety and also saying it was a decision for C as to what was best for her. We do not find this gets close to AC putting pressure on C to have the Vaccine and so the facts behind this allegation are not made out. In addition, whatever was discussed about Vaccination on this occasion was not because of C's inability to wear a mask (the pleaded 'something arising from disability'). That was a separate topic of conversation and not really connected to Vaccination at all. Therefore this complaint is not made out and is dismissed.

Issue 8.1.5.5 – telephone call of 3 December 2021

85 Our detailed findings of fact about this call are at paragraphs 19.42 to 19.46. Vaccination and the Vaccine Mandate was discussed in this call with AC

noting that this was a "*distressing and stressful conversation*" for C. However we do not conclude that what was said in this conversation amounted to AC putting pressure on C to have the vaccination. It records a discussion around C's concerns and risks to her health and her questions about the legality of the Vaccine Mandate. However AC clearly stated to C that she was not forcing or putting pressure on C to have the Vaccine and that only C could make that decision for herself. She apologised if she had upset C explaining that she was required to inform C of the Vaccine Mandate and what was happening in R as one of the managers of R. Clearly C did feel that she was being pressurised to have the Vaccine, but we do not conclude this was what AC was in fact doing. In any event, C has failed to make any connection at all between the discussion that took place between her and AC about the Vaccine Mandate and C's inability to wear a mask (which is the something arising she relies upon for the purposes of this claim). C's inability to wear a mask was clearly not why the Vaccine Mandate was being discussed. This complaint fails and is dismissed.

Issue 8.1.5.6 – e mail from AC 6 December 2021

86 As we record at paragraph 19.46, as well as stating this during the conversation on 3 December itself, AC then in her later e mail set out very clearly that she was not pressuring C into having the Vaccine and that this was a choice for C to make for herself. It is hard to see how AC could have been any clearer on this point. This is not made out on the facts and once again whatever was stated had no connection with C's inability to wear masks. This claim fails and is dismissed.

Issue 8.1.5.7 – e mail from AC 8 December 2021

87 Our findings of fact on this e mail are also at paragraph 19.46-7 and in the same vein as the e mail sent on 6 December 2021, AC expressly stated that she was not applying pressure, repeating again,

"I am not pressuring you into having the vaccine, I thought I was very clear that only you are able to make that decision for yourself. And I completely understand that you wish to undertake more research before making any decision about the vaccine."

She also went on to explain why it was necessary to give C the required information so that she could make a choice as to what to do about vaccination before the planned deadline of 1 April. Again we conclude that this e mail did not amount to pressuring or coercing C to have the vaccine, and it also had no connection with C's inability to wear a mask so the claim under section 15EQA is not made out and is dismissed.

Issue 8.1.5.8 - telephone call from AC on 10 December 2021

88 Our findings of fact about this telephone call are at paragraph 19.48 and we conclude that there was no pressure by AC during this phone call for C to

have the vaccine. AC listened to C's concerns about how the issue was making her feel and apologised if the contact had inadvertently made C feel pressured. In addition, the discussion around the Vaccine was not caused by C's inability to wear a mask. This claim is not made out as discrimination because of the something arising in consequence of disability and is dismissed.

Issue 8.1.5.9 – AC forwarding mandatory vaccine e mail to C.

89 Our findings of fact about this e mail are at paragraph 19.51. This was the first communication from R's corporate team about the Vaccine Mandate and AC forwarded this to C to forewarn her about what was happening given the concerns that C had already expressed to her. This was the reason the email was forwarded, and we do not conclude that this amount to pressurising or coercing C. She did not do this because of the something arising, namely C's inability to wear a mask. This claim therefore fails and is dismissed.

Issues 8.1.5.10 to 8.1.5.16; 8.1.5.19-8.1.5.21 – communications from the VCOD team and from the sathscommteam e mail address

90 There were a number of communications to C that are complained about and these comprise firstly being included on R wide communication e mails dealing with various matters including the Vaccine ; and secondly being sent specific e mails from R's VCOD team directed to her about the Vaccine Mandate and the fact that she was recorded as either being unvaccinated or not having informed R of her vaccination status. Dealing firstly with the general R wide comms e mails with the very wide circulation list of the entirety of R's workforce, our findings of fact about such e mails are at paragraphs 19.50 and 19.54. It is clear that in these e mails staff were being encouraged to have the Vaccine and being informed about the Vaccine Mandate. This was something R was obliged to do in order to comply with its legal obligations so it is hard to see how this can be regarded as pressuring or coercing. However most importantly, none of these e mails were sent to C because of her inability to wear a mask. These e mails were sent to C and thousands of other employees of R at the same time. They were not directed at anyone in particular and it is entirely implausible that C's individual health issues would have formed any part of the motivation of sending an e mail to this number of people. This complaint is illogical and misconceived, and we conclude that clearly none of these mails were sent because of something arising from C's disability. These complaints are dismissed.

91 The second part of this complaint relates to the slightly more targeted e mails and letters that were sent to C by the VCOD team. We refer to our findings of fact about these communications set out above. At paragraph 19.51 we addressed the first e mail sent to C about Mandatory Vaccines on 17 December 2021 as she had been identified as a frontline worker who was unvaccinated or whose vaccination status R was unaware of. This stated that staff were encouraged to have the vaccine but also clearly stated that R respected the individual right to choose. It further provided information about

possible exemptions from the Mandatory Vaccine. At paragraph 19.53 we address the response sent by the VCOD team to C's query about the basis for requesting information about vaccination and we accept that this was a standard template response sent to C and others who had raised similar queries. At paragraph 19.70 we make findings about the letter sent to C by post. Whilst the circulation list for these letters and e mails was narrower than the general all staff e mails, it is entirely clear that these were template letters sent to individuals who were in a similar situation to C i.e. that were either recorded as unvaccinated or whose vaccination status was unknown and who were recorded as being in a frontline role. They were sent in order that such people were informed as to what was R's position on the Vaccine Mandate was and what steps would be taken next. We do not conclude that these were coercive in nature but rather informative. In any event for exactly the same reasons as the 'round robin' e mails, none of these e mails were sent to C because of her inability to wear a mask. This would not have necessarily even been something that the e mail sender would have had any knowledge of. The ability or otherwise to wear a mask was not the reason these e mails were sent. They were sent in order to comply with R's legal obligations under the Vaccine Mandate. This complaint is not well founded and is dismissed.

92 As none of the complaints of unfavourable treatment because of something arising in consequence of disability have been made out, we do not need to consider the issue identified at paragraph 8.4 to 8.6 of the List of Issues as to whether the treatment was a proportionate means of achieving a legitimate aim. The claim under section 15 EQA is dismissed.

Indirect disability and/or religion/belief discrimination (section 19 EQA)

93 When considering the indirect discrimination complaint, R has conceded that it had the PCP relied upon, namely the requirement for nursing staff to wear surgical masks throughout their shift (issue 9.1). We also conclude that R applied this PCP to C (issue 9.2), and it also applied this PCP to persons without C's disability or without her religion and belief. That is self-evident as it was a policy applied to all staff without exception.

94 The question in issue is whether the application of that policy put persons with C's disability or with Cs' religion or belief at a particular disadvantage when compared with persons without that protected characteristic (issue 9.4). Dealing first with religion/belief, C has not established that the inability or indeed refusal to wear a mask had any connection at all to the religion/belief she adheres to. As we have already addressed, there is nothing apparently inherent in Christianity or her faith as a practicing Jehovah's witness that C directed us to as including an objection to mask wearing. Moreover, C herself stated that she had no objection to mask wearing per se, but it was the issue of informed consent and risk assessments not being carried out that she objected to. There is no evidence at all on which we are able to make a finding of 'group disadvantage' here to those sharing C's religion/belief in relation to the Mask Mandate. C's

objection was personal to her and her particular circumstances, but we do not find that it was connected to her religion/belief more generally and applicable to those with the same or similar religion/belief.

95 We went on to consider is whether the application of the PCP namely the Mask Mandate put persons with C's disability at a particular disadvantage when compared to persons without her disability. The disability her is Chronic Rhinosinusitis and it is accepted that the effect of this disability on C herself is that she was unable to wear a mask as she found it painful and had difficulties breathing properly (issue 9.5 relating to individual disadvantage). However, C provides no persuasive evidence at all of group disadvantage in relation to the application of this PCP (issue 9.4). She refers us in her witness statement to what she describes as the expert opinion of Simone Plaut contained at pages 1593-1600. The status of this document is unclear, but it appears to be an expert report prepared by Ms Plaut, a qualified Health and Safety Practitioner, in some civil proceedings relating to a case involving a Mr B against Tapton School Academy Trust. It refers to a paper published by Kisielinski K., Giboni P. Prescher A. et al: in the International Journal of Environmental Research and Public Health on 20 April 2021 entitled "Review; Is a Mask that Covers the Mouth a Nose Free from Undesirable Side Effects in Everyday Use and Free from Potential Hazards?". The document outlines certain views and opinions on the effective of mask use in terms of infection control and potential harms caused by masks. The issue of infection control is not relevant to the question we have to consider at all as we need to examine evidence which suggests that those with the disability of Rhinosinusitis are at a particular group disadvantage as a result of the Mask Mandate. The report briefly touches on what it sees as potential harms caused by mask wearing more generally but does not address whether this has a particular impact on those with Chronic Rhinosinusitis. The only mention of sinusitis at all is that a statement is made effectively suggesting that mask wearing can cause sinusitis as a result of the inhalation of fibres. The Tribunal was simply unable to validate or evaluate this evidence and it appears to have had no direct relevance on the issue of whether those with Chronic Rhinosinusitis are put at a particular group disadvantage by the Mask Mandate when compared to the population at large or any other identified group. Therefore, this complaint of indirect discrimination can go no further and is dismissed.

96 The Tribunal did not then need to go on to consider the issue of justification and whether the application of the PCP was a proportionate means of achieving a legitimate aim. However, it certainly appears to us that given the extraordinary circumstances that applied during the unprecedented Covid-19 pandemic, the requirement for nursing staff to wear surgical masks is highly likely to have been found to have been pursued in furtherance of the legitimate aim relied upon by R that the Mask Mandate was about,

"*a. Protecting the health and safety of members of staff and service users, specifically against the transmission of covid-19.*
b. Protecting the health and safety of patients, and in, particular patients on the oncology ward in which the Claimant worked, specifically against the transmission of covid-1 9.
c. Reduce the transmission of Covid-19 between staff members to ensure the Trust could continue to operate and provide safe, effective and efficient medical treatment to patients; and
d) To maintain the public and service users' trust and confidence in the Trust and nursing profession (including those nursing professionals employed or engaged by it), and the associated aim of ensuring that the public and service users continued to seek appropriate medical advice and treatment at the Trust when required."

97 The reduction of the spread of Covid-19 was an important and well-known aim for all governments and had particular importance for those operating NHS services such as R. An instruction for nursing staff to wear masks during their shifts is clearly in pursuance of the aims set out above. C may disagree with mask efficacy and have very strong views about the harms caused, but the purpose of the Tribunal is not to make a determine of such matters and nor could it do so. C is unlikely to be persuaded that she is incorrect in her views, but the approach taken by R was consistent with that taken by many if not all other NHS trusts during the Covid 19 pandemic and was at the direct instruction of PHE from 20 June 2020 onwards (see paragraphs 19.11-16). The needs of R and C were addressed as although C was prevented from working on clinical duties, many steps were taken to continue C's employment for the duration of the pandemic and beyond.

Complaint of failure to make reasonable adjustments (EQA ss 20 and 21)

98 When looking at C's complaint under sections 20 and 21 EQA, the first issue that appears to remain in dispute is whether R knew or could reasonably have been expected to know that C was disabled and from what date (issue 10.1). We were next required to look at whether the PCP identified and relied on by the C was applied to her and, if so, when this took place (issue 10.2). We then had to consider whether any such PCP applied put her at a substantial disadvantage compared to non-disabled people (and what that disadvantage was), considering the appropriate comparator (issue 10.3). We would then look at whether R knew that C was placed at this disadvantage (issue 10.4) and from when. We finally had to consider what adjustments would have been reasonable to make to avoid any relevant disadvantage (issues 10.5 and 10.6) and whether R failed to take those steps.

<u>Knowledge of disability</u>

99 C was disabled as a result of Chronic Rhinosinusitis from November 2020 until at least August 2023 (the last act of discrimination complained about). However, the issue of when C had knowledge (actual or constructive) is a different question. R in its submissions does not address this issue at all but we note that its position in its final amended grounds of resistance was that it

did not have the required knowledge "*at the material time*" (see page 555). The first mention of C having sinus issues in any communications involving R was on 14 October 2020, when the OH report received by R to consider her inability to wear a mask reported issues of pain, difficulty breathing and pins and needles in her nose (see paragraph 19.24). In February 2021 C informed she had seen a surgeon re swelling and was being referred to ENT (see paragraph 19.26) and still reported inability to wear a mask stating that her sinus issues were exacerbated by anything covering her face. Chronic Rhinosinusitis was diagnosed on 30 April 2021. An OH report received by R on 6 September 2021 mentioned her diagnosis of Rhinosinusitis and gave more detail with symptoms and clarified these would be likely to last at least 12 months (paragraph 19.29). It referred to ongoing issues with C's nose health affecting her ability to wear a mask and also gave a view that C was likely to be covered by EQA.

100 The discussions between C and R then shifted to the anxiety around mask wearing and there was less discussion and information about the physical symptoms with the OH recommendations in November 2021 recommending CBT to break down negative cycles associated with mask wearing. In January 2022, the main symptoms being recorded by occupation health related to C's anxiety and other mental health difficulties and around this time C was off work with work related stress. It was at this time that C disclosed her letters from her ENT specialist (paragraph 19.67).

101 On balance we conclude that R was either actually aware or had sufficient information to reasonably have been expected to know that C was disabled as a result of Chronic Rhinosinusitis from 6 September 2021 onwards. The indication from OH that EQA was likely to apply together with all that R knew about C's health issues and her difficulty mask wearing means that R was fixed with constructive knowledge from this date.

Application of the PCP

102 R admitted that it had the PCP identified at paragraph 10.2 of the List of Issues of: "*A requirement for nursing staff to wear surgical masks throughout their shift*". We conclude that it was applied to C from at least June 2020 onwards.

Substantial disadvantage

103 Although not specifically addressed in submissions, R did not admit that the application of the PCP put C at a substantial disadvantage compared to someone without C's disability in that C had breathing difficulties associated with her medical condition and was unable to wear a mask continuously for long periods. For similar reasons as set out at paragraph 66 above in relation to the complaint of discrimination arising from disability, we conclude that the application of the PCP did put C at a substantial disadvantage compared to someone without Chronic Rhinosinusitis and she was unable to wear a mask continuously for long periods. R operated on this assumption throughout the

relevant period and there is sufficient evidence from the various OH reports and in particular the OH advice received in September 2021 (see paragraph 19.29).

Knowledge of substantial disadvantage?

104 We next went on to consider whether R knew or could reasonably have been expected to know that C was placed at that disadvantage and from when. The first time raised issues around mask wearing was in April 2020 but at this stage, C explained her difficulties in terms of pain in her nose from wearing the mask as a result of her Rhinoplasty surgery (see paragraph 19.17). From this point on adjustments to C's working arrangements were made (see paragraph 19.18) but C was not in fact disabled at this time. The OH report issued following the appointment on 14 October 2020 made reference to C reporting breathing difficulties stemming from sinus issues which was causing anxiety and referred C for further OH advice about this (paragraph 19.24). That next OH report, also recording that C was unable to wear any type of mask due to pain and also recorded that C had breathing difficulties following her surgery in November 2019. C was as a matter of fact a disabled person at this time and adjustments were made to working arrangements (with C now being unable to work clinically). However, it was really only in September 2021 when we concluded that R was fixed with constructive knowledge of C's disability that it also became aware that this disability was causing the substantial disadvantage relating to mask wearing and thus was under a legal duty to make reasonable adjustments to avoid that disadvantage.

Adjustments sought by C

105 We then had to consider what steps could have been taken from this point on to avoid the disadvantage, determine whether the steps were reasonable and then decide whether C failed to take such steps

10.5.1 An exemption from the requirement to wear a mask

106 Clearly had C been granted an exemption from the requirement to wear a mask, the disadvantage would have been avoided, so the issue remaining is whether exempting C from the requirement to wear a mask at all was reasonable. It plainly was not. Our findings of fact about the Mask Mandate and how it was implemented in R are at paragraphs 19.11-16 above. R was at all times following the guidance that was being provided by PHE, UKHSA, the Department of Health and Social Care and others. This guidance changed over time but was mandatory in nature and it was not simply open to R or any other NHS trust to disregard this or disapply it in certain circumstances. It would have been entirely unreasonable for R to have done so. We fully accept the submission of R that masks were deemed necessary by the UK Government, and it mandated that NHS staff wear them and 'lead by example' to create public confidence in the NHS at such a crucial time of national emergency.

107 C relies heavily on what she says was her legal right to be exempted from wearing a mask under the 2020 Regulations as set out above. However, we accept R's submission that C has fundamentally misunderstood the context of the 2020 Regulations and their application to the present situation. Firstly the 2020 Regulations were put in place to enforce the wearing of face coverings in public places. As set out in the explanatory memorandum to the 2020 Regulations, they were designed to apply to members of the public to protect against public health risks. The sanctions for failing to comply with the 2020 Regulations as set out above were that an individual would commit an offence punishable on summary conviction by a fine, if they failed to wear a face covering in a relevant place without reasonable excuse. If C was able to show that she had a reasonable excuse, then she would not have committed an offence but that is as far as the 'exemption' goes. It does not offer some sort of free-standing pass or entitlement which was applicable in all other situations or contexts where mask wearing was required. The 2020 Regulations solely dealt with the commission of those specific summary offences and were not of any wider application than that.

108 Secondly it is abundantly clear that hospitals were not included within the scope of the 2020 Regulations at all as indicated by the specific exemption from the definition of a relevant place of premises providing wholly or mainly medical or dental services. Therefore the 2020 Regulations simply had no relevance at all to any additional requirement imposed by R as an employer. R was not trying to enforce mask wearing as a requirement punishable by summary conviction by a fine under the 2020 Regulations, so any exemptions are simply not relevant at all. R was imposing its mask wearing obligations as a reasonable instruction to its employees to comply with those policies that the NHS and it deemed necessary to protect employees, service users and members of the public. It was perfectly entitled to do so and whether or not any individual may have been able to rely on an exemption from mask wearing in a public place under the 2020 Regulations was simply not relevant or applicable to any requirements R applied.

10.5.2 A transfer to a different work environment where she would not have to wear mask all the time, such as Telford. The claimant says that a reasonable adjustment was initiated to facilitate her working in Telford on 14 February 2023, but this was revoked on 21 February 2023. The claimant also relies on an allegation that she was not informed that she would have to move roles after her 5-week phased return in February 2023 and this caused her anxiety and was not reasonable. She refers in particular to the comments made by RA on 10 March 2023 "Introducing herself as a PEF…".

109 In relation to transferring C to a different location where she would not have to wear a mask, then clearly this would also have removed the disadvantage and if such a suitable role was available for C, then we conclude this was a likely to have been a reasonable adjustment. However moving on to the final issue set out at paragraph 10.7 of the List of Issues we conclude that R did not fail to take these steps, but on the contrary, it did find C a different role in a setting where masks were not required on a number of occasions. Initially

in November 2020 C carried out interviewing by Teams from the ward 23 flat where there was no requirement to wear a mask (see paragraph 19.25); in January 2021 she did some audit work working alone in an office where she did not have to wear a mask; in April 2021 she again worked on site for ward 35 working in her own workspace (paragraph 19.27). She also continued to carry out ad hoc interviewing. After a period of sickness in January 2022, she worked with the nMABS triage team until March and in May began work as an absence call handler (see paragraphs 19.57-58 and 19.83). Following further sickness she then started work with the PEF team in February 2023 observing the role to start her phased return back to duties. We do not accept that this role was removed or revoked from her in March 2023 for the same reasons we have set out at paragraph 75 above in relation to the similarly framed complaint under section 13 EQA. The fundamental difficulty that C has with this particular claim was that throughout the period we were considering, she was unable to wear a mask and thus unable to work at all in a clinical setting. Roles suitable for a grade 6 sister not in a clinical setting were not easy to come by. R made considerable efforts to keep C in employment and actively working but the fact that C was simply unable to work clinically under the conditions in place at the time posed a significant obstacle to finding a suitable position. We do not find that R failed to comply with its duty to make reasonable adjustments in this regard.

Other potential adjustments

110 During the hearing, C identified other potential steps C could have taken to remove the disadvantage. She suggested that C could have carried out an individual risk assessment on the impact of wearing a mask on her. When asked in cross examination what the outcome of such a risk assessment would have looked like i.e. what it was that could be put in place following such an assessment to remove the disadvantage, C was unclear on this point suggesting that surgical masks were not appropriate PPE and when pushed suggested what she was really suggesting was that she could have worn a surgical mask not fully over her nose in combination with a visor and that if she had symptoms of Covid she could have taken a lateral flow test before attending work. Firstly, we conclude that the conducting of an individual risk assessment, of itself, would not have removed the substantial disadvantage of C being unable to wear a mask due to breathing difficulties. All it could have done was identify risks and potential controls to avoid those risks. The issue of C's inability to wear a mask would have remained even if an individual risk assessment had been carried out. In terms of C's suggestions for the outcome of such an individual risk assessment, for the same reasons as are set above in relation to the suggested adjustment of a mask exemption, we do not find that conducting a risk assessment leading to C being required to wear a mask only partially with a face visor was a reasonable adjustment for R to have made. Allowing someone to wear a mask incorrectly was not an appropriate step to take, even though this may have been tolerated for a short time in the early stages of the pandemic (see paragraphs 19.18-19). R Mask Mandate was clear that there should be no

exceptions and for the very many reasons of reducing the spread of infection, it was vitally important that masks were not only worn but worn correctly by everyone.

111 She also suggests that R could have permitted her to wear a different type of mask rather than the type of surgical mask required by the Mask Mandate. C suggested that R could have permitted her to wear an FFP2 type of the kind that C showed to the Tribunal during the hearing. However, we also conclude that this could not have been a reasonable adjustment given that C's position about the FFP2 mask from February 2021 onwards was that she could only wear this for short periods of time and was struggling to wear any mask at all (see paragraph 19.26). Moreover, C when demonstrating this particular mask to KT to see if it could be a possible solution, was wearing the mask incorrectly so that her nose was not fully covered (see paragraph 19.28). This was clearly an unreasonable step for R to have taken.

Complaint of harassment related to disability and/or religion or belief (EQA s26)

112 To determine these complaints, we needed to decide whether the C was subject to unwanted conduct of the type described; then determine whether the conduct was related to disability or religion/belief. We were then required to consider whether the conduct had the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to: (a) the perception of C; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. We set out our conclusions on each matter alleged to be harassment below:

<u>Issue 11.1.2: The Respondent pressurised, coerced and bullied the Claimant to have a covid-19 vaccine on multiple dates including:</u>

<u>Issue 11.1.2.1 November 2021 (35-minute impromptu telephone call from second Respondent (AC)).</u>

113 We refer to our findings of fact at paragraphs 19.34-37 and our conclusions on this same factual allegation when it was made as a complaint of discrimination arising from a disability. We do not consider that the conversation that took place amounts to coercion, bullying or putting pressure on C to have the Vaccine. In addition, C has not been able to show that the discussion about vaccination in fact was related to her disability of Chronic Rhinosinusitis at all. We also conclude that this discussion was also not related to C's religion or belief. C did not express any objection to having the vaccine in relation to her religious or other beliefs during this conversation. She raised the risk of side effects. Whatever this conversation was about we do not conclude that this was related to religion/belief. It is a key element of a claim made under section 26 EQA that any unwanted conduct must relate to the protected characteristic. There is no link to C's protected characteristic here at all. On this basis this allegation can go no

further and must fail. We did not need to go on to consider whether the conduct had the required purpose or effect. This allegation is not well founded and is dismissed.

Issue 11.1.2.2 3 December 2021 (35-minute impromptu telephone call from AC).

114 We once again refer to our findings of fact about this call at paragraphs 19.42 to 19.46 and to our conclusions at paragraph 85 above to this same factual complaint brought as a claim under section 15 EQA. Whatever the effect of this call on C the conduct complained of has to be related to C's protected characteristic. For the same reasons as just set out above, there was no connection between a discussion about the Vaccine Mandate and C's religion or belief. There had been no suggestion at this time that C's religious belief had anything to do with her concerns about the vaccine. There is at least a tangential connection in this conversation between C's health and the Vaccine as C expresses her concern about how the vaccine would affect her given previous health issues. We have therefore considered whether anything said by AC during this conversation had the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to: (a) the perception of C; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. The information given to C by AC in no way can be said to have this purpose. It was necessary for AC to provide this important information to C and in the circumstances, she did this in an entirely appropriate and sensitive manner. C is clear as to the effect she says has this call had on her and AC recorded that C became very distressed during the conversation. However, we cannot conclude that it was objectively reasonable for anything AC said or did on that telephone conversation to have had the required effect to amount to disability related harassment. C had to be informed about the forthcoming Vaccine Mandate and how it affected her. We are satisfied that AC approached this difficult topic in a sensitive and measured manner and in no sense was C pressured or coerced. This fails to meet the level of conduct that gets anywhere close to equating to C's dignity being violated or a hostile, degrading, humiliating or offensive environment being created. This claim is dismissed.

Issue 11.1.2.3 6 December 2021 (email call from AC).

115 As per our findings at paragraph 19.46, this e mail was a summary of the discussion that took place on 3 December 2021, so for the same reasons as are set out at paragraph 100 above, this claim is dismissed. AC made it absolutely clear during this e mail that there was no pressure to have the Vaccine, acknowledged that C found the issue difficult and also apologised if the earlier phone call had distressed C. Nothing set out in this e mail gets close to the requirements for harassment under section 26 EQA.

Issue 11.1.2.4 8 December 2021 (email call from AC).

116 See our findings at paragraph 19.47. The Vaccine was not even mentioned in the exchange of messages on this date. These were entirely supportive and appropriate. This claim fails on the facts and on the substantive elements none of which are made out.

Issue 11.1.2.5 10 December 2021 (20-minute impromptu telephone call from AC while the Claimant was off sick).

117 For the same reasons as set out at paragraph 115 above for allegation 11.1.2.3. this claim is dismissed. This call was made to get an update on C's health after she had gone off work and again was entirely appropriate.

Issue 11.1.2.6 13 December 2021(email from the Respondent while the Claimant was off sick).

118 This all staff announcement sent by e mail which we address at paragraph 19.49 above falls well short of being unwanted conduct with the purpose or effect required. It was measured and reasonable and gave staff links to sources of information. We conclude that C has failed to show any link at all to her religion or belief and it is difficult to see how an e mail sent to many thousands of employees could be related to C's disability. This claim is not well founded and is dismissed.

Issue 11.1.2.7 17 December 2021 (2 emails while the Claimant was off sick (Trust and AC)).

119 Our findings about the e mails sent to C on 17 December 2021 are at paragraphs 19.50-52. C received a general update e mail that day re the Vaccine Mandate which AC also forwarded to her. She also received a more directed e mail which was still a standard e mail sent to those that R had no record of vaccination status or who had confirmed they were unvaccinated. The effect of these e mails was simply to set out the necessary information for the recipients to work out how they were going to respond to the Vaccine Mandate. For the same reasons as set out at paragraph 118 above in relation to the allegation at 11.1.2.6, this complaint is not well founded and is dismissed.

Issues 11.1.2.8 5 January 2022 email while the Claimant was off sick (Trust); 11.1.2.9 12 January 2022 email (Trust); 11.1.2.10 26 January 22 letter (Trust); 11.1.2.11 27 January 22 email (Trust).

120 For the same reasons as set out at paragraph 118 above in relation to the allegation at 11.1.2.6, each of these four complaints is not well founded and is dismissed. Individually we conclude that each of the instances of contact either by e mail or telephone call that are listed above does not amount to harassment or come close to the nature of unwanted conduct that could form the basis of such a complaint. However, we also understand that C complains about the cumulative effect of such communications and contact and contends that these amounted to "*a disproportionate amount of pressure*

from managers for staff to be vaccinated with novel covid vaccines", stating that she found it "*intimidating and hostile and continued for a prolonged period, including while I was off work sick with stress and anxiety"*. We accept that this was the effect on C of these communications. She fundamentally disagreed with the need for vaccination and had repeatedly stated to R and to us in evidence and submissions that she was,

"*confident in natural immunity and had proof of antibodies for SARS/COV2*".

No doubt many people employed within R and in the wider community entirely agreed with the views espoused by C. However, it the highly unusual circumstances surrounding the Vaccine Mandate and the forthcoming legal requirement on R to ensure that all frontline staff were fully vaccinated, the communications it sent to C and others were entirely appropriate, proportionate, reasonable and measured. The communications gave clear information and always emphasised that whether or not vaccination was agreed to was a matter of personal choice. It was simply outlining as clearly as possible in the light of information available at the time what the consequences of that choice were. Therefore, even if the communications had the required effect on C, it was not reasonable in these particular circumstances for this to be the case. The complaints all fail on this ground but perhaps more significantly, we do not conclude that any of these communications had any connection with either of the protected characteristics C relies upon for the same reasons we have already outlined. These complaints are all not well founded and are dismissed.

<u>Issue 11.1.5 The claimant was excluded from working her contracted role as a clinical ward sister from 14 October 2020 to 4 June 2023.</u>

121 We refer to our findings of fact from paragraph 19.23 onwards. We conclude that C was excluded from working in a clinical setting because she was unable (and also later unwilling) to wear a surgical mask and for similar reasons as are set out above that had no connection in our conclusion to C's religion or belief and thus the complaint of religion/belief related harassment must fail. C's inability to wear a mask does have a connection to her disability so we have gone on to consider the purpose and effects of R's decision to exclude C from a clinical setting. Firstly, in terms of the purpose, we conclude that the decision was absolutely not done with the purpose of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. It was done because it was not considered safe for C to remain working in a clinical setting without wearing the appropriate protective equipment to prevent the risk of infection not only to herself, but to other staff and the vulnerable patients in her care. That was the sole purpose of this decision. Following the Pemberton decision above, to decide whether any conduct falling within section 26(1)(a) has either of the proscribed effects under section 26(1)(b), a tribunal must consider both (by reason of section 26(4)(a)) whether the putative victim perceives themselves to have suffered the effect (the subjective question) and (by reason of section 26(4)(c)) whether it was reasonable for the conduct to be regarded

as having had that effect (the objective question). It must also consider all the other circumstances under section 26(4)(b). The relevance of the subjective question is that if C does not perceive their dignity to have been violated etc. the conduct should not be found to have had that effect. The objective question is then relevant and if it was not reasonable for the conduct to be regarded as violating C's dignity etc., then it should not be found to have done so.

122 We firstly considered the subjective question which was whether C perceived the conduct to have had the effect of violating dignity or creating an intimidating etc. environment. It was clear that C was upset on the day she was asked to go home but it is clear that in the first period she remained at home during 2020 and early 2021 C understood why this had been done and appreciated what AC and PW were doing to try and support her (see paragraphs 19.26 where C acknowledges this in February 2021 and in October 2021 where she thanks AC for her support). However, it is clear that C's view on her removal starts to change towards the end of 2021. The Vaccine Mandate and then shortly after the period of time when C began to be supported by WUE coincided with many of the views C was taking becoming more inflexible and strident and by the time of the January 2022 wellness meeting C had concluded that she had no intention of wearing a surgical mask. Whilst C experienced periods of great distress and mental ill health during this period, she has really provided no evidence that she perceived the removal from clinical duties as having violated her dignity or created an intimidating environment for her. However, even if C did perceive this to have been the effect of her removal, we still had to consider the objective question which is whether it was reasonable for C to have regarded her removal from clinical duties as having that effect. On that particular issue, we conclude it was not once again in the very unusual circumstances of that time when the Mask Mandate had been introduced and needed to be enforced by R.

Issue 11.1.6 On 23.2.23 MC gave RA the claimant's vaccination status without her consent. As a result, RA's behaviour towards the claimant changed and in particular she described the claimant as a risk in a covid risk assessment. The claimant will also rely on RA's behaviour in the meeting on 21 March 2023 where she alleges RA was negative and judgmental.

123 For similar reasons as set out at paragraph 68 to 70 above in relation to the identical factual allegation made as one of direct discrimination (issue 7.2.4) this complaint is not well founded. Although the test for determining whether the unwanted conduct was related to disability or religion/belief is different than deciding whether treatment was because of such protected characteristic, we conclude that MC giving RA's vaccination status to RA without C's consent was entirely unrelated to either C's religion/belief or to her disability. We were satisfied with the explanation as to why C's status was shared and also accept that it would have been better if MC had checked with C that she was content for this information to be shared before

it was done. However, there was no connection with the protected characteristic and therefore this complaint of harassment must fail and is dismissed.

Issue 11.1.7 On 21.3.23 RA and MC asked if the claimant could wear a mask for short period – they did not understand it was not an option for the claimant and did not take her seriously. They were judging and shaming the claimant. The claimant was not given any feedback on her 5week phased return. They revoked the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there. MC blamed the claimant for the loss of the opportunity saying it was "your choice" and "your beliefs".

124 We refer to paragraphs 19.104-105. RA (but not MC) asked C if she could wear a mask for short periods during their Teams meeting on 21 March 2023 whilst discussing whether C may be able to continue to perform the PEF role carrying out the pastoral element of this role which required her to be in a clinical setting. The remaining elements of this complaint were not made out on the facts as set out in our conclusions at paragraphs 74 to 77 above where the same acts are said to be direct discrimination at issue 7.2.6. For the same reasons as already stated we conclude that there is no relationship between questions about mask wearing to C's religion or belief. The question is related with disability as the reason for C's inability to wear a mask stemmed at least initially from her disability of Chronic Rhinosinusitis. Going on to consider whether this question had the desired purpose or effect, it did not have the purpose as the only purpose of asking this question was to explore whether there was any realistic possibility of C being able to continue with the pastoral part of a PEF role. We accept C's evidence that being asked the question had the required effect but when looking at this question objectively it is not reasonable taking into account all the circumstances for such a fairly straightforward question to have had this effect. C's reaction seems to have been extreme and surely could not have been anticipated by RA who was trying to understand whether anything in relation to mask wearing had changed such that some short periods could be tolerated which may mean C could undertake the pastoral elements of the role. On this basis, this complaint is not well founded and is dismissed.

Issue 11.1.8 On 04.08.23 MC said, "I have not denied any possibility of disability which [C] considers she may have." As a result of this the claimant believes the respondent has not taken her disability seriously or as a fact.

125 We address this allegation at paragraph 19.117. There is mention of disability so in that sense it could be seen to be disability related. This statement was included in a response sent by MC as part of the investigation into C's grievance. It was not a direct response to C or directed towards her. It is unlikely that there was even an anticipation that C would read this comment. It clearly did not have the required purpose. C says that this comment upset her when she read it as it suggested that R had not taken her disability seriously. We are not satisfied that C has shown that the effect

of reading this comment perhaps some months later had the effect of violating dignity or creating an intimidating etc. environment. In any event, we conclude even if it did, it was not reasonable in all the circumstances for it to have had this effect. C had made a number of allegations in her grievance many of whom against MC. AW and JE needed to get MC's responses to the points made to full consider C's allegations. We do not consider it reasonable therefore for this information to have had the proscribed effect in this context. We do not consider that reading about this matter in investigatory notes was something that it was reasonable to have had the effect of violating dignity and creating a hostile environment etc. On this basis the allegation is dismissed.

Issue 11.1.9 KM and TD arranged weekly meetings, putting the claimant in an impossible situation. The claimant felt intimidated and harassed to consent to a redeployment register or return to the ward that caused trauma or drop a band in pay from band six to band five. This unwanted behaviour caused extreme anxiety and distress. It started in June 2023.

126 Our findings of fact about the weekly meetings that took place between C, KM and TD from June 2023 onwards are at paragraphs 19.119-122. There was a connection to disability in that these meetings were arranged to support C in returning to work after a period of sickness absence. Moreover, the OH report just obtained recommended that regular meetings were held. In this context it is very difficult to see how arranging and holding such meetings could be seen to have the required purpose or effect to fall within the ambit of section 26 EQA. There is also nothing which we have found to have occurred that suggests that KM and TD were intimidating or pressuring C to consent to be placed on the redeployment register or return to ward 23 so this element of the complaint fails on the facts. By this time C had been unable to work in her contracted role for over 2 years as a result of her inability to wear masks when this was a strict requirement of R. In June 2023, this requirement was removed, and it is entirely reasonable and appropriate for R to have considered that it was now time for C to return to her contracted role. Nonetheless KM handled this as sensitively as possible and gave C plenty of time to consider what she wanted to do. It was hard to see what more R could really have done if now that the issue that was preventing C from returning to ward 23 had gone, that C was unwilling to actually do this. It was entirely sensible and appropriate for R at this stage to have considered placing C on its redeployment register to find a suitable alternative role for C. The fact that R waited so long before this was implemented was a testament to the patient and reasonable way in which it dealt with this very difficult and challenging situation not just for C but for R as well. This allegation is dismissed.

Issue 11.1.10 On 28.07.23 Claimant left the meeting room and witnessed KM and TD laughing in amusement.

127 As we have found at paragraph 19.121, we were not satisfied that KM and TD were "laughing in amusement" when C left the meeting room. Our

conclusion is that C may have witnessed some unrelated social interaction between KM and TD during a break in the meeting and has wrongly assumed this to be directed at her due perhaps to her distressed state and poor health on that day. This is not made out on the facts, and in any event is not related to disability or religion/belief. The conduct did not have the required purpose and even if what C saw may have caused her distress, it was not reasonable in all the circumstances for it to be considered to have the effect of violating dignity or creating an intimidating, hostile, degrading or offensive environment for C. This claim is accordingly dismissed.

Issue 11.1.11 On 19.01.2023. MC documented that she would complete a stress risk assessment and covid assessment. MC handed the covid assessment to RA to complete. A stress risk assessment was not completed. The claimant alleges this amounted to failing to take reasonable care to protect her from distress and it made her feel they did not take her stress and anxiety seriously.

128 C complains here that MC and RA failed to complete a stress risk assessment that had been recommended by OH and that this amounts to harassment on the grounds of disability or religion/belief. She acknowledges that this was completed and provided to her on 19 December 2023 when different managers were involved. We refer to our findings of fact at paragraph 19.97. The stress risk assessment was not carried out, but we accepted that this was an oversight rather than anything that was targeted at C. It was not in fact related to her protected characteristic at all as the disability C had here was C's Chronic Rhinosinusitis. There is clearly no connection with religion/belief. In addition, we do not accept that there was the required purpose and other than bare assertion we have no actual evidence that it had the effect required by section 26 EQA. This claim is dismissed.

Issue 11.1.12 In March 2023 the claimant was not informed that she would only be able to stay in her new role during her 5-week phased return. The claimant contends she felt humiliated and as though her anxiety had not been taken into account.

129 We refer to our conclusions at paragraphs 59 to 63 above in relation to a similar factual complaint brought as a complaint of direct discrimination at allegation 7.2.6. For similar reasons, we do not find that this complaint is made out on the facts. Whatever C believed to be the case about this role, she was informed that work in clinical areas was required (see paragraph 19.93). She was also informed by e mail on 19 January 2023 that the role was temporary and that it was about supporting C to begin to return to work (see paragraph 19.93). The risk assessment sent to C on 23 February 2023 also stated that the role would continue "for the duration of her 5-week phased return" and that it was a" temporary measure". Whatever C might have assumed about this role, she was informed that it was temporary and was intended to support her 5-week phased return. This complaint is not made out on the facts and is dismissed.

Issue 11.1.13 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

130 For very similar reasons as set out at paragraph 54 above in relation to this same factual allegation made as a complaint of protected disclosure detriment as allegation 3.1.12, this complaint is not made out and dismissed.

Issue 11.1.14 The claimant was not personally contacted to inform her of the policy change regarding wearing mask announced on 26 May 2023, even though she had been excluded from the site for more than 2.5 years as a result of the previous policy.

131 We refer to our findings of fact at paragraph 19.118. C did not receive a personalized e mail from R about the change to policy with regards to mask wearing. It was unfortunate that this had been raised by C only the day before in the meeting with AW and JE (see paragraph 19.117) and they had confirmed they were unaware of the decision. However, we accepted that this was indeed the case, and it was communicated to C that they were aware that the requirement was being reviewed but did not know anything further. We do not accept that there was anything in any way sinister or suspicious about this and that JE and AW were simply stating the position as they knew it on 25 May 2023. As soon as this was raised by C, an apology and an offer of a meeting was made and C seemed to be content with this. We conclude that any failure to directly and personally inform C neither had the purpose or effect that is required by section 26 EQA. Even if it came close to having such an effect, given our findings of fact about what was known and when, it would be entirely unreasonable for such a matter to have had the effect suggested. We take note that mask wearing as at this date was still required in Ward 23 where C had original worked in any event so the change in policy was perhaps of less relevance at this time. As and when the mask wearing requirement changed for C's home ward, she was informed directly (see paragraph 19.120). This complaint is not well founded and is dismissed.

Victimisation - Equality Act, section 27:

132 C pleads three matters which she says to be protected acts (issues 12.1.1 to 12.1.3) comprising four incidents on 27 and 28 March, 24 April and 12 May 2023 and R accepts that C did a protected act in respect of each of the three pleaded matters, so we do not need to consider this further. C makes 11 allegations of detrimental treatment which she says took place because she did a protected act. For each detriment relied upon we had to determine whether R subjected C to the detriment complained of (which is set out at paragraphs 12.2.1 to 12.2.11 of the List of Issues) and then go on to decide whether any of this was because of the protected act. The provisions on the

two-stage burden of proof set out at Section 136 EQA apply in victimisation cases. If C establishes a prima facie case of victimisation, the burden of proof shifts to R to show that the contravention did not occur. To discharge that burden of proof, there must be cogent evidence that the treatment was in "no sense whatsoever" because of the protected act. We set out below our conclusions on these matters for each allegation listed in the List of Issues with reference to each paragraph number whether the allegation is listed:

Issue 12.2.1 LB has not acknowledged or answered the claimant's questions or communicated with her following the meeting on 24 April 2023.

133 For almost identical reasons as we set out above in relation to this complaint as made as a protected disclosure detriment claim (issue 3.1.10) this claim is dismissed. This was not established on the facts and in any event in respect of anything done or not done in respect of C's questions or the meeting with LB. C has not met the first stage of showing a prima facie case that this was because of her having raised a protected act. There is simply no evidence at all that the protected act played any part. This treatment was not because of the protected act. This allegation of victimisation is dismissed.

Issue 12.2.2 On 19.01.23 MC excluded the claimant from working clinically as she 'poses a risk to patients on this area without the required PPE as per policy'. MC also said she has 'found a placement where masks are not required …. this should integrate her within a team offsite at Telford College'.

134 This complaint is misconceived and cannot succeed for the most straightforward reason that the alleged detriment occurred before any of the protected acts took place. This cannot be because of a protected act and the complaint is dismissed.

Issue 12.2.3 On 12.05.23 MC informed Occupational Health that the claimant believes masks "are not required due to religious beliefs". The claimant believes this choice of words to be prejudicial and offensive.

135 We refer to our findings of fact at paragraph 19.115. We accept that MC understood that C objected to mask wearing partly due to religious beliefs. We also take account of the fact that by this time C had commenced a claim in the Employment Tribunal part of which was a claim alleging that the requirement for mask wearing was discrimination on the grounds of religion/belief (see paragraph 2 above). Therefore, what was said by MC in this referral was entirely accurate and it is hard to see how it could be seen as "prejudicial and offensive" given that this was exactly what C was contending herself at this time. In addition, C has not shown that this was anything at all connected to her having done a protected act. We conclude that the inclusion of this accurate comment was not because of the protected act. This allegation of victimisation is dismissed.

Issue 12.2.4 The claimant was excluded from working her contracted role as a clinical ward sister from 14 October 2020 to 4 June 2023.

136 This allegation fails for the same reasons as set out at paragraph 134 above. The act of alleged detriment occurred before the protected act and so it cannot possibly have been because of the protected act. The complaint is dismissed.

Issue 12.2.5 On 23.2.23 MC gave RA the claimant's vaccination status without her consent. As a result, RA's behaviour towards the claimant changed and in particular she described the claimant as a risk in a covid risk assessment. The claimant will also rely on RA's behaviour in the meeting on 21 March 2023 where she alleges RA was negative and judgmental. We refer to our findings of fact at paragraph 18.192 above.

137 This allegation again fails for the same reasons as set out at paragraph 134 above. The act of alleged detriment occurred before the protected act and so it cannot possibly have been because of the protected act. The complaint is dismissed.

Issue 12.2.6 On 21.3.23 RA and MC asked if the claimant could wear a mask for short periods – they did not understand it was not an option for the claimant and did not take her seriously. They were judging and shaming the claimant. The claimant was not given any feedback on her 5week phased return. They revoked the reasonable adjustment of the claimant moving to work in Telford and not having to wear a mask all the time while working there. MC blamed the claimant for the loss of the opportunity saying it was "your choice" and "your beliefs".

138 This allegation once again fails for the same reasons as set out at paragraph 134 above. The act of alleged detriment occurred before the protected act and so it cannot possibly have been because of the protected act. The complaint is dismissed.

Issue 12.2.7 On 04.08.23 MC said, "I have not denied any possibility of disability which [C] considers she may have." As a result of this the claimant believes the respondent has not taken her disability seriously or as a fact.

139 We refer to our findings of fact at paragraph 19.117 above. C has adduced no evidence whatsoever to suggest that this comment was included because of any of the protected acts having occurred. MC made this comment in her response to questions posed by the investigator of C's grievance, so in that sense there is a connection to that grievance, but we remind ourselves that the test we must apply is one of "the reason why" not a "but for" test. This comment was not included because of any protected act and the claim of victimisation is dismissed.

Issue 12.2.8 KM and TD arranged weekly meetings, putting the claimant in an impossible situation. The claimant felt intimated and harassed to consent to a redeployment register or return to the ward that caused trauma or drop a band in pay from band six to band five. This unwanted behaviour caused extreme anxiety and distress. It started in June 2023.

140 We refer to our findings of fact at paragraphs 19.119-121 and for similar reasons to those given at paragraph 126 above where this identical allegation is made as one of harassment (issue 11.1.9) this complaint is dismissed. The weekly meetings were put in place because of an OH recommendation. No pressure was put on C to consent to being placed on the redeployment register and the return to ward 23 being raised was entirely appropriate given that this was where C had previously worked. None of this was because of any of the protected acts and this claim fails and is dismissed.

Issue 12.2.9 On 28.07.23 Claimant left the meeting room and witnessed KM and TD laughing in amusement.

141 As per our findings of fact at paragraph 19.121 we were not satisfied that KM and TD were "laughing in amusement". In addition, C has not shown that anything done or said by either KM or TD had any connection to a protected act. She has failed to show a prima facie case, and the complaint is dismissed.

Issue 12.2.10 On 10 March 2023 RA said "Introducing herself as a PEF, with assumptions she is now a permanent part of the team, they also feel she isolated herself from them during sessions and when she does get involved, does not always give out the correct information to the nurses in the sessions. I have not organised any off duty with [C] past 17th March as this will be the end of the phased return."

142 We refer to our findings and conclusions above for this identical complaint posed as one of protected disclosure detriment (issue 3.1.11) and direct discrimination (issue 7.2.7) and for broadly the same reasons this complaint is dismissed. There is simply no evidence at all that RA was influenced by the fact C had done a protected act in making this note in her record of interactions with C and we conclude it was entirely unconnected.

Issue 12.2.11 When she returned to work on a phased return in February 2023 doing the PEF role the claimant was rarely invited to share in sessions or given training. She was not adequately supported and was simply told to observe. Despite this the claimant was criticised by RA on 10 March 2023 for isolating herself from the team and telling students wrong information. The claimant contends these criticisms were unwarranted and were done behind her back.

143 We refer to our conclusions at paragraph 54 above in relation to this same allegation being put as a complaint of protected disclosure detriment (issue 3.1.12). Much of this allegation fails on the facts and C has failed to adduce any cogent evidence which suggests that the reason for what took was anything to do with a protected act. The burden of proof does not pass to R to explain any actions and this claim is dismissed.

Jurisdiction

144 Given that none of the complaints have succeeded, we do not need to go on to consider whether, the claims were made in time, whether there was conduct extending over a period and if not, whether the claims were made within a further period that the Tribunal thinks is just and equitable or whether it was not reasonably practicable for the complaints to have been presented in time (and was presented within a reasonable period thereafter) as set out at paragraph 1 of the List of Issues. All the claims failed having been considered fully on their merits.

Signed by: Employment Judge Flood

Signed on: 24 January 2025